This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HL 5000 7

Digitized by Google

HARVARD LAW LIBRARY

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

3

WEEKLY NOTES OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF PENNSYLVANIA, THE COUNTY COURTS OF PHILADELPHIA, AND THE UNITED STATES DISTRICT AND CIRCUIT COURTS FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BY

MEMBERS OF THE BAR.

VOLUME III.

OCTOBER, 1876, TO MAY, 1877.

PHILADELPHIA:
KAY & BROTHER, 17 AND 19 SOUTH SIXTH STREET.
LAW PUBLISHERS, BOOKSELLERS, AND IMPORTERS.
1877.

Digitized by Google

Entered according to Act of Congress, in the year 1877, by
KAY & BROTHER,
in the Office of the Librarian of Congress, at Washington.

Rec. Apr. 14, 1883

PHILADELPHIA:
COLLINS, PRINTER,
705 Jayne Street.

Digitized by Google

REPORTERS.

Supreme Court (*Eastern District*).

MR. FRANK P. PRICHARD, *assisted by* Messrs. Francis J. Alison, W. W. Carr, Horace Castle, Richard C. Dale, Jr., James S. Fenton, Jr., George Harrison Fisher, Joseph de F. Junkin, Louis C. Massey, N. Dubois Miller, J. Rodman Paul, and John J. Wilkinson.

Supreme Court (*Middle District*).

MR. ROBERT SNODGRASS, Prot'y, MR. JOHN B. MCPHERSON and MR. GEORGE H. IRWIN (Harrisburg).

Supreme Court (*Western District.*)

Messrs. John E. Speer, S. C. Wells, and W. S. Wilson (Pittsburgh), and James S. Fenton, Jr., J. Rodman Paul, and Joseph de F. Junkin (Philadelphia).

Court of Common Pleas (*Law and Equity*).

C. P. No. 1. MR. WILLIAM WYNNE WISTER, JR., *assisted by* Messrs. Joseph P. Gross, J. L. Jones, Alfred Lee, Jr., John Horace Lind, and Walter E. Rex.

C. P. No. 2. HON. JAMES T. MITCHELL, *assisted by* Messrs. Alex. J. D. Dixon, Edward F. Hoffman, Charles B. McMichael, Robert H. Neilson, and James C. Sellers.

C. P. No. 3. MR. SAMUEL W. PENNYPACKER, *assisted by* Messrs. Harold Goodwin, William Drayton, Abraham M. Beitler, Peter Boyd, and William H. Peterman.

C. P. No. 4. MR. HENRY BUDD, JR., *assisted by* Messrs. Albert B. Guilbert, Randal Morgan, T. Elliott Patterson, Henry Pleasants, Jr., and W. Herbert Washington.

Quarter Sessions and Oyer and Terminer.

MR. HENRY S. HAGERT, Assistant District Attorney, *assisted by* Mr. T. Horace Tharp.

Orphans' Court.

MR. GEORGE TUCKER BISPHAM and MR. HENRY C. OLMSTED, *assisted by* Messrs. William D. Neilson, Wm. Lyttleton Savage, T. B. Stork, and Charles Townsend.

U. S. Courts.

MR. A. SYDNEY BIDDLE, *assisted by* Messrs. Arthur Biddle, Frank C. Fallon, and Charles H. Howell.

N. B. Admiralty Cases revised by MR. MORTON P. HENRY: *Bankruptcy Cases* by MR. SUSSEX D. DAVIS; and *Patent Cases* by MR. JOSEPH C. FRALEY.

Commonwealth Causes.

MR. LYMAN D. GILBERT, Asst. Attorney-General (Harrisburg).

GENERAL EDITOR.

MR. ALBERT A. OUTERBRIDGE, 707 Walnut Street.

Digitized by Google

ERRATA.

De Coursey *v.* Guarantee Trust Co., 66, column ii., lines 14 and 17 of opinion, *transpose* dates "May, 1873," and "March, 1873."

McCambridge *v.* Casselberry, 134, *for* "Rule discharged," *read* "Rule absolute."

In Commonwealth, etc., *v.* Marshall, 182, the opinion of the Court was by Hon. Henry Hice, President Judge of the 36th Judicial District.

Clarke's Estate, etc., 284, column ii., lines 28 and 34, *transpose* "$5000," and "$10,000."

Commonwealth, etc., *v.* Maloney, 407, *for* "*exoneratur*," *read* "*exoneretur*."

Wallace's Appeal, 468, *for* "Appeal from decree of the Court of Common Pleas No. 3 of Philadelphia County," *read* "Appeal from decree of the late Court of Common Pleas of Philadelphia County."

Digitized by Google

TABLE OF SUPREME COURT CASES

REPORTED IN VOLUME III. OF THE WEEKLY NOTES.

ADAMS, Brindle *v.* 5
Adams, Clarke *v.* 381
Alexander *v.* Weidner, 245
Allegheny Trans. Co., Phillips *v.* 847
Allen, Millett *v.* 874
Amer. Steamship Co. *v.* Bryan, 528
App, Cadwalader *v.* 1
Ashton, R. R. Co. *v.* 281
Association *v.* Bank, 295
Attorney-General *v.* Kilgore, 174
Attorney-General *v.* Walter, 876

BACON, Harkinson *v.* 403
Bair, Insurance Co. *v.* 126
Bair & Shenk's Appeal, 81
Baldwin's Appeal, 73
Bank *v.* Association, 295
Bank, Bryar *v.* 421
Bank, Overholt *v.* 419
Bank *v.* Roseberry, 13
Bare's Estate, 85
Baschore, Miller *v.* 402
Bashore, Shryock *v.* 360
Beamish, Commonwealth *v.* 111
Bear *v.* Trexler, 214
Becker, Louchheim *v.* 449
Bell, Halfpenny *v.* 9
Beneficial Soc. *v.* March, 55
Bennett, Speyerer *v.* 213
Benton Poor Dist., Overseers of, Moreland *v.* 20
Bethlehem *v.* Fire Co., 104
Biddle's Appeal, 396
Bierly's Appeal, 210
Bierly *v.* Grimes, 210
Binswanger *v.* Fisher, 340
Bisler, Richards *v.* 485
Bittner's Appeal, 70
Blair Iron Co. *v.* Lloyd, 103
Blakiston, Freck *v.* 464
Bogue's Appeal, 256
Bomberger's Appeal, 71
Bonniwell *v.* Hopson, 492
Boom Co. *v.* Rogers, 478
Booth *v.* Meyer, 196
Borie *v.* Crissman, 144
Borie, Evans *v.* 86
Borough *v.* McGee, 83
Boyd *v.* Wilson, 521
Brady *v.* Conway, 110
Breisch *v.* Coxe, 84
Bricker's Admrs. *v.* Dull, 254
Brindle *v.* Adams, 5
Bronson, Bond *v.* 298
Brown's Appeal, 85
Bryan, Steamship Co. *v.* 528
Bryar *v.* Bank, 421
Bond *v.* Bronson, 298
Building Association, Swift *v.* 54
Bumm, Lea *v.* 335
Bunting, Hopple *v.* 472
Burke *v.* Maxwell, 48

CADWALADER *v.* App, 1
Carothers, Kimble *v.* 88
Carter *v.* Hess, 325
Centreville School District's Appeal, 75
City, Huidekoper *v.* 469
City *v.* R. R. Co., 492
Clark, Frew *v.* 497
Clark, McCray *v.* 451
Clarke *v.* Adams, 381
Clarke's Estate, 283
Clement, Reed *v.* 53
Coal Co. *v.* Price, 224
Coal Co. *v.* Warren, 525
Commonwealth *v.* Beamish, 111
Commonwealth, Green *v.* 424
Commonwealth, Hays *v.* 549
Commonwealth *v.* Kilgore, 174
Commonwealth, Leeds *v.* 554
Commonwealth *v.* McCarthy, 477
Commonwealth *v.* Mitchell, 398
Commonwealth, Myers *v.* 306
Commonwealth *v.* Overseers, 299
Commonwealth, Quigley *v.* 490
Commonwealth, Rolland *v.* 230
Commonwealth, Rowand *v.* 318
Commonwealth *v.* Thompson, 196
Commonwealth *v.* Walter, 876
Conway, Brady *v.* 110
Copely, Appeal of, 145
Corrigan's Appeal, 362
Coxe, Breisch *v.* 84
Coxe *v.* Derringer, 97
Coyle's Appeal, 533
Craig *v.* Gregg, 287
Cresson, McNamee *v.* 450
Crissman, Borie *v.* 144
Croasdell *v.* Tallant, 375
Crouse *v.* Staley, 83

DARLINGTON *v.* U. S., 221
Davis' Appeal, 163
Dawson *v.* Robinson, 449
Decker, R. R. Co. *v.* 121
De Coursey *v.* Trust Co., 65
De Haas, Quigley *v.* 315
Delpeuch, Ins. Co. *v.* 277
Derringer, Coxe *v.* 97
Dougherty, Malone *v.* 116
Dovey, Rand *v.* 349
Dull, Bricker's Admrs. *v.* 254
Dunning, Van Auken *v.* 15

EBY *v.* Ins. Co., 487
Ege, Kille *v.* 443
Ege *v.* Medlar, 437
Elliott, Ins. Co. *v.* 504
Enderiss *v.* Harkness, 366
Entricken, Shirley *v.* 51
Ervin's Appeal, 18
Evans *v.* Borie, 86

FAULKNER *v.* Wilson, 339
Fell *v.* Philadelphia, 261
Fessler's Appeal, 71
Findley's Appeal, 422
Fire Co., Bethlehem *v.* 104
Fisher, Binswanger *v.* 340
Forrester *v.* Hanaway, 113
Foster's Appeal, 362
Freck's Appeal, 464
Freck *v.* Blakiston, 464
Frew *v.* Clark, 497
Freyer, Jones *v.* 365
Fritz, Sands *v.* 531
Fuller, Ins. Co. *v.* 7

GEDDES' Appeal, 150
German Soc. *v.* Philadelphia, 483
Gorrell, Prevost *v.* 366
Graham, Herron *v.* 176
Gray, Pass. R. R. Co. *v.* 421
Gregg, Craig *v.* 287
Green *v.* Commonwealth, 424
Grimes, Bierly *v.* 210
Grubb *v.* Grubb, 177

HALFPENNY *v.* Bell, 9
Halloway's Appeal, 556
Hammett's Estate, *In re*, 416
Hammett *v.* Hammett's Exr's, 189
Hanaway, Forrester *v.* 113
Harkinson *v.* Bacon, 403
Harkness, Enderiss *v.* 366
Hart *v.* Kelley, 336
Hays *v.* Commonwealth, 549

Digitized by Google

Heenan, Lahey v. 181
Herron v. Graham, 176
Hersh, Appeal of, 283
Hertzler, McCulloch v. 88
Hess, Carter v. 325
Hibbs, Lloyd v. 21
Hoff's Appeal, 461
Hoffa's Appeal, 144
Hook, Weichart v. 488
Hopkins v. West, 343
Hopple v. Bunting, 472
Hopson, Bonniwell v. 492
Horter v. Silliman, 405
House of Good Shepherd's Appeal, 320
Hubert, Seymour v. 423
Huidekoper v. City, 469
Hulseman, Myers v. 487
Hydraulic Works Co. v. Orr, 552

INS. CO. v. Bair, 126
Ins. Co. v. Delpeuch, 277
Ins. Co., Eby v. 487
Ins. Co. v. Elliott, 504
Ins. Co. v. Fuller, 7
Ins. Co. v. Kane, 201
Ins. Co., Leonard v. 527
Ins. Co , Liblong v. 358
Ins. Co. v. O'Maley, 267
Ins. Co. v. Robinson, 173
Ins. Co. v. Rosenberger, 16
Ins. Co., Seipel v. 537
Ins. Co. v. Snyder, 269
Iron Co. v. Supervisors, 29
Iron and Coal Co. v. Loyd, 103

JACKSON v. Morter, 140
Johnson's Appeal, 52
Johnson's Estate, 364
Jones v. Freyer, 365

KANE, Ins. Co. v. 201
Kelley, Hart v. 336
Kelly, Taylor v. 206
Kemmerer v. Tool, 69
Keystone Zinc Co., Evans v. 3[illegible]
Kilgore, Commonwealth v. 174
Kille v. Ege, 443
Kimble v. Carothers, 88
Knight, Raydure v. 109
Kostenbader v. Spotts, 249
Krause v. Fuller, 7

LAHEY v. Heenan, 181
Lane's Appeal, 379
Lazarus' Appeal, 431
Lazarus' Estate, 428
Lea v. Bumm, 335
Lee, Wickersham v. 400
Leeds v. Commonwealth, 554
Lehigh Iron Co. v. Supervisors, 29
Leonard v. Ins. Co., 527
Lightner's Appeal, 295
Lippincott v. Seidenbach, 448
Lippincott v. Whitman, 313
Littell, Moeck v. 341
Liblong v. Ins. Co., 358
Lloyd's Estate, *In re*, 145
Lloyd v. Hibbs, 21
Lloyd, Iron Co. v. 103
Logan, McCulloch v. 88
Long, Matthews v. 512
Louchheim v. Becker, 449
Lower Macungie Twp., Iron Co. v. 29
Lusk's Admr., Kimble v. 88

McALARNEY, Roumfort v. 6
McBride's Admr. v. Carothers, 88
McCarthy, Comm. v. 477
McClure, Shryock v. 362
McCray v. Clark, 451
McCutcheon, Hays v. 549
McNamee v. Cresson, 450
McCulloch v. Logan, 88
McCulloch, Morris v. 357
McGee, Borough v. 33
McIlvaine's Appeal, 130
Magee v. McCarthy, 477
Malone v. Dougherty, 116
Manheim, Martien v. 10
March, Beneficial Soc. v. 55
Martien v. Manheim, 10
Martin's Appeal, 320
Mattern's Appeal, 166
Matthews v. Long, 512
Mauch Chunk v. McGee, 33
Maule v. Stokes, 373
Maxwell, Burke v. 48
Meadville, Huidekoper v. 469
Medlar, Ege v. 437
Merkle's Appeal, 110
Meyer, Booth v. 196
Meyers v. Comm., 506
Middleton, Pass. Railway Co. v. 486
Millar v. Saving Association, 480
Miller v. Baschore, 402
Millett v. Allen, 374
Mitchell, Snyder v. 393
Moeck v. Littell, 341
Mohr, Nav. Co. v. 322
Moreland Twp. v. Overseers of Benton, 20
Morgan, R. R. Co. v. 137
Morgan v. Tener, 398
Morris v. McCulloch, 357
Morter, Jackon v. 140
Moss' Appeal, 428
Mulherin, R. R. Co. v. 39
Myers v. Hulseman, 487

NATHAN Wood's Estate, 556
Navigation Co. v. Mohr 322
Newburger's Appeal, 256
Nicklin's Appeal, 396
North's Estate, 52
Nyce's Estate, 73

OIL Co. v. R. R. Co., 288
O'Maley, Ins. Co. v. 267
Orphan Asylum's Appeal, 320
Orr, Hydraulic Co. v. 552
Overholt v. Bank, 419
Overseers of Benton, Overseers of Moreland v. 20
Overseers of Moreland v. Overseers of Benton, 20
Overseers of Porter v. Overseers of Jersey Shore, 299

PALMER v. Paul, 366
Pass. R. R. Co. v. Gray, 421
Pass. R. R. Co. v. Middleton, 486
Patterson, Pratt v. 161
Paul, Palmer v. 366
Peet, Leeds v. 554
Perseverance Fire Co., Bethlehem v. 104
Peter v. Schlosser, 47
Peterson, Wagner v 344
Phila., Fell v. 261
Phila., German Soc. 483
Phila. v. R. R. Co., 492
Phila., Wistar v. 124
Phila. Coal Co. v. Warren, 525
Phila. Hydraulic Co. v. Orr, 552
Phillips v. Transportation Co., 347
Pilling's Ap., 252
Pittsburgh, Seely v. 413
Plum Township, division of, 242
Poulson's Estate, 471
Power v. Winsor, 360
Pratt v. Patterson, 161
Prevost v. Gorrell, 366
Price's Estate, 320
Price, Coal Co. v. 224

QUIGLEY v. Commonwealth, 490
Quigley v. DeHaas, 315

RAILROAD CO. v. Ashton, 281
R. R. and C. Co. v. Decker, 121
R. R. Co. v. Morgan, 137
R. R. Co. v. Mulherin, 39
R. R. Co., Oil Co. v. 288
R. R. Co., Phila. v. 492
R. R. Co. v. Shay, 45
R. R. Co., Watson v. 467
Ramey, Tatham v. 3
Rand v. Dovey, 349
Raydure v. Knight, 109
Reed v. Clement, 53
Rice, Wheeler v. 333
Richards v. Bisler, 485
Robinson, Dawson v. 449
Robinson, Ins. Co. v. 173
Rogers, Boom Co. v. 478
Rolland v. Commonwealth, 230
Roseberry, Bank v. 13
Rosenberger, Ins. Co. v. 16
Roumfort v. McAlarney, 6
Rowand v. Commonwealth, 318
Ruby's Appeal, 349
Ruggles, Shamburg v. 293

SANDS v. Fritz, 531
Saving Assoc., Millar v. 480
Schlosser, Peter v. 47
Schmidt and Friday's Appeal, 282
School District's Appeal, 75
Seaton's Appeal, 364
Security Co. v. Elliott, 504
Seely v. Pittsburgh, 413
Seidenbach, Lippincott v. 448
Seipel v. Ins. Co., 537
Seymour v. Hubert, 423
Shamburg v. Ruggles, 293
Shay, R. R. Co. v. 45
Sheetz's Appeal, 148
Sheetz v. Sheetz, 148
Shirley v. Entriken, 51
Shriner's Appeal, 155
Shryock v. Bashore, 360
Shryock v. McClure, 362
Silliman, Horter v. 405
Smith v. Coyle, 533
Snyder, Ins. Co. v. 269
Snyder v. Mitchell, 393

Digitized by Google

Speyerer v. Bennett, 213
Spotts, Kostenbader v. 249
Staley, Crouse v. 83
Steamship Co. v. Bryan, 528
Stein's Appeal, 256
Stokes, Maule v. 373
Stoll v. Weidman, 205
Stoll v. Weidman (dissenting opinion), 208
Supervisors, Iron Co. v. 29
Susquehanna Co. v Rogers, 478
Swift v. Building Association, 54

TALLANT, Crosadell v. 375
Tatham v. Ramey, 8
Taylor's Appeal, 75
Taylor v. Kelly, 206
Tener, Morgan v. 398
Thirty-fourth Street, *In re*, 130
Thompson, Commonwealth, 196
Thompson v. Thompson, 228
Tool, Kemmerer v. 69
Transportation Co., Phillips v. 347
Trexler, Bear v. 214
Trust Co., De Coursey v. 65

UNITED STATES, Darlington v. 221

VALENTINE'S Appeal, 471
Vanarsdalen's Appeal, 463
Van Auken v. Dunning, 15

WAGNER v. Peterson, 344
Wallace's Appeal, 468
Walter, Commonwealth v. 376
Warren v. Coal Co., 525
Watson v. R. R. Co., 467
Weaver v. Zimmerman, 56
Weichart v. Hook, 488
Weidman, Stoll v. 205
Weidner, Alexander v. 245
Welti, contested election of, *In re*, 165
Wentworth's Appeal, 248
West, Hopkins v. 343
Wheeler v. Rice, 333
Wheelock, contested election of, 168
Whitman, Lippincott v. 313
Wickersham v. Lee, 400
Wilson, Boyd v. 521
Wilson, Faulkner v. 339
Winsor, Power v. 360
Wistar v. Philadelphia, 124
Wood's Appeal, 85
Wood's Estate, 556

ZERBE v. Zerbe, 535
Zimmerman's Estate, 70
Zimmerman, Weaver v. 56
Zinc Co., Evans v. 36

HOUR RULE 245

NEW RULES OF SUPREME COURT IN CAPITAL CASES 277

Digitized by Google

Digitized by Google

TABLE OF CASES

OTHER THAN SUPREME COURT CASES

REPORTED IN VOLUME III. OF THE WEEKLY NOTES.

ADAMS, Elliott *v.* 44
Adams *v.* Levy, 543
Adams *v.* Smithman, 432
Adolph's Estate, 188
Alexander, Brooke *v.* 804
Allen *v.* Graham, 493
Allen, Houston *v.* 134
Alter's Estate, 356
Am. Suit Mfg. Co. *v.* Blair, 170
Anderson, Guth *v.* 133
Anfrye, *In re* 188
Ashman *v.* Doerr, 474
Association, Gormerly *v.* 11
Association, Pollock *v.* 170
Association *v.* Schuller, 431
Assurance Co. *v.* Power, 407

B—— *v.* H——, 132
Bacharach *v.* Schaller, 77
Bagley *v.* R. R. Co., 457
Bailey *v.* Waterhouse, 275
Baker, Tunis *v.* 368
Baldwin *v.* George, 326
Bambrick, Tischner *v.* 94
Bank *v.* Ervin, 63
Bank, Garsed *v.* 475
Bank *v.* Matthews, 158
Bank, Moodie *v.* 118
Bank *v.* Myers, 290
Bank, Wasserman *v.* 475
Banking Co. *v.* Wolf, 93
Bardsley's Estate, 548
Barnett's Estate, 412
Bast, Torry *v.* 63
Beach *v.* Wade, 219
Beck's Estate, 248
Bentley *v.* Kaufman, 352
Benton, A. & Bro., *In re* 547
Berques, Rezende *v.* 43
Binder, Gerson *v.* 156
Blanco *v.* Bosch, 171
Blair, Am. Suit Mfg. Co. *v.* 170
Bleim, O'Donnell *v.* 432
Bliem, Brown *v.* 26
Bockenkamp, Boyd *v.* 25
Borda *v.* R. R. Co., 351
Bosch, Blanco *v.* 171
Bowers, Burns *v.* 64
Bowers *v.* Supplee, 22
Boyd *v.* Bockenkamp, 25
Boyd *v.* Hart, 220
Bozarth, Kennedy *v.* 157
Brooke *v.* Alexander, 804
Brophy's Estate, 306
Brown *v.* Bliem, 26
Brown, Donly *v.* 275
Browning *v.* Rafsnyder, 204
Brown *v.* Rogers, 12
Brown *v.* Walton, 76
Bryan *v.* Paul, 64
Buckingham's Estate, 564
Buckley, Thompson *v.* 561
Buckman *v.* Jones, 302
Bucknor *v.* Pitman, 474
Building Association *v.* George, 289
Building Association, Ledger, *v.* Cook, 804
Building Association *v.* Metzger, 204
Bulletin, Struthers *v.* 215
Bunting *v.* McCormick, 496
Burns *v.* Bowers, 64

CAIN *v.* Shakespear, 514
Cardwell *v.* Hickman, 258
Casselberry, Lindsay *v.* 42, 133
Casselberry, McCambridge *v.* 134
Casselberry, Paul *v.* 273
Centennial Bd. of Finance *v.* Patterson, 307
Chamberlain *v.* Sloan, 518
Chambers's Estate, 188
Charlton's Estate, 305
Chestnut *v.* Meace, 240
Chew's Estate, 392
Church, St. Mark's, Harrison *v.* 384
City *v.* Devine, 25
City *v.* Patterson, 273
City *v.* Peterson, 292
City *v.* Scott, 562
Clemens, Held *v.* 475
Coal Co., Gate Vein, Detmold *v.* 567
Coaler *v.* Schlecht, 27, 242
Cole *v.* Wehn, 408
Collins *v.* O'Toole, 564
Collins's Estate, 434
Commonwealth *v.* Daily, 133
Commonwealth *v.* Faulkner, 540
Commonwealth *v.* Lane, 546
Commonwealth *v.* Malony, 407
Commonwealth *v.* Marshall, 182
Commonwealth *v.* Miller, 301
Commonwealth *v.* McClure, 58
Commonwealth *v.* Severn, 303
Commonwealth *v.* Smith, 95
Conrad *v.* Rodgers, 157
Cook, Ledger Bldg. Assn. *v.* 804

DAILY, Commonwealth *v.* 133
Day *v.* Garrett, 558
Debraham *v.* Walker, 26
De Coursey *v.* Trust Co., 518
De Leon's Estate, 76
Detmold *v.* Gate Vein Coal Co., 567
Detmold *v.* Fisher, 567
Detwiler, Rhoads *v.* 327
Devine, City *v.* 25
Dickerson *v.* McCausland, 327
Dickerson, Tennery *v.* 158
Dobbins, Roberts *v.* 494
Doerr, Ashman *v.* 474
Donly *v.* Brown, 275
Dougherty, Railway Co. *v.* 62

EDWARDS *v.* Franklin F. Ins. Co., 241
Eichert, Eichert *v.* 290
Eichert *v.* Eichert, 290
Elliott *v.* Adams, 44
England *v.* Kelly, 156
Ervin, Bank *v.* 63
Ervin, Volkmar *v.* 291
Evans's Estate, 519
Eyster *v* McCulla, 219

FARRELL'S Estate, 243
Faulkner, Commonwealth *v.* 540
Fire Association, Whipple *v.* 259
Fisher, Detmold *v.* 567
Fluch *v.* Insurance Co., 433
Forrest Mansion Hotel Co., Moore *v.* 289
Fortieth Street, *In re*, 64
Foulkrod, Taylor *v.* 171
Franklin F. Ins. Co., Edwards *v.* 241
French *v.* Kaign, 495
Freno, Marberry *v.* 563
Frey's Estate, 371
Frick, James *v.* 291
Frost, Steffey *v.* 409
Frostman *v.* Hicks, 202
Fulton *v.* O'Donnell, 42

GARRETT, Day *v.* 558
Garsed *v.* Bank, 475
George, Baldwin *v.* 326
George, Building Association *v.* 289
Gerber, Mayberry *v.* 240
Gerson *v.* Binder, 156
Greenwald *v.* Kaster, 327
Gibson, Jones *v.* 329

Digitized by Google

Gilbough v. Keller, 78
Given's Estate, 160
Gordon's Estate, 410
Gormerly v. Port Richmond B. and L. Assoc., 11
Gormley v. Stovell, 79
Gorrell, Prevost v. 548
Govett, Harris v. 560
Graham, Allen v. 493
Graves, McNamee v. 350
Greentree's Estate, 519
Griffith v. Salter, 433
Guth v. Anderson, 133

H——, B—— v. 132
Hallahan v. Murray, 44
Hanbest's Estate, 28, 520
Hanly, Wetherill v. 473
Harris v. Govett, 560
Harrison v. St. Mark's Church, 384
Harrison, Stokes v. 5 8
Havens, Huddy v. 432
Harley, Suplee v. 240
Harmstead v. Kingsley, 64
Hart, Boyd v. 220
Hart, Kelley v. 93
Hart v Schooner Enterprise, 172
Held v. Clemens, 475
Hellerman's Estate, 391
Hemphill, Hopper v. 474
Hewer v. Richardson, 274
Hicks, Frostman v. 202
Hickman, Cardwell v. 258
Hickman, McCausland v. 94
Hicks, Pastor v. 63
Hilt v. Walton, 545
Hogg v. Loughery, 514
Holden v. Woodward *et al.*, 133
Hollinshead v. Shallcross, 44
Hoover v. Munyon, 356
Hopper v. Hemphill, 474
Hopple, Smith v. 27, 44
Hopple's Estate, 79
Hotel Co., Stover v. 156
Houston v. Allen, 134
Huddy v. Havens, 432

ICE Co., Phila. Butcher's, Sheppard v. 565
Insurance Co., Fluch v. 433
Insurance Co., Kerns v. 390
Insurance Co., Penn Mutual, v. Watson, 513
Insurance Co., State, Todd v. 330

JAMES v. Frick, 291
Johnson v. Kolb, 278
Johnson, Singerly's Adm's v. 541
Jones, McLaughlin v. 203
Jones, Buckman v. 302
Jones v. Gibson, 329
Juillard v. Remington, 372

KAIGN, French v. 495
Kaster, Greenwalt v. 327
Kaufman, Bentley v. 352
Kavanaugh v. Woll, 242
Keller, Gilbough v. 78
Kelly, England v. 156
Kelley v. Hart, 93
Kennedy v. Bozarth, 157
Kerns v. Life Ins. Co., 390
Ketcham v. Singerly, 544
Keystone Lodge, Paul v. 408
Kingsley, Harmstead v. 64
Kleine, Meany v. 474
Kohl, Shallcross v. 219, 272
Kohler, Snyder v. 156
Kolb, Johnson v. 273
Krauss v. McGlone, 272
Kunkel, Nachod v. 368

LADOMUS, Times Publishing Co. v. 557
Landis, McGlensey v. 240
Lane, Commonwealth v. 546
Larbling, Oelschlager v. 32
Leech v. Leech, 542
Leech, Leech v. 542
Lennig v. Steamboat Co., 434
Le Van v. R. R. Co., 496
Levy, Adams v. 543
Levy v. Mustin, 220
Lindsay v. Casselberry, 42, 133
Lindsay, Young v. 169
Lindsey v. Casselberry, 42
Lippincott, Whitman v. 94
Loeb, Moyer v. 95
Loughery, Hogg v. 516
Loxley's Estate, 306

MAC EUEN'S Estate, 158
Magee, Wendill v. 204
Malony, Commonwealth v. 40
Marberry v Freno, 563
Matsinger v. Mullen, 544
Matthews, Bank v. 158
Maxwell, Peters v. 548
Mayberry v. Gerber, 240
McAdam, Shiras v. 326
McCambridge v. Casselberry, 134
McCausland, Dickerson v. 327
McCausland v. Hickman, 94
McClellan v. Melloy, 559
McClure, Commonwealth v. 58
McCormick, Bunting v. 496
McCosker v. Pollock, 95
McCulla, Eyster v. 219
McDonough, Ryan v. 44
McFadden, Veite v. 63
McGlensey v. Landis, 240
McGlone, Krauss v. 272
McLaughlin v. Jones, 203
McNamee v. Graves, 350
McShain, Nisbet v. 120
Meace, Chestnut v. 240
Mealey's Estate, 370
Meany v. Kleine, 474
Meinhard, Siegert v. 541
Melloy, McClellan v. 559
Merrian v. Nash, 155
Miller, Commonwealth v. 301
Moodie v. The Bank, 118
Moore's Estate, 80
Moore v. Hotel Co., 289
Moyer v. Loeb, 95
Mullen, Matsinger v. 544
Munyon, Hoover v. 356
Murray, Hallahan v. 44
Murray v. Yard, 275
Mustin, Levy v. 220
Myers, Bank v. 290

NACHOD v. Kunkel, 368
Nagle v. Potter, 26
Nash, Merrian v. 155
Nisbet v McShain, 120
North, Taylor v. 77, 170
Nyce, Taylor v. 433

O'DONNELL v. Bleim, 432
O'Donnell, Fulton v. 42
Oelschlager v. Larbling, 132
Ohman v. Winsmore, 157
Osmer v. Souder, 155
O'Toole, Collins v. 564

PASTOR v. Hicks, 63
Patterson, Centennial Bd. of Finance v. 307
Patterson, City v. 273
Paul, Bryan v. 64
Paul v. Casselberry, 273
Paul v. Keystone Lodge, 408
Peacock, Struthers v. 517
Peale's Estate, 134
Peters v. Maxwell, 548
Peterson, City v. 292
Petry, Sanborn v. 170
Phila. Butcher's Ice Co., Sheppard v. 565
Piatt, Rex v. 187
Pitman, Bucknor v. 474
Pollock v. Association, 170
Pollock, McCosker v. 95
Porter v. The Trust Co. 260
Potter, Nagle v. 26
Power, Mutual Assurance Co. v. 407
Prevost v. Gorrell, 548

RAFSNYDER, Browning v. 204
Railway Co., West Philada., v. Dougherty, 62
Ralston's Estate, 392
Reed v. Roberts, 458
Reeves v. Reeves, 558
Reeves, Reeves v. 558
Reinheimer's Estate, 244
Remington, Juillard v. 372
Restein, Schlecht v. 95
Restine's Estate, 27
Rex v. Piatt, 187
Rezende v. Berques, 43
Rhoads v. Detwiler, 327
Richardson, Hewer v. 274
Richardson, Snyder v. 272
Rickard v. R. R. Co., 517
Ristine, Schlecht v. 48
Roberts v. Dobbins, 494
Roberts, Reed v. 458
Robinson's Estate, 28
Rodgers, Conrad v. 157
Rogers, Brown v. 12
Rosengarten, Wharton v. 258
R. R. Co., Bagley v. 457
R. R. Co., North Penna., Richard v. 517
R. R. Co., Penna., Le Van v. 496
R. R., Phila. & Reading, Borda v. 351
Ryan v. McDonough, 44

SALTER, Griffith v. 433
Salter, Steinwick v. 64
Sanborn v. Petry, 170
Sanders v. Sanders, 43
Sanders, Sanders v. 43
Saul v. Turnpike Co. 270
Schaller, Bacharach v. 77
Schiller Assn. v. Yost, 171

Digitized by Google

Schlecht, Coaler v. 27, 242
Schlecht v. Restein, 95
Schlecht v. Ristine, 43
Schlecht v. Watson, 43
Schooner Enterprise, Hart v 172
Schooner "Maggie Cain," Shakespear v. 167
Schuller, Association v. 481
Scott, City v. 502
Secker's Estate, 391
Severn, Commonwealth v. 303
Seyfert's Estate, 565
Shakespear, Cain v. 514
Shakespear v. Schooner "Maggie Cain," 167
Shallcross, Hollinshead v 44
Shallcross v. Kohl, 219, 272
Sheppard v. Ice Co., 565
Shiras v. McAdam, 326
Siegert v. Meinhard, 541
Singerly's Admrs. v. Johnson, 541
Singerly, Ketcham v 544
Sloan, Chamberlain v. 518
Smith, Commonwealth v. 95
Smith v. Hopple, 27, 44
Smithman, Adams v. 432
Smythe, Tolman v. 169
Snyder v. Kohler, 156
Snyder v. Richardson, 272
Soley's Estate, 80
Souder, Osmer v. 155
Steamboat Co., Lennig v. 434
Steffey v. Frost, 409
Steger's Estate, 368
Steinmetz v. Wade, 187
Steinwick v. Salter, 64
Stewart's Estate, 332, 476
Stilz, Yarnall v. 12
Stœver v. Stœver, 169
Stœver, Stœver v. 169
Stokes v. Harrison, 563
Stovell, Gormley v. 79
Stover v. Hotel Co., 156
Struthers v. The Bulletin, 215
Struthers v. Peacock, 517
Sudam's Estate, 305
Suplee v. Harley, 240
Supplee, Bowers v. 22

TAYLOR v. Foulkrod, 171
Taylor v. North, 77, 170
Taylor v. Nyce, 433
Tennery v. Dickerson, 158
Thomas's Estate, 96
Thompson v. Buckley, 560
Times Publishing Co. v. Ladomus, 557
Tischner v. Bambrick, 94
Todd v. Ins. Co., 330
Tolman v. Smythe, 169
Torry v. Bast, 63
Trust Co., DeCoursey v. 518
Trust Co., Porter v. 260
Tull, Wilmarth v. 475
Tunis v. Baker, 368
Turnpike Co., Saul v. 270

VEITE v. McFadden, 63
Volkmar v. Ervin, 291

WADE, Beach v. 219
Wade, Steinmetz v. 187
Wainwright's Estate, 458
Walker, Debraham v. 26
Walton, Brown v. 76
Walton, Hilt v. 545
Wasserman v Bank, 475
Waterhouse, Bailey v. 275
Watson, Insurance Co. v. 513
Watson, Schlecht v. 43
Watson's Estate, 244
Wehn, Cole v. 408
Weis v. Weis & Fowler, 76
Weis & Fowler, Weis v. 76
Wendill v. Magee, 204
Wetherill v. Hanly, 473
Wharton v. Rosengarten, 258
Whipple v. Fire Assn. 259
Whitehead's Estate, 475
Whitman v. Lippincott, 94
Wilmarth v. Tull, 475
Winsmore, Ohman v. 157
Wolf, Banking Co. v. 93
Woll, Kavanaugh v. 242
Woodward, Holden v. 133

YARD, Murray v. 275
Yarnall v. Stilz, 12
Yost, Schiller Assn. v. 171
Young v. Lindsay, 169

RULE OF COURT OF COMMON PLEAS 258

RULE OF U. S. DISTRICT COURT, IN ADMIRALTY 565

Digitized by Google

Digitized by Google

TABLE OF CASES CITED

IN THE

OPINIONS OF THE SUPREME COURT IN THE CASES REPORTED IN THIS VOLUME.

ALDRIDGE *v.* Eshelman, 10 Wr. 420, 383
Alexander *v.* Ticknor, 1 Phila. 120, 424
Allegheny Home's Appeal, 27 Sm. 77, 34
Ankeny *v.* Albright, 8 Har. 157, 86
Ardesco Oil Co. *v.* Gilson, 13 Sm. 146, 123
Armstrong's Appeal, 5 W. & S. 352, 453
Arnold *v.* Suffolk Bank, 27 Barb. 424, 348
Ash *v.* Ashton, 3 W. & S. 510, 87
Ashford *v.* Ewing, 1 Casey, 213, 418
Ashhurst's Appeal, 10 Sm. 290, 38
Aurentz *v.* Porter, 12 Wr. 335, 180

BABB *v.* Read, 5 Rawle, 151, 107
Babcock *v.* Stewart, 8 Sm. 179, affirmed, 295
Bachdell's Appeal, 6 Sm. 386, remarked on, 15
Bailey *v.* Fairplay, 6 Binn. 450, 446
Baird *v.* Cahoon, 5 W. & S. 540, 86
Bancroft *v.* Ashhurst, 2 Grant, 520, 298
Bank's Appeal, 23 Sm. 59, 298
Bank *v.* Comm., 7 Har. 144, 551
Bank *v.* Davis, 6 W. & S. 285, 123
Bank *v.* Eyer, 8 Sm. 97, 447
Bank *v.* Israel, 6 S. & R. 293, 255
Bank *v.* Knoof, 16 How. 369, 200
Bank *v.* McCalmont, 4 Rawle, 307, remarked on, 82
Barmon *v.* Brandon, 10 Casey, 253, 3
Barnet *v.* Ihrie, 1 Rawle, 44, 180
Barnhart *v.* Riddle, 5 Casey, 92, 383
Barnhart *v.* Pettit, 10 Har. 135, 441
Bartholomew *v.* Leech, 7 Watts, 472, 86
Bertsch *v.* Coal Co., 4 Rawle, 130, 383
Bethel Tw'p, division of, *In re*, 4 Barr, 97, followed, 343
Bevin *v.* Cullen, 7 Barr, 281, distinguished, 347
Black *v.* Black, 10 Casey, 354, 418
Blackstone *v.* Buttermore, 3 Sm. 266, 298
Blashford *v.* Duncan, 2 S. & R. 480, remarked on, 67
Blight *v* Schenck, 10 Barr, 285, 102
Blood *v.* Mercellott, 3 Sm. 391, 34
Blystone *v.* Blystone, 1 Sm. 373, 344
Boas *v.* Updegrove, 5 Barr, 516, 174
Bollin *v.* Shiner, 2 Jones, 205, 289
Borrekins *v.* Bevan, 3 Rawle, 23, remarked on, 523, 526
Bowen *v.* Goranflo, 23 Sm. 357, followed (doubted by AGNEW, C. J.), 501
Bower *v.* McCormick, 23 Sm. 427, 48
Boyd *v.* Boyd, 16 Sm. 283, distinguished, 501, 502
Boyd *v.* Eby, 8 Watts, 66, 280
Boyd *v.* Wilson, 3 WEEKLY NOTES, 521, 526
Boyer's Estate, 5 Watts, 50, 418
Bradford *v.* Dornseiff, 2 Pa. 503, 87
Bradstreet *v.* Everson, 22 Sm. 133, 400
Brann *v.* Comm. 28 Sm. 122, 511
Bratton *v.* Mitchell, 5 Watts, 71, 247
Breden *v.* Gilliland, 17 Sm. 34, 8
Breneman's Estate, 15 Sm. 298, 212
Bronson *v.* Silverman, 27 Sm. 94, 342
Brough's Estate, 21 Sm. 460, remarked on, 82
Brown *v.* Bank, 22 Sm. 209, remarked on, 420
Brown *v.* Caldwell, 10 S. & R. 114, remarked on, 246
Brown *v.* Comm. 23 Sm. 322, 235
Brown *v.* Foster, 1 Sm. 165, distinguished, 348
Bubb *v.* Thompkins, 11 Wr. 359 86
Bull's Appeal, 12 Har. 286, 418
Bulton *v.* Penna., 10 How. 402, 200
Buna *v.* Wightman, 5 Casey, 335, 8
Burd's Ex'r *v.* Patterson, 10 Har. 219, 87
Burt *v.* Merchant's Ins. Co., 106 Mass. 356, disapproved, 223

CADBURY *v.* Duval, 10 Barr, 265, 180
Caldwell *v.* Brown, 3 Sm. 453, 123
Calhoun *v.* Logan, 10 Har. 46, 8
Campbell's Appeal, 12 Casey, 247, 115
Campbell *v.* Consalus, 25 N. Y. 613, followed, 447
Campbell *v.* Sloan, 12 Sm. 481, approved, 420
Canal Co. *v.* Barnes, 7 Casey, 193, remarked on, 123
Canon *v.* Campbell, 10 Casey, 309, 116
Carmalt *v.* Platt, 7 Watts, 318, remarked on, 317
Carson's Appeal, 9 Sm. 493, 500
Carson *v.* Baillie, 7 Har. 375, 523
Cathcart *v.* Comm., 1 Wr. 112, 492
Canal Co. *v.* Young, 1 Whar. 410, 227
Chadwick *v.* Patterson, 2 Phila. 275, 142
Chandelor *v.* Lopus, Cro. Jac. 4, 525
Christ *v.* Diffenbach, 1 S. & R. 464, 314
Church *v.* Fetterow, 2 Pa. 301, distinguished, 348
Church St., *In re*, 4 Sm. 353, 34
City *v.* Brooke, 2 W. N. 537, 266
City *v.* Burgin, 14 Wr. 539, 266
City *v.* Hoxie, 2 Wr. 339, 126
City *v.* Lea, 5 Phila. 77, 267
City *v.* Reilly, 10 Sm. 467, 267
City *v.* Stewart, 1 WEEKLY NOTES, 242, 267
City *v.* Tryon, 11 Casey, 402, 125
City *v.* Wistar, 11 Casey, 427, 267
Clark *v.* Baker, 2 Whar. 340, 123
Clark's Case, 2 East P. C. Ch. 15, 237
Clark *v.* Douglass, 12 Sm. 415, 344
Clark *v.* Partridge, 2 Barr, 13, 314
Cochran *v.* O'Hern, 4 W. & S. 95, 442
Coleman's Appeal, 12 Sm. 252, 447
Collins *v.* Collins, 1 Wr. 387, 48
Colt *v.* Selden, 5 Watts, 525, 2
Commonwealth *v.* Clark, 2 Browne, 325, 237
Commonwealth *v.* Commissioners, 8 Casey, 222, 301
Commonwealth *v.* Common Pleas, 3 Bin. 273, 180
Commonwealth *v.* Fisher, 1 Pa. 462, 226
Commonwealth *v.* Green, 8 Sm. 234, 34
Commonwealth *v.* Haas, 7 Sm. 443, 180
Commonwealth *v.* McAllister, 2 Watts, 190, 226
Commonwealth *v.* Miller, 2 Ash. 61, 319
Commonwealth *v.* Mitchell, 3 WEEKLY NOTES, 393, affirmed, 423

Digitized by Google

Commonwealth v. Mitchell, 2 Pa. 517, 301
Commonwealth v. P. & C. R. R. Co., 8 Sm. 26, 551
Commonwealth v. Perkins, 7 Barr, 42, 395
Commonwealth v. Rosseter, 2 Bin. 360, 301
Commonwealth v. Woods, 8 Wr. 113, 414
Coney v. Owen, 6 Watts, 435, 86
Conneaut Township, *In re*, 6 Pittsb. Legal Journal, 121, 121
Connelly v. Nedrow, 6 Watts, 451, 86
Cope's Appeal, 3 Wr. 284, distinguished, 257
Cotton v. Babcock, 14 Sm. 462, 282
Cook v. Nicholas, 2 W. & B. 27, 3
Cooke v. Reinhart, 1 Rawle, 317, 181
Cox v. Hickman, 8 House of Lords Cas. 268, 338
Coxe v. Derringer, 1 Weekly Notes, 397, 101
Craig v. Alleghany, 3 Sm. 477, 227
Criswell v. Altemus, 7 Watts, 580, 101
Crow v. Knightlinger, 1 Cas. 343, 442
Crowell v. Meconkey, 5 Barr, 168, remarked on, 142
Cunningham v. Gardner, 4 W. & S. 120, remarked on, 67
Curren v. Conway, 5 Bin. 489, 280

DAMON v. Bache, 5 Sm. 67, 115
D'Arras v. Keyser, 8 Casey, 240, 116
Dartmouth College Case, 4 Wheat. 518, 551
Davis v. Farr, 1 Har. 167, 375
Dean v. Fuller, 4 Wr. 474, 47
Dean v. Harris, 33 Law Times Rep. N. S. 639, 338
Dearie v. Martin, 2 Weekly Notes, 574, remarked on, 22
Dedrick v. Keichenback, 10 S. & R. 90, 116
Deer v. Greenawalt, 26 Sm. 254, 501, 502
Deford v. Reynolds, 12 Casey, 325, 294
Dellinger's Appeal, 21 Sm. 425, overruled, 207, 211
Deval v. Bushbridge, 6 W. & S. 529, 280
Deysher v. Triebel, 14 Sm. 383, 108
Diehl v. Emig, 15 Sm. 207, 207, 209
Dietrick v. Mason, 7 Sm. 40, 86
Directors of Schuylkill v. Overseers, 8 Wr. 484, 301
Ditmars v. Comm'th, 11 Wr. 335, 50
Dodson v. Ball, 10 Sm. 492, affirmed, 405
Doe v. Burt, 1 Term Rep. 701, 383
Dorsey's Ap., 22 Sm. 192, 34
Dougherty's Est., 9 W. & S. 189, 15
Dougherty v. Dickey, 4 W. & S. 146, 86
Drexel v. Man, 2 Barr, 271, 446
Drum's Case, 8 Sm. 16, approved, 428
Dubs v. Dubs, 7 Cas. 149, 442
Duchess of Kingston's Case, 11 Harg. State Trials, followed, 447
Duff's Road, 16 Sm. 459, 141
Duncan v. Clark, 7 Watts, 224, affirmed, 368
Dundas's Estate, 23 Sm. 474, distinguished, 195, 418
Dunlap v. Bournonville, 2 Casey, 72, 299
Dyott v. Comm., 5 Whar. 67, 236

EAGER v. Call, 10 Casey, 236, 523
Earp's Ap., 4 Casey, 368, distinguished, 429
Erb v. Scott, 2 Har. 20, 447
Erie v. Canal Co., 9 Sm. 177, 200
Eshleman's Ap , 24 Sm. 47, 209
Evans v. Hall, 9 Wr. 235, 48
Evans v. Reed, 28 Sm. 415; S. C., 2 Weekly Notes, 175, 162, 207, 209, 218
Everman's Ap., 17 Sm. 335, 418
Eyre v. Yohe, 17 Sm. 477 342

FENELON'S Petition, 7 Barr, 173, 414
Finley's Ap., 17 Sm. 458, remarked on, 22
Finney's Ap., 1 Wr. 328, 212
Fleming v. Potter, 7 Watts, 580, distinguished, 348
Foster v. Comm., 8 W. & S. 77, 239
Foust v. Comm., 9 Casey, 338, 236
Fraley v. Bispham, 10 Barr, 320, 528
Frazier v. R. R. Co., 8 Wr. 104, 123
Frederick's Ap., 2 Sm. 338, 500
French v. Mehan, 6 Sm. 286, 230
Fulton v. Hood, 10 Casey, 365, distinguished, 814

GARRARD v. R. R. Co., 5 Casey, 154, 453
Gee v. Lane, 15 East, 592, not followed, 376
Gernet v. Lynn, 7 Cas. 94, 442
Gibson v. Winslow, 2 Wr. 49, 13
Gilman v. Wilbur, 12 Pick. 120, 108
Gilmer v. Lime Point, 18 Cal. 229, disapproved, 223
Ginder v. Farnum, 10 Barr, 98, 500
Good v. Grant, 26 Sm. 52, remarked on, 15
Good v. Mylin, 8 Barr, 51, 179
Good v. Mylin, 1 Har. 538, 443
Graeff's Appeal, 2 Weekly Notes, 104, 82
Graham v. Pancoast, 6 Casey, 97, 155
Grant v. Comm., 21 Sm. 495, 511
Gray v. Griffith, 10 Watts, 431, 108
Greene v. Tyler, 3 Wr. 361, remarked on, 15
Greenfield's Estate, 2 Har. 496, remarked on, 46
Gregg v. Patterson, 9 W. & S. 208, 116
Griffith v. Cochran, 5 Bin. 87, 395
Grubb v. Fox, 6 Bin. 460, 68
Gyger's Ap., 24 Sm. 48, 207, 209, 211

HABERGHAM v. Vincent, 2 Ves., Jr. 204, 500
Hageman v. Salisbury, 24 Sm. 280, 143, 447
Haldeman v. R. R. Co., 14 Wr. 425, distinguished, 227
Hall v. Mathias, 4 W. & S. 331, 8
Hall v. Rupley, 10 Barr, 231, 92
Hallowell's Ap., 8 Har. 215, 212
Halsey v. Blood, 5 Casey, 319, 86
Hamilton v. Pittsburgh, 10 Casey, 496, 801
Hammett v. Philadelphia, 15 Sm. 146, 82, 414
Hancock Street, Extension of, 6 26, 414
Hardy v. Merriweather, 14 Ind. 203, approved, 348
Hardy v. Thomas, 23 Miss. 544, 7
Hare v. Fury, 3 Yeates, 14, 446
Harper v. Keely, 5 Har. 234, 375
Harris v. Bell, 10 S. & R. 39, 116
Harris v. Butterfield, 33 Law Times Rep., N. S. 639, 338
Harrison Tw'p, *In re*, 5 Barr, 447, 343
Hart v. Gregg, 10 Watts, 185, 3
Hartley & Minor's Ap., 3 Sm. 212, 298
Hauer's Appeal, 5 W. & S. 473, 15
Heffner v. Comm., 4 Casey, 108, 301, 395
Heft v. McGill, 3 Barr, 256, 116
Henry v. Brothers, 12 Wright, 70, 8
Herring v. Adams, 5 W. & S. 459, 174
Hess's Estate, 19 Sm. 272, 82
Hester's Case, 2 W. & S. 416, 301
Hester v. Riehle, 7 Watts, 37, 101
Hettrick v. Hettrick, 5 Sm. 290, remarked on, 56
Hibshman v. Dulleban, 4 Watts, 183, 447
Hoffman v. Bell, 11 Sm. 444, distinguished, 101
Hollister v. Commonwealth, 10 Sm. 105, 238
Hope v. Everhart, 20 Sm. 284, remarked on, 143
Hopkins v. Mehaffy, 11 S. & R. 128, 317
Homer v. Harrington, 6 Watts, 331, 180
Hough v. Doyle, 4 Rawle, 291, 123
Howard's Appeal, 20 Sm. 344, 84
Howe v. Commissioners, 11 Wr. 361, 301
Hubley v. Keyser, 2 Pa. 496, 86
Hulings v. Guthrie, 4 Barr, 123, 280
Hunt v. Hunt, 4 N. H. 434, 500
Hunt v. Rousmanier, 8 Wheat. 174, 298
Hunt v. Wall, 25 Sm. 413, 442
Huston v. Wickersham, 2 W. & S. 308, 446
Hutchinson v. Pittsburgh, 22 Sm. 320, 267

Digitized by Google

IDDINGS v. Cairns, 2 Grant, 88, 87
Iddings v. Iddings, 7 S. & R. 111, 314
Ingham v. Crary, 1 Pa. 338, remarked on, 123
Iron City Bank v. Pittsburgh, 1 Wr. 340, 551
Irwin v. Shoemaker, 8 W. & S. 75, 47
Ives v. Trees, 5 Barr, 121, 116

JACKSON v. Wetherill, 7 S. & R. 480, 526
James v. Bucks Co., 1 Har. 72, 301
Jaques v. Weeks, 7 Watts, 270, 453
Jenks v. Wright, 11 Sm. 610, distinguished, 101
Jennings v. Gratz, 3 Rawle, 168, remarked on, 523
Jewell v. Comm., 10 Har. 94, 236
Johnson's Appeal, 25 Sm. 96, 126
Johnson v. Cowen, 9 Sm. 275, 2
Johnston v. Jackson, 20 Sm. 164, 87
Jones v. Murphy, 8 W. & S. 295, 500
Jones v. Shawhan, 4 W. & S. 257, 249

KARNS v. Tanner, 16 Sm. 297, 207, 208
Kaul v. Lawrence, 23 Sm. 410, 446
Kemmerer v. Toll, 1 WEEKLY NOTES, 447, remarked on, 70
Keim's Appeal, 3 Casey, 42, 82
Kennedy v. Daily, 6 Watts, 269, 86
Kille v. Ege, 1 WEEKLY NOTES, 500, 441
Kimball v. Kelsey, 1 Barr, 183, 251
Kimmel v. Kint, 2 Watts, 431, 533
King v. Boyles, 7 Casey, 424, 180
Kirk v. Nice, 2 Watts, 867, 523
Kittera's Estate, 5 Harris, 416, 418
Kohl v. U. S., Amer. Law Reg., Sept. 1876, 222
Kostenbader v. Peters, 2 WEEKLY NOTES, 531, 814
Krause v. Dorrance, 10 Barr, 462, 400

LAIRD v. Hiester, 12 Har. 452, 86, 187
Lamb v. Irvin, 19 Sm. 436, 86
Lamberton v. Stouffer, 5 Sm. 284, 144
Lancaster v. De Normandie, 1 Whar. 49, 246
Lance's Appeal, 5 Sm. 26, 225
Lea v. Philadelphia, 1 WEEKLY NOTES, 189, remarked on, 126
Leibert v. Hocker, 1 Miles, 263, approved, 424
Le Mott's Case, Rel. 42, 237
Lentz v. Wallace, 5 Har. 412, 447
Lessee of Billington v. Welsh, 5 Bin. 134, 453
Lewis & Nelson's Appeal, 17 Sm. 153, 447
Lewis v. Rogers, 4 Har. 18, 15
Linsebigler v. Gourley, 6 Sm. 172, 195
Lloyd v. Galbraith, 8 Casey, 108, 73
Long v. Mast, 1 Jones, 189, 8
Longchamp v. Kenny, 1 Doug. K. B. 137, 108
Lord v. Ocean Bank, 8 Har. 384, 490
Lowry v. Mehaffey, 10 Watts, 387, 2
Lucas v. Bank, 28 Sm. 231, remarked on, 420
Lucesco Oil Co. v. Brewer, 16 Sm. 31, distinguished, 317
Lums v. Van Buskirk, 4 Barr, 310, 280
Lynch v. Comm., 27 Sm. 205, 511

McALLISTER'S Appeal, 9 Sm. 204, distinguished, 283
McBride's Appeal, 22 Sm. 480, 207, 211
McCall v. Himebaugh, 4 W. & S. 164, 87
McCall v. Neely, 3 Watts, 72, 101, 441
McClemmons v. Graham, 3 Binn. 88, 180
McCue v. Comm., 28 Sm. 185, 492
McCullough v. Comm., 17 Sm. 30, 319
McCullough v. McCullough, 2 Har. 295, remarked on, 108
McCullough v. Wainwright, 2 Har. 171, 383
McFarland v. Newman, 9 Watts, 55, 523
McFarson's Appeal, 1 Jones, 503, 2
McFee v. Harris, 1 Casey, 102, 142
McGeary's Appeal, 22 Sm. 365, 209
McGee v. Pittsburgh, 10 Wr. 858, 414
McGinnis' Appeal, 4 Har. 448, 462
McGonigle v. Allegheny, 8 Wr. 118, 414
McIlhenny's Appeal, 10 Wr. 847, 397
McKibbin v. Martin, 14 Sm. 352, 116
McKissick v. Pickle, 4 Har. 148, 108
McLean Ex'r v. Wade, 3 Sm. 146, 91
McMarlan v. English, 24 Sm. 296, 299
McMaster v. Comm., 3 Watts, 292, 414
McMasters v. Rupp, 10 Har. 298, 180
McReynolds v. Longenberger, 7 Sm. 13, remarked on, 13
Mack's Appeal, 18 Sm. 281, 502
Magill v. Brown, Brightly's C. C. Rep. 347, 107
Magill v. Kauffman, 4 S. & R. 320, 123
Mahon v. Gormley, 12 Har. 80, remarked on, 22
Mahoning County Bank's Appeal, 8 Casey, 158, 283, 340
Mann's Appeal, 1 Barr, 29, 174
Martin v. Berens, 17 Sm. 459, 314
Martin v. Gerndant, 7 Har. 124, 447
Meehan v. Williams, 12 Wr. 238, 453
Methodist Church v. Remington, 1 Watts, 218, 107
Miller's Appeal, 11 Casey, 481, 82
Miller v. Henderson, 10 S. & R. 290, 314
Miller v. Jacobs, 3 Watts, 477, 462
Miller v. Miller, 4 Barr, 317, 123
Mishler v. Merkle, 10 Barr, 509, 92
Mitchell's Estate, 2 Watts, 87, 418
Mitchell v. Freedly, 10 Barr, 208, remarked on, 142
Mohney v. Evans, 1 Sm. 80, 50
Mollwo v. Court of Wards, 4 Law Rep., Priv. Coun. Cas., 419, 338
Mon. Nav. Co. v. Coons, 6 W. & S. 114, 34
Moreland Township v. Davidson Township, 21 Sm. 371, remarked on, 21
Morrell v. Dickey, 1 Johns. Ch. 153, 500
Morris v. Hunt, 1 Chitty's R. 551, 179
Morris v. Olwine, 10 Har. 441, remarked on, 82
Morrison v. Funk, 11 Har. 422, 453
Morrison v. Robinson, 7 Casey, 456, 447
Moulton v. Libbey, 15 N. H. 480, approved, 447
Mumford v. Gibson, 4 East, 441, 7
Munderbach v. Lutz, 14 S. & R. 121, 246
Murray v. Keys, 11 Casey, 384, 239
Musselman's Appeal, 15 Sm. 480, 418

NACE v. Boyer, 6 Casey, 109, 155
Nash v. Gilkeson, 5 S. & R. 352, remarked on, 123
Nav. Co. v. Feulon, 4 W. & S. 205, 317
Neal v. R. R. Co., 7 Casey, 19, 224
Neiler v. Kelly, 19 Sm. 403, 346
Newell v. Gibbs, 1 W. & S. 496, 67
Nippe's Appeal, 25 Sm. 472, 229

O'DONNELL v. R. R. Co., 9 Sm. 239, 123
O'Harra v. R. Co., 1 Casey, 448, 224
Ortwein v. Comm., 26 Sm. 414, 511
Osbourn v. Osbourn, 11 S. & R. 58, 446
Overseers of Nippenose v. Overseers, 12 Wr. 402, 301
Owen v. Meyers, 8 Har. 134, 453

PACKET Company v. Sickles, 5 Wallace, 592, 447
Palmer v. Waite, 1 WEEKLY NOTES, 363, followed, 362
Park v. Chadwick, 8 W. & S. 96, 314
Patten's Appeal, 9 Wr. 151, remarked on, 82
Patterson v. English, 21 Sm. 454, 500
Patterson v. Kountz, 13 Sm. 251, remarked on, 247
Patterson v. R. R. Co. 26 Sm. 389, 123
Pattison v. Armstrong, 24 Sm. 476, 207, 209
Paxson's Appeal, 13 Wr. 199, affirmed, 253
Payne v. Croft, 7 W. & S. 458, affirmed, 363

Digitized by Google

Penna. Co. *v.* Dovey, 16 Sm. 267, 102
Pepper's Will, 1 Pars. Eq. Ca. 436, 107
Peries *v.* Aycinena, 3 W. & S. 79, 324
Perit *v.* Pittfield, 5 Rawle, 166, 92
Philadelphia *v.* Edwards, 2 WEEKLY NOTES, 102, remarked on, 266
Philadelphia *v.* Fox, 14 Sm. 169, remarked on, 201
Philadelphia *v.* Tryon, 11 Casey, 401, 414
Phillips *v.* Gregg, 10 Watts, 158, 3
Pittsburgh *v.* Walter, 19 Sm. 365, 267
Postens *v.* Postens, 3 W. & S. 183, 446
Price *v.* Mott, 2 Sm. 315, 86
Pusey *v.* Clemson, 9 S. & R. 207, 897

RAILROAD Co. *v.* Armstrong, 13 Wr. 186, 42
R. R. Co. *v.* Brooks. 7 Sm. 339, 123
R. R. Co. *v.* Norton, 12 Har. 465, 41
R. R. Co. *v.* Spearen, 11 Wr. 300, explained, 140
Ralston *v.* Groff, 5 Sm. 276, 50
Rapalje *v.* Emory, 2 Dall. 51, 231, remarked on, 174
Reading *v.* Comm., 1 Jones, 196, 301
Renrich *v.* Swineheart, 1 Jones, 333, 314
Read's Ex'rs. *v.* Erie, 33 Leg. Int. 184, 126
Rees *v.* Berrykill, 1 Watts, 263, 142
Reeside's Exr. *v.* Reeside, 13 Wr. 322, distinguished, 847
Reigart *v.* Ellmaker, 14 S. & R. 124, 246
Reitenbaugh *v.* R. R. Co., 9 Har. 104, 224
Renny *v.* Stiltz, 5 Whar. 384, approved, 405
Renshaw *v.* Gans, 7 Barr, 117, 314
Reynolds *v.* Caldwell, 1 Sm. 298, 317
Rhines *v.* Evans, 16 Sm. 195, followed, 400
Richardson *v.* Stewart, 4 Binn. 200, 280
Rigler *v.* Cloud, 2 Har 361, 102
Ringwalt *v.* Brindle, 9 Sm. 51, 8
Rivis *v.* Watson, 5 Mees. & Wel. 266, 67
Road from Thomas' Creek, 3 Whar. 11, 131
Roob *v.* Bowen, 9 Barr, 71, 87
Roberts *v.* Beatty, 2 Pa. 63, distinguished, 348
Robinson *v.* R. R. Co., 22 Sm. 316, 227
Rockafellow *v.* Baker, 5 Wr. 319, 155
Rogers *v.* Johnson, 17 Sm. 43, 87
Rose *v.* Quick, 6 Cas. 225, 500
Roshi's Appeal, 19 Sm. 462, 103
Ross *v.* Baker, 22 Sm. 186, 2

SAAM *v.* Saam, 4 Watts, 432, 7
Sames' Appeal, 2 Casey, 184, 453
Schenly *v.* Allegheny, 1 Casey, 128, 414
Schenley *v.* Allegheny, 12 Casey, 57, 414
Schenly's Appeal, 20 Sm. 98, 54
Schmidt *v.* Armstrong, 22 Sm. 355, 51
Seider's Appeal, 10 Wr. 61, 240
Sergeant's Exrs. *v.* Ewing, 6 Casey, 76, 19
Shaeffer *v.* Kreitzer, 6 Binn. 430, remarked on, 123
Shallenberger *v.* Ashworth, 1 Cas. 152, 442
Sheetz *v.* Norris, 2 WEEKLY NOTES, 637, 162
Shelbyville *v.* Shelbyville, 1 Met. Ky. 54, approved, 848
Sheppard, election of, *In re*, 27 Sm. 297, 236
Shields *v.* Miltenberger, 2 Har. 76, 142
Sloan's Case, 8 Watts, 194, 142
Smith's Appeal, 11 Wr. 128, 453
Smith *v.* McCarthy, 6 Sm. 359, 34
Smyth *v.* Craig, 3 W. & S. 20, 298
Snyder's Appeal, 4 Sm. 65, 180
Sopp *v.* Winpenny, 18 Sm. 80, 446
Souder's Appeal, 7 Sm. 498, 195
Spangler's Appeal, 9 Harr 335, distinguished, 897
Speer *v.* Evans, 11 Wr. 141, 453
Springer *v.* Springer, 7 Wr. 518, 180
Sprogg *v.* Shriver, 1 Casey, 282, remarked on, 142
Stahle *v.* Spohn, 8 S. & R. 316, 115
State *v.* Blackwell, 9 Alabama, 79, 319
State *v.* Flye, 26 Maine, 312, 112
State Line and Juniata R. R. Co.'s Appeal, 27 Sm. 429, 34
Steel *v.* Henry, 9 Watts, 523, affirmed, 863
Steel *v.* Thompson, 2 Pa. 34, remarked on, 67
Stephens *v.* Stephens, 1 Phila. 108, 142
Stine *v.* Sherk, 1 W. & S. 195, 47
Stinger *v.* Com'th, 2 Casey, 428, 102
Stœver's Appeal, 3 W. & S. 154, 418
Stokes *v.* McKibbin, 1 Har. 267, 442
Stopp *v.* Smith, 21 Sm. 285, 179
Stroh *v.* Ulrich, 1 W. & S. 57, 48
Stroud *v.* Philadelphia, 11 Sm. 255, 414
Sugar Loaf *v.* Directors, 8 Wr. 481, 301
Sutton *v.* Nelson, 10 S. & R. 238, 86
Swain *v.* Ettling, 8 Casey, 486, 91

THOMAS *v.* Ellmaker, 1 Pars. Eq. Ca. 98, 107
Thomas *v.* Shoemaker, 6 W. & S. 183, 173
Thomas *v.* Smith, 6 Wr. 68, approved, 51
Thompson's Appeal, 7 Sm. 175, 15
Tioga Co. *v.* South Creek Twp., 25 Sm. 433, remarked on, 209
Trego *v.* Lewis, 8 Sm. 463, 446
Tripp *v.* Bishop, 6 Sm. 424, 2
Trombley *v.* Humphrey, 23 Michigan, followed, 223
Turner *v.* Scott, 1 Sm. 126, 500
Turner *v.* Watterson, 4 W. & S. 171, 101
Twaddle's Appeal, 1 WEEKLY NOTES, 227, remarked on, 397
Twitchell *v.* McMurtrie, 27 Sm. 383, 342

UNANGST *v.* Kraemer, 8 W. & S. 391, 128
Union Pass. R. R. Co.'s Appeal, 29 Leg. Int. 380, 35
Uniontown *v.* Comm., 10 Casey, 293, 301

VANDIKE'S Appeal, 5 Har. 271, distinguished, 257
Vauter *v.* Ohio R. Co., 14 Ind. 174, approved, 348
Verner *v.* Carson, 16 Sm. 440, 15, 344

WAGNER'S Appeal, 7 Wr. 102, 383
Washington Avenue, 19 Sm. 352, approved, 414, 415
Watson *v.* Gregg, 10 Watts, 289, 8
Weaver *v.* Springer, 2 Miles, 42, 9
Weaver *v.* Weaver, 4 Sm. 152, affirmed, 403
Weidel *v.* Roseberry, 13 S. & R. 178, 533
Weigel *v.* Weigel, 5 Watts, 486, 501
Weimer *v.* Clement, 1 Wr. 147, 523
Wetherill *v.* Neilson, 8 Har. 448, 523
Wharton *v.* School Directors, 6 Wr. 358, 112
Wheeler *v.* Winn., 3 Sm. 122, remarked on, 247
Whitaker *v.* Eastwick, 25 Sm. 229, 523, 526
White *v.* Tompkins, 2 Sm. 365, distinguished, 348
Whiteside *v.* Whiteside, 8 Har. 473, 418
Wike *v.* Lightner, 1 Rawle, 290, 246
Willett *v.* Willett, 3 Watts, 277, 108
Williams *v.* Davis, 19 Sm. 21, 229
Wilson *v.* Bank, 17 Wall. 473, 70
Wilson *v.* Hayes, 6 Har. 354, 9
Wiltbank's Appeal, 14 Sm. 256, distinguished, 429
Winrow *v.* Raymond, 4 Barr, 501 9
Witman *v.* Lex, 17 S. & R. 88, 107
Wolf *v.* Payne, 11 Casey, 97, 251
Wray *v.* Pittsburgh, 10 Wr. 365, 414
Wright *v.* Linn, 9 Barr, 435, 107, 108

YORK BANK'S Appeal, 12 Cas. 458, 453
York Co. Bank's Appeal, 8 Casey, 446, distinguished, 257

ZELLAR'S Lessee *v.* Eckert, 4 How. 289, 8
Zimmerman *v.* Eshback, 8 Har. 417, 447

Digitized by Google

Weekly Notes of Cases.

VOL. III.] THURSDAY, OCT. 5, 1876. [No. 1.

Supreme Court.

July 14, '74. **Cadwalader v. App et al.** Feb. 24.

Act of March 26, 1785, § 2 (*Purd. Dig.* 927, *pl.* 3)—*Adverse possession, what constitutes—Statute of Frauds—The requisites of a writing sufficient to pass an interest in real estate.*

Some clear, positive, and unequivocal act is necessary to give an adverse character to a possession originally subservient to the title of the owner.

Error to the District Court of Philadelphia County.

Ejectment by George Cadwalader against Samuel App, Ann Keen, and Edward Zeitler for a lot of ground twenty by one hundred feet with a three story brick dwelling thereon erected, situate on Frankford Road, in the sixteenth ward of Philadelphia. Summons issued April 22, 1872. Plea, Not guilty.

The evidence produced at the trial showed that on July 1, 1784, Richard Penn and Mary his wife leased the land in question, the property of Mary Penn, to Scipio Wormly for ten thousand years, at a yearly rent of thirteen and one-third Spanish silver milled dollars. To secure the payment of this rent, a right of distress was reserved, and, in case no sufficient distress should be found on the premises, a right of re-entry. Wormly continued in possession until 1829, when he died without heirs. During the last few years of his life, George App, a pumpmaker occupying the adjoining property, used the back part of this lot as a place of storage for pump logs. After Wormly's death, he continued this occupation with the consent of the plaintiff, the latter being agent for the Penns. App was desirous of purchasing the lot, but, owing to the outstanding lease to Wormly, there were doubts as to the proper mode of making title. By indenture of October 19, 1838, Richard Penn, Mary Penn's son and devisee, conveyed to George Cadwalader, the plaintiff, the ground-rent issuing out of this lot, and all his estate in the land itself. In July, 1839, there being no chattels on the premises upon which to distrain, the plaintiff as owner of the lot, made a re-entry thereupon for non-payment of rent on the Wormly lease, and carefully performed all the acts necessary to constitute a valid re-entry. This was done in pursuance of an arrangement with App, for the purpose of vesting a marketable title in the plaintiff. On October 31 of the same year, Cadwalader and App entered into the following written agreement:—

"I, George App, do hereby agree to take the lot on Frankford Road, twenty feet front by one hundred feet deep, adjoining my house to the south, on a ground-rent of three dollars per foot, equal to sixty dollars per annum, payable half-yearly, clear of taxes, from the first day of November, A. D 1839.

GEORGE APP, SR.,
GEORGE CADWALADER.

PHILADELPHIA, 31st October, 1839.
Witness: T. CADWALADER."

App paid rent to the plaintiff under this agreement at various times, the last instalment being paid September 4, 1850, but no deed was ever executed in pursuance of it, as counsel were still in doubt as to how title should be made. App several times requested the plaintiff to make him a deed, and the latter always expressed his willingness to do so, saying that he would sign any deed App might have prepared. At the last payment of ground-rent App requested that the deed should be made to his son Samuel, one of the defendants. Afterwards, at a time not exactly fixed, Samuel App called on David F. Foley, Cadwalader's clerk, and, on being told that the latter was not yet prepared to give the deed, said he intended to claim the property, because he did not believe the plaintiff had any title, adding, "I want you to understand my father will pay no more rent." On April 24, 1851, George App formally notified Cadwalader in writing that he no longer recognized the latter's title, but should hold adversely to the same. On May 6 of the same year, George App conveyed the property by a fee simple deed to Samuel App, who soon after erected the brick dwelling now standing thereon. The defendants, Zeitler and Keen, claim as tenants under Samuel App.

The plaintiff submitted, *inter alia*, the following point: (3) There is no evidence that any change of the relation of landlord and tenant took place between the parties till the note from George App to the plaintiff of April 24, 1851. *Refused.*

THAYER, J., said in his charge: "The contract of October 31, 1839, amounted to a contract of sale—a parol contract for the sale and purchase of the land on ground-rent."

Verdict and judgment for the defendants.

The plaintiffs took this writ of error, assigning, *inter alia* (2, 3), the action of the Court in leaving to the jury to decide when the relation of landlord and tenant between the plaintiff and George App ceased, and the latter's adverse possession began, instead of charging as requested in the plaintiff's third point; and (7) the portion of the charge quoted above.

G. T. Bispham and *Wm. Henry Rawle*, for plaintiff in error.

Digitized by Google

An adverse character can be given to a possession, which in its origin was consistent with the owner's title, only by some clear, positive, and unequivocal act. There is no evidence of any such act on George App's part before the notice of April 24, 1851. This suit was brought April 22, 1872, two days before the expiration of the twenty-one years required to give a valid title by mere adverse possession.

Hall *v.* Mathias, 4 W. & S. 331.
Bannon *v.* Brandon, 10 Cas. 263, and 2 Wr. 63.
Watson *v.* Gregg, 10 Watts, 296.
Long *v.* Mast, 1 Jones, 189.
Zeller's Lessee *v.* Eckert, 4 How. 289, 295.

The agreement of October 31, 1839, between App and Cadwalader was not a parol contract, but a written agreement sufficient under the Statute of frauds.

J. D. Bennett, contra.

The adverse possession of App began in 1829, and was not interrupted by the agreement of October 31, 1839, or any acts of the defendant under it, such as the payment of rent, etc.; for this agreement was entered into upon the false representations of Cadwalader that he could make title to the land, when, in fact, the ten thousand years' lease to Wormly was still outstanding.

May 8. THE COURT. This was an action of ejectment. It was for a lot which Richard Penn and Mary his wife demised to one Wormly in 1784 for a term of ten thousand years, reserving a yearly rent of thirteen dollars and thirty-three cents, payable in Spanish milled dollars. The payment thereof was secured by a right of distress, and a right of re-entry was reserved, in case no sufficient distress should be found on the premises. Wormly continued in possession and resided on the premises until his death in 1829. He left no known heirs. The plaintiff claims under the deed of October 19, 1838, from Richard Penn. He was the son and devisee of Mary Penn, who owned the land when demised to Wormly. George App, under whom all the defendants claim, occupied the lot adjoining Wormly's. Probably during the latter part of Wormly's life and with his permission, App occupied the back part of the Wormly lot, for depositing pump-logs thereon, and soon after his death took possession of the whole lot. Prior to Wormly's death, the plaintiff acted as agent for Penn, and so continued until his purchase in 1838. The uncontradicted testimony is that in July, 1839, the plaintiff made a re-entry with an unequivocal and declared intention to resume the actual possession; that he then and there gave the notices and did all the acts necessary to repossess the premises for the non-payment of rent, if there was not sufficient distress on the premises to pay the rent in arrear. The sufficiency of that distress was questioned on the trial. It appears, however, by the testimony of the plaintiff, that this re-entry was made in pursuance of an arrangement with App, and for the purpose of making title to him; that he had purposely withdrawn everything from the lot; he had paid no rent prior to 1838; that the plaintiff was practically in possession, and App was there to take care of the property for him. Some three months thereafter, App entered into an agreement in writing, with the plaintiff, for the lot, in these words: "I, George App, do hereby agree to take the lot on Frankford road, twenty feet front, and one hundred feet deep, adjoining my house on the south, on a ground-rent of three dollars per foot, equal to sixty dollars per annum, payable half yearly, clear of taxes, from the first day of November, 1839. Philadelphia, October 31, 1839." It was signed by George App and George Cadwalader, and by a subscribing witness. The question of the legal effect of this instrument is raised by the seventh assignment of error.

It has been held that the Statute of Frauds was passed for the protection of land owners. It was intended to guard them against perjuries in the proof of parol contracts. Hence the requirements of the statute are answered by a memorandum in writing signed by the party to be charged therewith. If, therefore, it be signed by the vendor alone, and delivered to the vendee, it is all the statute requires. (Lowry *v.* Mehaffey, 10 Watts, 387; McFarson's Appeal, 1 Jones, 503; Tripp *et al v* Bishop, 6 P. F. Smith, 424; Johnson *v.* Cowen, 9 Id. 275.) This writing was signed by both parties.

Nor is it necessary that the writing be under seal. (Colt *v.* Selden, 5 Watts, 525; McFarson's Appeal, *supra;* Tripp *v* Bishop, *supra;* Johnson *v.* Cowen, *supra.*) Nor is any particular form of words essential to its validity for the sale of lands. (Colt *v.* Selden, *supra;* McFarson's Appeal, *supra;* Ross *et al. v.* Baker, 22 P. F. Smith, 186.)

This agreement fulfils all the requirements of the statute. It is in writing, and signed by the parties. The terms of the contract, the land to be conveyed, and the price to be paid, are all stated. The learned Judge erred, therefore, in charging that this written agreement "amounted to a parol contract for the sale and purchase of the land."

The second and third assignments involve the sufficiency of the evidence to give title to the defendants, under the Statute of Limitations. The answer depends on the effect to be given to the testimony of Foley. He was clerk to the plaintiff from 1845 to 1861. On the 4th of September 1850, he collected the last payment made by App on his lease of October 31, 1839. That portion of Foley's testimony which does not closely relate to events too late to affect the question, is in these words: "At the last payment App requested that the plaintiff would furnish him with a deed for the lot; he said he wanted

Digitized by Google

it made to his son instead of himself. After that he called and said his son was going to build, and he wanted his deed. Afterwards, Samuel App told me he intended to claim the property, because he did not believe the plaintiff had any title. This was after the last payment of ground-rent by his father. He asked if General Cadwalader was prepared to give the deed. I said no. He then said 'I want you to understand my father will pay no more rent.'" Thus the time when Samuel App declared that his father would pay no more rent is very vague and uncertain. The reason why is not given. It is more reasonable to presume the remark was made to expedite the execution of the deed by the plaintiff than to indicate any intention to hold adversely to him. Samuel did not allege that he spoke by any authority from his father, or with his knowledge. He had no deed from his father until May 6, 1851.

George App indicated no hostile claim or adverse right when he made the payment of 4th September, 1850. On the contrary, both by his verbal request then made, as well as by his letter of the same date, requesting the deed to be made to his son Samuel, he most unmistakably negatived the idea of his claiming title paramount to the plaintiff's. After that when he said his son wanted to build, the same recognition of title in the plaintiff is clearly manifested.

There is no evidence that prior to the 24th April, 1851, George App gave any notice indicating a denial of the plaintiff's title. That notice of the 24th April clearly assumes, if it does not declare, that negotiations in regard to executing the deed had been continued and were open until that date.

There is no allegation that he, prior to that date, either personally or through his son, discontinued those negotiations.

Still further, assuming Samuel to have spoken by authority from his father, it was a mere declaration accompanied by no act. It was not made when a payment was demanded.

When one has entered expressly or legally in subservience to the title of the owner, the statute does not begin to run in favor of such occupant until the privity existing between him and the owner is severed by some unequivocal act; until such act his possession does not become adverse. Mere declaration of an intention is insufficient. This rule was applied to co-tenants in Phillips *v.* Gregg (10 Watts, 158); Hart *v.* Gregg (Idem. 185); Watson *v.* Gregg (Idem, 289). But it is held that the rule is not restricted to co-tenants, It applies generally whenever the title was originally taken and held in subserviency to the title of the real owner. (Zellar's Lessee *v.* Eckert, 4 Howard, 289; Cook *v.* Nicholas, 2 W. & B. 27; Hall *v.* Mathias, 4 W. & S 331, Long *v.* Mast, 1 Jones, 189; Barmon *et al.* *v.* Brandon, 10 Casey, 263.)

Tested by the authorities, we think the declarations of Samuel App were insufficient to submit to the jury as evidence of adverse possession by George App. It was not in his power acting through an agent, to make the Statute of limitations begin to run in his favor, while he at the same time, by his own personal conduct was continually recognizing the plaintiff's title. His possession was not adverse. To hold otherwise, would be to sanction a fraud on his landlord. His written notice of 24 April, 1851, contains a disclaimer of any adverse claim prior to that date. He therein says: "I now notify you that I no longer recognize your title to the same." Up to that time he had recognized it, but thenceforth he would not. As George App had unquestionably held under the plaintiff, and there is no sufficient evidence that he held adversely prior to his written notice, these assignments are sustained.

The fourth assignment is made by uniting disconnected parts of the charge. Considered in connection with the context, we see no error in the idea conveyed, nor do we think the language used in any wise injured the plaintiff. There are no substantial errors in the remaining assignments.

Judgment reversed and a *venire facias de novo* awarded.

Opinion by MERCUR, J. WILLIAMS, J., absent.

May, '76. **Tatham v. Ramey.** May 17.

Amendment—When not allowed—Act of May 10, 1871—Change of cause of action—Appearance of defendant—Withdrawal of, on change of cause of action.

The Act of May 11, 1871, permitting an amendment by changing the form of action, does not authorize a new and different cause of action to be substituted.

The amendment of an action of dower, to one of debt for arrears of interest on the money proceeds of the widow's share, is a change of the cause of action, and cannot be made.

Error to the Common Pleas of Blair County.

This was originally an action of dower brought by Elizabeth Ramey, widow of Jacob Ramey, deceased (afterwards intermarried with Joseph S. P. Harris), against George M. Tatham, to recover the third part of the undivided two-sevenths of a tract of land, of which the said Jacob Ramey died seized, intestate. The narr. set forth that plaintiff demanded the said third part of said real estate as her dower. The writ was served on the terre tenants only, but the defendant, who resided in another county, afterwards appeared by attorney. Subsequently, the plaintiff, having obtained leave of the Court to file an

Digitized by Google

amended declaration, filed a new declaration in debt for the sum of $789.92, setting forth that plaintiff, immediately after the death of her husband, Jacob Ramey, was endowed with the interest of the third part of the real estate described in the first narr., that two of the children of Jacob Ramey had conveyed to defendant their interest in said land, to wit, the undivided two-seventh parts thereof, for the sum of $4539.75, that defendant had retained the one-third of said purchase money, to wit, the sum of $1513.25, the interest of which amounted annually to $90.79, and that from May 9, 1864, the defendant owed and was to pay to plaintiff annually the said sum of $90.79, yet the defendant had not paid said money, to the damage of the plaintiff, etc. Upon the filing of this narr., defendant applied to the Court for leave to withdraw his appearance, which application was refused. Defendant then filed a demurrer to the declaration, on the grounds that it was in debt while the action was in dower, that no permission had been given to change the action from dower to debt, and that no such permission could be given whereby the appearance of a non-resident defendant could be secured by service on the tenants in a real action, and afterwards taken advantage of by a change to a personal action. The Court below entered judgment for the plaintiff on the demurrer. A rule to plead was then entered, and defendant pleaded, never indebted and payment with leave, etc. On the trial (before DEAN, P. J.), before the jury were sworn, the Court on motion of plaintiff amended the record of her former application to file an amended narr., so as to read: "And now, Feb. 5, 1873, plaintiff has leave to amend upon payment of costs to date, to change the form of action from dower to debt, and file declaration accordingly." Defendant presented, *inter alia*, the following point, which was declined: "Plaintiff, having issued a writ of dower, cannot recover from defendant, having changed the cause of action and the form thereof."

Verdict and judgment for plaintiff for $775.55. Defendant took this writ, assigning for error, *inter alia*, the refusal of the Court to allow him to withdraw his appearance, the entry of judgment for plaintiff on the demurrer, and the refusal of defendant's point.

Samuel S. Blair, for plaintiff in error.

The rule is, that, so long as the substantive cause of action remains the same, the mode of stating it may be varied by amendment.

Cassel *v.* Cooke, 8 S. & R. 268.
Newlin *v.* Palmer, 11 S. & R. 98.
Root *v.* O'Niel, 12 H. 326.

The Act of May 10, 1871 (Purd. Dig. 70, pl. 6), is in entire harmony with this well understood limitation on the power of amendment. If debt is brought where case in assumpsit is the proper form to reach the same thing claimed, the statute would apply; or when case in assumpsit is brought instead of case in deceit, as in Smith *v.* Bellows (27 Sm. 441; 1 WEEKLY NOTES, 292), where it is said the same facts would support either form of action.

But how can an action of dower at common law be changed to an action of debt? The thing claimed in the one is land, to be assigned by metes and bounds, with damages for detention; in the other it is for a fixed sum of money. The one is local and the other transitory. If this change can be made, then ejectment may be changed to case for slander, and a citizen of Philadelphia who appears to a writ of ejectment served on his tenants in Erie, must stay in court to answer anything the plaintiffs may choose to count against him.

D. J. Neff and *Frederick Jackell*, contra.

The Act of 1871 (*supra*) enlarges the powers which were given to the Court under the Act of 1806; it permits an amendment of the form of action whenever it is necessary for a proper decision of the cause on its merits. An action of dower is for a specific piece of land or its equivalent in money. It is for a sum certain. If Tatham was not actually indebted to Mrs. Harris she could not recover, no matter what her form of action would be, whether dower, debt, or covenant. In Smith *v.* Bellows (*supra*), assumpsit was changed to trespass on the case. Amendments which tend to advance the interest of justice are proper and necessary, and should always be liberally allowed.

Trego *v.* Lewis, 8 Sm. 463.
Knapp *v.* Hartung, 22 Id. 294.

May 29. THE COURT. It certainly was not the meaning of the Legislature, in passing the Act of May 10, 1871 (Pamph. L. 265), permitting an amendment or change in the form of an action, to authorize an entirely new and different cause of action to be substituted. The words of the Act, "if the same shall be necessary for a proper decision of the case upon its merits," plainly evince this, and it is the principle which runs through all our Acts for amendment and the decisions which have been had upon them. The Courts have construed these Acts with the greatest liberality, but never to the extent of allowing a different cause of action to be introduced. It would lead to very great injustice to defendants if this could be done, of which the case presented on this record is an illustration. The plaintiff below sued out a writ of dower against the defendant. It was served on the tenants of the land, and the landlord or owner in fee simple residing in a distant county appeared by his attorney. It was proper that he should do so if he had any defence against the claim of the demandant. Dower is a real action and cannot be brought except in the county where the land lies (Act of 13 June, 1836, Pamph. L. 587). The demandant was allowed to change

Digitized by Google

the form of action from dower to debt, which is a personal and transitory action, and to file an amended declaration grounded upon a contract of the defendant to pay the plaintiff a sum of money as interest. Yet the attorney for the defendant, who had never been served and was not within the jurisdiction of the Court, was not allowed to withdraw the appearance which he had entered to the writ of dower. Thus, upon the same principle as that adopted and carried out by the learned Judge below, a man, by commencing an action of ejectment and by a service on the tenant securing the appearance of the landlord, may then change the form to assumpsit, and recover upon any contract relating to the same land, for it can hardly be pretended that he could introduce a cause of action not connected in some way with the same subject-matter. If one sues to recover the possession of land, that is a different cause of action from a claim for rent on a lease. The demandant had no right to maintain her action of dower, on her own showing, for the Court had no jurisdiction of it. As her husband had died seised and intestate, her remedy was in the Orphans' Court, or, if the defendant had become personally bound to pay her interest upon her thirds as valued by agreement, she must pursue him by personal action in the proper forum for the arrears.

Judgment reversed.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

July, '75, 149. **Brindle v. Adams et al.** June 5.

Replevin—Measure of damages—Evidence to ascertain—When too remote.

In replevin, the measure of damages is the value of the goods at the time the writ issued; and evidence of value at a time long subsequent, although accompanied by an offer to show the intermediate deterioration, is inadmissible.

Error to Common Pleas of Lycoming County.

Replevin by Adams *et al.* against Brindle, to recover the type, presses, etc., contained in the office of the *Lycoming Standard.* Pleas, *Non cepit;* property in defendant.

Under an execution against one Guernsey, the property in question was purchased at U. S. Marshal's sale by the plaintiffs; the defendant, Brindle, had possession and claimed property, and plaintiffs commenced this action of replevin December 12, 1871. The defendant gave bond and retained possession.

Upon the trial (before GAMBLE, P. J.), in December, 1875, the evidence as to the value of the property was contradictory, plaintiff's witnesses estimating it at figures ranging from $4500 to $7000, while defendant's witnesses fixed it at from $1500 to $1800. The defendant offered to prove "that at an assignee's sale of the same property and material, by the assignee of Wm. Brindle, in April, 1874, the same sold, at a fair, open and public sale for the sum of $1515, and that from the time of the Marshal's sale to the assignee's sale, about $1000 worth of new material had been put in the office, and was included in the said assignee's sale for the above sum; to be followed with proof, showing the extent of the deterioration in value, if any, of the said property between the time of the Marshal's sale and the sale by said assignee, with evidence also of the manner and extent of the use of said material in the mean time." Objected to; excluded.

Verdict and judgment for plaintiff for $4125.34. Defendant took this writ, assigning for error the rejection of the offer.

R. Bruce Petriken and *R. P. Allen* (*Metzger* with them), for the plaintiff in error, argued that the measure of damages in replevin was the value of the property at the time the writ issued, with interest. The direct testimony of the witnesses was conjectural and contradictory, and with the view of arriving at some just standard, we offered the best evidence of which the nature of the case was susceptible, viz., the price actually brought at a fair sale in 1874, supplemented by evidence of the use, improvement, and deterioration of the property since the issuing of the writ in 1871. On the principle that *id certum est*, etc., such evidence clearly tended to ascertain what the value was at that time; it was, therefore, pertinent and admissible.

Sedgwick on Damages, 422.
Ashcom *v.* Smith, 2 Penna. Rep. 211.

H. C. Parsons (with whom was *Merrill*), contra, did not controvert the proposition as to the measure of damages; but insisted that the Court below had followed it in confining the testimony as to value to the time of the issuing the writ in replevin. He argued that a forced public sale is no test of the value of the articles sold, and that Ashcom *v.* Smith (*supra*) was inapplicable.

June 9. THE COURT. The offer to show the assignee's sale of the property as evidence of value was entirely too distant from the time of the replevying of the property, and too variant in the circumstances to be a fair criterion of value. The offer itself concedes this by offering to show the extent of the intermediate deterioration of part and the additional value of other parts, thus introducing new issues and tending to distrust. Besides, the hostile intent and claim of title must have had something to do in affecting the price at the sale. We discover no error, and therefore affirm the judgment.

PER CURIAM. Judgment affirmed. SHARSWOOD and WILLIAMS, JJ., absent.

Digitized by Google

May, '76, 104. May 26.

Roumfort, Admr., v. McAlarney.

Executor de son tort—Widow—Unauthorized settlement by—Right of administrator to recover from her vendee—Recoupment of debt by creditor withholding decedent's property.

While an executor *de son tort* may make a binding *quasi* administration, a settlement of mutual accounts existing between the decedent and another, in which no property changed possession and no cash was directly paid, is of no effect.

A widow, undertaking to settle her deceased husband's estate without administering thereon, made a settlement, in writing, with his surviving partner, whereby, in consideration of decedent's indebtedness to him, and of the future payment by him of a balance in cash, he was to retain property of the decedent used in the business of the late firm. In replevin brought by a subsequently appointed administrator against the surviving partner:

Held (reversing the judgment of the Court below), that the defendant acquired no title as against the administrator.

Held further, that the *bona fide* payment of debts by the widow to an extent greater than the value of the property did not help the defendant's title.

Error to the Common Pleas of Dauphin County.

Replevin for a law library. Defendant pleaded *Non cepit*, payment and property.

Wm. H. Miller, with whom J. C. McAlarney, the defendant, had been a partner in the practice of law, died intestate and insolvent in 1870, leaving a widow and a minor child. Among the assets of his estate was a law library, the subject of this action, which, after his death, remained in defendant's possession. Mrs. Miller undertook, with the defendant's knowledge, to settle up the estate without taking out letters of administration, and paid debts, etc., but afterwards, on April 19, 1871, procured A. L. Roumfort, the plaintiff, to become administrator. On the trial (before HENDERSON, A. L. J.) plaintiff proved that defendant asserted no claim to the library either before the appraisers or the administrator, but that he agreed in March, 1871, with Mrs. Miller to purchase it at a fair valuation; he further proved that the debts of the estate were not all paid. Defendant offered a paper, showing in detail a settlement made between him and Mrs. Miller, by which he was to retain the library and pay a certain balance in cash, and proved that she had paid debts of the decedent amounting to more than the value of the library; further, that only one debt of decedent remained unpaid, and for this the creditor had taken Mrs. Miller's obligation. Plaintiff objected to the admission of the paper, on the ground that it showed a settlement to which the administrator was not a party, and that it embraced partnership accounts; objection overruled, and evidence admitted only for the purpose of showing the alleged sale of the library by Mrs. Miller to the defendant. Plaintiff asked the Court to instruct the jury "that Mrs. Miller, after the death of her husband, was incompetent in law to sell or dispose of his personal property: and any arrangement, therefore, made by her with the defendant, about the property in question, even if proved, but not sanctioned by the plaintiff, can be no defence in this action." *Answer:* "We cannot answer this point as requested, but say to you that if you find that Mrs. Miller undertook to settle the estate, and pay the debts of her deceased husband, without taking out letters of administration, and that the estate was wholly insolvent, and that in pursuance of that purpose she went on and sold the library in question to the defendant, McAlarney, and gave him possession of it, and that he has paid, or been ready and willing at all times to comply with the terms of sale as thus made, and if you find, further, that Mrs. Miller paid debts largely in excess of any amount that came into her hands from the estate, and has since paid to the present plaintiff more than twice the amount or value of the library, as appears by the administration account, then we instruct you that there can be no recovery in this action." He also requested the Court, verbally, to call the attention of the jury to the testimony of the administrator and appraisers that defendant did not make a claim to them of title to the property; this the Court omitted to do.

The Court also charged: "You will determine as to the solvency of the estate, and whether Mrs. Miller was acting in good faith, knowing it to be largely insolvent. Nobody could complain of that; the heirs could not complain; and if it was all done fairly and honestly, there is no reason why the arrangement she made, with that motive, and with that purpose in view, could not be carried out. The law will carry it out, and the law will enforce it. Then, if you find that to be the state of facts, we instruct you that the plaintiff cannot recover, and that your verdict should be for defendant." Verdict and judgment for defendant.

Plaintiff took this writ, and assigned for error the admission of the above-mentioned paper, the answer to his point, the part of the charge quoted, and the omission of the Court to instruct the jury as to the effect of defendant's silence to the administrator and appraisers upon the subject of his alleged purchase from Mrs. Miller.

H. M. Graydon and *F. Jordan*, for plaintiff in error.

The error was in treating the executrix *de son tort* as an administratrix *de jure*. She was incompetent to make the sale or put the defendant in a better position than she would have been if the action had been brought against herself. She

Digitized by Google

had neither title nor possession, and therefore gave none to the defendant; nor could the latter as a creditor, who received goods of the decedent in payment of a debt, protect his possession against the administrator.

2 Black. Comm. 507.
1 Williams on Executors, 5 Am. ed. *225, 226, 232.
Toller on Executors, *366, *243.
Holland's Admr. v. Gibson, 4 East, 441.
Carpenter v. Going, Admr., 20 Ala. 587.
Hardy et al. v. Thomas, Admr., 23 Miss. 544.
Padget v. Priest, 2 Durn. & East, 97, 100.
Curtis v. Vernon, 3 Id. 587, 590.

Defendant, not being an executor *de son tort*, cannot show payment of debts in mitigation of damages.

1 Williams on Executors, *232.
Padget v. Priest, 2 T. R. 99.
Wiley v. Truett, 12 Geo. 588.
Smith v. Porter, 35 Maine, 287.
Paull v. Simpson, 9 Ad. & El., N. S., 365. [58 E. C. L. R.]

Defendant was estopped by making no claim of property to the administrator.

Com. v. Moltz, 10 Barr, 527.
Patterson v. Lytle, 1 Jones, 53.

The Court below should have instructed the jury in compliance with the request made verbally.

Newman et al. v. Edwards, 10 Casey, 32.
Weamer v. Juart, 5 Id. 257.
Wertz v. May, 9 Harris, 275.
Fisher v. Filbert, 6 Barr, 61.

J. W. Simonton, for defendant in error.

The sale having been made by the widow, who had paid all the debts, the administrator cannot ask to have it set aside. Her vendee is in a better position than she would be, and is protected even if she were liable to damages. The facts of this case make it an exception to the general rule.

Weeks v. Gibbs, 9 Mass. 77.
Nass v. Vanswearingen, 7 S. & R. 196.
Viner, Title Executor, F. a. 2, a. 3, pl. 9.
Saam v. Saam, 4 W. 432.
Walworth v. Abel, 2 Sm. 370.

June 5, 1876. THE COURT. At, and before, the decease of Wm. H. Miller, he and the defendant were partners in the law business, occupying the same office, and, as we understand the evidence and the statements of the parties through their counsel, the property in suit remained in the possession of the defendant until the bringing of the present action, and, perhaps, until this time. The defence rests solely on the ground of title acquired through the sale by Mrs. Miller. Though McAlarney claims to be a creditor of the decedent, yet it is certainly not law that he can, on this ground, withhold the property in his hands from the lawful administrator. A creditor cannot be permitted thus to pay himself to the detriment of the estate. (Lomax on Executors, 80-81.) Besides this, the defendant's claim is subject to a settlement between himself, as the surviving member of the firm of Miller & McAlarney, and the administrator, and until such settlement occurs, and a balance is found in his favor, he has no debt which he can enforce against the estate of his copartner. As, however, the Court below rightly refused to consider this as a legitimate defence, we need pursue the subject no further.

What, then, was the title which he acquired through Mrs. Miller? If we assume that she is to be regarded as an executrix *de son tort* of her husband's estate, that she took possession of the property in question, sold it to the defendant, received the money, and applied it to the debts of the decedent, in such case it might be that we should treat the title as having vested in the defendant, for, under such circumstances, the property would have passed into a *quasi* administration which it would be inequitable to disturb. But two important elements in the above proposition are wanting in this case: (1) Mrs. Miller had neither the possession of, nor the right of possession to, the property. (2) McAlarney did not pay her for it; and hence there was no administration thereof for the benefit of the estate. Hence, as we have already intimated, the defence must rest solely on the title acquired by the bargain and sale of Mrs. Miller. As, however, she had no title, her sale could confer none. (Sellers v. Licht, 9 Har. 98.) That she paid debts of the estate does not help the matter, for in an action against her, for the conversion of the goods of the estate, she could not plead the payment of such debts, but would be allowed only to recoup them in mitigation of damages on the general issue. (Saam v. Saam, 4 Watts, 432; Mumford v Gibson, 4 East, 441.) If, however, we accept the doctrine of Hardy v. Thomas (23 Miss. 544), even this rule of recoupment fails where the action is for property remaining undisposed of in the hands of an executor *de son tort*. This same doctrine is intimated as probable in Buller's Nisi Prius, 48. This case, however, does not require us to endorse the rule thus enunciated; for, under any view, the defence admitted in the Court below fails to bear the test of authority. The plaintiff's point should have been affirmed.

The judgment is reversed and a *venire facias de novo* is awarded.

Opinion by GORDON, J. WILLIAMS, J., absent.

Jan. '76. 87. March 16.

Lehigh Valley Ins. Co., Garnishees, and Krause v. G. A. & J. F. Fuller.

Practice—Service of process upon agent, where defendant resides out of county—Act of May 4, 1852, § 1, strictly construed.

In serving process upon the agent of a defendant residing in another county, the provisions of the Act of May 4, 1852, § 1, must be strictly followed. Mere

Digitized by Google

personal service is not alone sufficient; the return must also set forth a service "at the usual place of business or residence" of the agent.

Error to the Mayor's Court of the City of Scranton.

This was an attachment execution against The Lehigh Valley Insurance Company, garnishees, and H. Krause, defendant, issued on a judgment for $351 44 against the latter. The marshal made the following return :—

"Attached as within commanded by giving a true and attested copy of the within writ, November 25, 1872, at 6.30 P. M., to C. Soellner, agent Lehigh Valley Insurance Company, and by summoning him as garnishee, and by making known to him the contents thereof, and same time by like copy to Henry Krause, the within named defendant, and by making known to him the contents thereof. So answers,

"T. J. Walsh, Marshal."

The garnishees not having entered an appearance, judgment was taken in default thereof for $351.44, with interest and costs, February 17, 1873. On April 13, 1875, a *testatum fi. fa.* to the sheriff of Lehigh County was issued against the Lehigh Valley Insurance Company. The Court having granted a rule to show cause why judgment against the garnishee should not be opened, an affidavit of C. Soellner was filed, stating that the writ of attachment was never served upon him in any manner whatever, that he had no knowledge of this writ until April, 1876, and that in November, 1872, at the time of the alleged service of the writ of attachment upon him, he had no regular agency for the Lehigh Valley Insurance Company, having no authority to take risks or settle claims, but merely received applications for policies and made surveys of property, forwarding both to the secretary of the company.

The defendants also filed the deposition of H. C. Hunsberger, the president and former secretary of the company, who said that the only debt which the company ever owed Krause (a claim on a policy of fire insurance) was paid him in full on December 24, 1872; that the company never had any knowledge of the attachment until the issuing of the *testatum fi. fa.;* and that C. Soellner never was a regularly appointed agent of the company, and had no authority to bind the company in any way.

The rule to show cause was discharged and the defendants took this writ, assigning for error the entry of judgment against the garnishees for default of appearance, and the refusal to open the same.

H. C. Hunsberger (with him *W. H. Gearhart*), for plaintiffs in error.

The judgment, for want of appearance, was wrongly entered, for the writ of attachment was never properly served on the garnishees. The Act of April 8, 1851, § 6 (Purd. Dig. 287, pl. 31), provides that actions *may be commenced* against corporations in any county in which they transact business, and that *original writs* may be served upon their agents resident in such county. But an attachment execution is not original process, and each defendant, individual or corporation, must be served within his own county.

Wray *v.* Tammany, 1 Har. 394.
Newlin *v.* Scott, 2 Cas. 102.
Kase *v.* Kase, 10 Id. 131.
Cowden *v.* Bank, 7 W. & S. 432.

The service of a summons upon one authorized merely to receive applications or effect insurance is not a valid service upon the company.

Parke *v.* Ins. Co., 8 Wr. 422.

The return of the marshal is defective, for it does not set out what property is attached.

Rhoads *v.* Monigal, 2 Barr, 41.
Christmas *v.* Biddle, 1 Har. 223.

E. N. Willard, contra.

The validity of the service of the writ of attachment on the agent of the company does not rest on the Act of April 8, 1851 (*supra*), which has been decided to apply only to foreign corporations, but on the Act of May 4, 1852, § 1,* (Purd. Dig. 43, pl. 7).

Landis *v.* Lyon, 21 Sm. 475.
Bancord *v.* Parker, 15 Id. 336.

The marshal having returned that he had served the agent of the company, the Court will not inquire into the question of his agency.

Kennard *v.* Railroad, 1 Phila. 41.

The action of the Court below in discharging the rule to show cause why judgment should not be opened cannot be reviewed, for opening such a judgment is discretionary with them.

Bredin *v.* Gilliland, 17 Sm. 34.

The affidavit and depositions are not part of the record, and cannot be reviewed on writ of error.

Calhoun *v.* Logan, 10 Har. 43
Ringwalt *v.* Brindle, 9 Sm. 51.

May 8. The Court. The decision of the Court below, upon the motion to open judgment, is not the subject of review here (Buna *v.* Wightman, 5 Casey, 335; Henry *v.* Brothers, 12 Wright, 70; Ringwalt *v.* Brindle, 9 P. F. Smith, 51; Breden *v.* Gilliland, 17 P. F. Smith, 34), nor can we inquire into the question of fact whether Soellner, upon whom the service of the writ was made, was an agent of the corporation garnishees upon whom a lawful service could be made. The affidavit and depositions are no part of the record, and are not before us. (Calhoun *v.* Logan, 10 Harris, 46.)

The only question which properly arises is as to the regularity of the judgment by default for want of appearance. That depends upon whether the return by the marshal showed a lawful service upon the garnishees. The defendants in error

* This Act is set forth in the opinion of the Court, *infra*.

Digitized by Google

rest it upon the first section of the Act of May 4, 1852 (Pamph. L. 547), entitled "An Act relative to Courts in this Commonwealth." It provides "that where any person or persons, being residents of this commonwealth, shall engage in business in any other county than the one in which he, she, or they shall reside, or not being in the county at the time of the issuing of such writ or process, it shall be lawful for the officer charged with the service thereof to serve any writ of summons, or any other mesne process, upon the agent or clerk of any such defendant at the usual place of business or residence of such agent or clerk, and to have the same effect as if served upon the principal personally."

Conceding that an attachment execution with the clause of *scire facias* to the garnishees embodied in it is a "summons or other mesne process," the legislature has seen fit to provide that the service shall be "at the usual place of business or residence" of the agent, and in no other way. A personal service is not sufficient. Why, it is not our place to inquire. *Ita lex scripta est.* It is clear that the return must show on its face a legal service. (Winrow *v.* Raymond, 4 Barr, 501; Wilson *v.* Hayes, 6 Harris, 354; Weaver *v.* Springer, 2 Miles, 42.)

Judgment reversed. Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

Jan. '75, 333. May 17.

Halfpenny v. Bell, to use, etc.

Set-off—Act of 1705—*Unliquidated damages arising out of separate and distinct cause of action — Damages from tortious acts of plaintiff—Contract—Construction of.*

Unliquidated damages arising *ex contractu*, which are capable of liquidation by any known legal standard, may be set off under the Act of 1705, although arising out of a distinct and separate cause of action.

In a suit by A. against B. upon a single bill, B. to prove a set-off offered in evidence a sealed agreement between A. and B., whereby A. was given the right to float logs down a certain stream, provided that no injury should be caused to B.'s lands thereby, and that any accidental injury should be promptly repaired by A.; to be followed by proof that a large amount of damage had been done to B.'s lands by the floating of A.'s logs down said stream:

Held (reversing the judgment of the Court below), that this evidence should have been admitted:

Held, further, that the agreement was a covenant to repair; and, therefore, that the damages claimed by defendant were not necessarily founded upon a tort.

Error to Common Pleas of Blair County.

Debt by Benjamin F. Bell, to use of W. W. Apsley & Co., against John Halfpenny, to recover the amount of a single bill for $370.90, dated October 22, 1873, and payable one day after date. The defendant pleaded "never indebted, and payment with leave," etc. On the trial (before DEAN, P. J.) plaintiff gave in evidence the single bill. Defendant, under his plea of payment, offered in evidence an agreement under seal between John Halfpenny and Daniel Nole, the firm of Halfpenny & Nole of the one part, and Benjamin F. Bell of the other part, dated June 13, 1868, which, after reciting that the firm of Halfpenny & Nole were seized of a tract of land on Laurel Run, lying between two tracts of land belonging to said B. F. Bell, gave to said B. F. Bell the right to float and drive timber along said Laurel Run and to pass along its banks through the land of Halfpenny and Nole, "provided that the said floating or driving of logs shall not at any time be allowed to work or cause injury or detriment to said Halfpenny & Nole, and that any accidental injury shall be promptly repaired by said Benjamin F. Bell; injury from floods or other natural causes excepted." This agreement was signed by John Halfpenny and Benjamin F. Bell. This evidence to be followed by proof that a large amount of damage had been done to defendant by plaintiff by reason of floating the logs as aforesaid down said stream; this for the purpose of proving a set-off to an amount equal to or greater than the note in suit. Objected to by plaintiff, first, because the offer is to prove unliquidated damages; secondly, because the offer is to prove a set-off arising out of a distinct and separate cause of action not relating to the subject-matter of the present cause. The Court below sustained the objection and overruled the offer. Verdict and judgment for plaintiff for $404.29. Defendant took this writ, assigning for error the overruling of his offer of proof.

Samuel Calvin, for plaintiff in error.

The damages claimed did not arise from a trespass or tort, but under a contract of the parties. The Act of 1705 authorizes defendant under his plea of payment to give any "bond, bill, receipt, account, or *bargain* in evidence;" and this Court have repeatedly decided that it is not material whether the damages claimed to be set off arose out of the same contract on which suit is brought, or out of a distinct and different bargain or contract.

Phillips *v.* Lawrence, 6 W. & S. 150.
Carman *v.* Franklin Fire Ins. Co., Id. 155.
Thomas *v.* Shoemaker, Id. 179.
Ellmaker *v.* Franklin Fire Ins. Co., Id. 439.
Hunt *v.* Gilmore, 9 Sm. 450.

H. M. Baldrige, for defendant in error.

The claim of defendant arose *quasi ex delicto*, and out of a transaction altogether distinct from the debt sought to be recovered. A set-off is not admissible where the demand against the plaintiff arises from an act of a tortious nature.

Digitized by Google

Gogel v. Jacoby, 5 S. & R. 117.
Harper v. Kean, 11 S. & R. 280.
Kachlein v. Ralston, 1 Yeates, 572; S. C., reported as Kachlin v. Mulhallan, 2 Dall. 237.

Unliquidated damages arising from a covenant cannot be given in evidence by way of set-off where such damages sound in tort, though the remedy of the party might be on the covenant.

Heck v. Shener, 4 S. & R. 218.

Claims arising on separate and distinct covenants under seal cannot be set off against each other.

McQuaide v. Stewart, 12 Wr. 198.

The defendant below claimed to set off damages for injuries to land not held in his own right, but as tenant in common with another. Set-off can only be allowed where the parties have a mutual right to sue each other.

Henderson v. Lewis, 9 S. & R. 379.
Everson v. Fry, 22 Sm. 326.

May 29. THE COURT. It was held in Hunt v. Gilmore (9 P. F. Smith, 450) that unliquidated damages arising *ex contractu* from any bargain may be set off under the Defalcation Act of 1705 (1 Sm. Laws, 40) whenever they were capable of liquidation by any known legal standard. Tested by this rule, the offer of evidence embraced in the plaintiff's assignment of error ought to have been received. That the damages were unliquidated, and that the offer was to prove a set-off arising out of a distinct and separate cause of action, is not material. There was no difficulty under the well-settled rules of law in liquidating the damages; that they arose out of a separate cause of action constitutes no objection. Matters growing out of the same transaction, as a general rule, are the subjects of an equitable defence; our Defalcation Act allows other and totally distinct transactions to be proved by way of set-off in order to avoid circuity of action. We see no reason why the defendant below should not set off as a defence to the note in suit the damages, if any, sustained by him under the agreement of 13 June, 1868. The objection that such damages arise from tortious acts is not tenable. The agreement, although inartificially drawn, is a covenant to repair. Under it, Bell, the plaintiff below, acquired the right to float his logs down the stream through the defendant's property, subject to the condition of promptly repairing any accidental injury occasioned thereby. It does not necessarily follow that the damages which the defendant claimed to set off arose from any tortious acts. If they did, we concede, under all the cases, they could not be allowed.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by PAXSON, J. WILLIAMS, J., absent.

Jan. '74, 262½. Feb. 1.

Martien v. Manheim.

Suit against partners trading as two firms—Denial of partnership in one firm—Book entries charging firms separately—Affidavit of defence, sufficiency of.

A. brought assumpsit against M. and others, "trading as the C. M. and S. Co., *and also* as B. & W.," and filed a copy of his book entries charged to the company, and copies of various orders and of a bill of exchange drawn by B. & W.

The affidavit of defence of M. (the only defendant served) averred, that he never was a member of the firm of B. & W., which firm had purchased the goods, although he was a member of the firm of the C. M. and S. Co., which had never purchased the goods nor authorized such purchase.

Held (reversing the judgment of the Court below), that the defence appearing in the affidavit was sufficient.

Error to the District Court for the City and County of Philadelphia.

Assumpsit by Manheim against Martien and three other "Copartners, trading as the Coaquannock Smelting and Mining Company, and also as Bevan & Wallace." The summons was served on the defendant Martien only.

The copies filed were: (1) Of the plaintiff's original book entries, charged to the Coaquannock Smelting and Mining Company; (2) Of a bill of exchange in his favor, drawn on Martien by Bevan & Wallace; and (3) of numerous orders on him drawn by the latter firm.

The affidavit of defence by Martien was: "That he never was and is not now a member of the firm of Bevan & Wallace, which firm purchased the goods sued on in the copy filed. That he is a member of the firm trading as the Coaquannock Mining and Smelting Company, but said firm never authorized the purchase of the goods sued for. And deponent believes that said plaintiff has charged the firm of Bevan & Wallace with said goods; and that said firm is indebted to the firm of the Coaquannock Mining and Smelting Company, all of which deponent will prove in the trial of the case."

The Court below having entered judgment for want of a sufficient affidavit of defence, the defendant took this writ, and assigned for error the entry of judgment.

D. W. Sellers, for the plaintiff in error.

The defence disclosed by the affidavit was good, and should have barred judgment.

Thompson v. Clark, 6 Smith, 33.
Youngman v. Walter, 23 Id. 134.

Jos. W. Hunsicker, contra.

May 8. THE COURT. This suit was brought against four persons as copartners, "trading as the Coaquannock Smelting and Mining Company, and also as Bevan & Wallace." Thus, it

Digitized by Google

was averred that said four persons composed each of said firms, and that there was a joint liability of said firms and of all their members. The claim filed was on original book entries (said to have been charged to the Mining and Smelting Company), and on a bill of exchange and numerous orders drawn by Bevan & Wallace.

In the affidavit put in by Martien, and held insufficient by the Court below, he swears he has a legal defence to the whole claim, the particulars of which defence he gives substantially as follows: that he never was and is not now a member of the firm of Bevan & Wallace, which firm purchased the goods sued for; that he is a member of the firm trading as the Mining and Smelting Company, but that firm never authorized the purchase of the goods.

Now we understand this to affirm that the goods were purchased by the firm of Bevan & Wallace, of which Martien was never a member. If he is not one of the firm, why is he liable for one of its contracts? Admitting his membership of the other firm, he denies its liability, inasmuch as it never authorized the purchase of the goods. In other words, he affirms that he is a member of the firm that did not purchase the goods, and not a member of the firm that did purchase.

The affidavit further avers, as matter of belief, that the defendant in error had charged the goods to the firm of Bevan & Wallace; but to negative any presumption that the Mining and Smelting Company was to pay for them, he affirms Bevan & Wallace are indebted to said firm. Martien affirms he will prove all the facts averred on the trial of the case.

The plaintiff below claimed against two firms. In seeking to answer for each the affidavit has somewhat blended the defence. We think, however, it sufficiently avers grounds why there should not be a recovery of the claim against both firms, and all of the individuals composing either. The learned Judge therefore erred in entering judgment for want of a sufficient affidavit of defence.

Judgment reversed, and a *procedendo* awarded.

Opinion by MERCUR, J. WILLIAMS, J., absent.

Common Pleas—Equity.

C. P. No. 3. Sept. 18.

Gormerly v. Port Richmond Building and Loan Association et al.

Equitable jurisdiction—Application to a court of equity to interfere in winding up the affairs of an insolvent building association when there are no responsible officers—Remedy at law.

Demurrer to bill in equity.

The bill set out the incorporation of the association defendant, and that it became insolvent within a year, and was practically broken up; that the complainant is informed and believes that a pretended organization of the company is still maintained wherein the defendants, Joseph Hegenbotham *et al.*, pretend to act as officers, though what offices are claimed to be held by each respectively, complainant does not know; that no due and legal election has taken place, and no one is authorized to wind up the affairs of the corporation; that the complainant is owner of seventeen shares in the said association, and is also a creditor of the association to a large amount; and that the only assets of said corporation consist of certain described real estate. The bill further averred that said association is insolvent, debts are due by it to complainant, and that there are no proper officers or other persons lawfully authorized to settle its affairs, and *prayed* that the affairs of the corporation be wound up under the direction of this Court; that a sale of the real estate be made; that the defendants, Hegenbotham *et al.*, be enjoined from interfering or meddling in any way with said real estate; and that a receiver be appointed to take possession and dispose of the same, and to distribute the proceeds under order of the Court.

Demurrer for want of equity.

Quinn, in support of the demurrer.

There is an adequate remedy at law, and equity has no jurisdiction.

Fowle *v.* Lawrason, 5 Peters, 495.
Patterson *v.* Lane, 11 Cas. 275.
Gloninger *v.* Hazard, 6 Wr. 389.
Act of 12 April, 1859 (Building Associations), Purd. Dig. 183–189.
Turnpike Company *v.* McCoseaby, 16 S. & R. 140.
Comm. *v.* Union Insurance Co., 5 Mass. 230.
Att'y General *v.* Utica Ins. Co., 2 John. Ch. 389.
Comm. *v.* Allegheny Bridge Co., 20 Pa. 185.

Insolvency does not dissolve a corporation.

Railway Co. *v.* Fitler, 10 Sm. 132.
Wilde *v.* Jenkins, 4 Paige (N. Y.), 481.
Brinkerhoff *v.* Brown, 7 Johns. Ch. 217.
Mickles *v.* Rochester Bank, 11 Paige, 118.
Barclay *v.* Talman, 4 Edwards Ch. 123.
State *v.* State Bank of Maryland, 6 Gill & J. 205.
Rollins *v.* Clay, 33 Maine (3 Red.), 132.

Bispham (with whom was *Wayne MacVeagh*), contra, argued that the Court should interfere where there is irresponsibility of parties claiming to be officers, and where it appears that there is no person properly authorized to take care of the assets.

High on Receivers, § 293.

C. A. V.

Sept. 23. Demurrer sustained.

Digitized by Google

C. P. No. 4. Aug. 28.

Yarnall, Adm'x, etc., v. Stilz.

Injunction—A court of equity will not intervene to prevent a sale of stock, pledged as collateral for a note, on the allegation that a set-off exists, which set-off is in its nature and amount indeterminate.

Motion to continue special injunction.

The bill set forth that the plaintiff was administratrix of one James S. Yarnall; that she had received a letter dated August 19, 1876, from the defendant's attorney, stating that the defendant held a note of the decedent for $1000, and also held sixty shares of the stock of the Keely Motor Company as collateral security therefor, and that, unless the note, which had been duly protested, were paid before noon on August 23d, 1876, the stock would be sold at public sale; that the defendant's attorney, Chas. F. Stilz, Esq, handed the said notice to the plaintiff, and stated that he would accept the said sixty shares at the price of $17.50 per share, which, after deducting the debt and interest, would leave the plaintiff the sum of $30, and thus discharge the note—which offer the plaintiff declined, believing the stock more valuable, and that the defendant so regarded it; that the plaintiff was informed and believed that the defendant, who was a large holder of Keely Motor stock, had sold some of said stock at $125 per share; that the plaintiff had no knowledge or information respecting the promissory note; that on receipt of the note above alluded to, she made a written demand on the defendant's attorney for a statement of all the transactions, accounts, and matters in which the decedent and Stilz were interested, especially as to matters wherein Stilz claimed to be a creditor, believing such statement and account to be indispensable for the adjustment of such matter; that no account was furnished; that through her attorney she had requested a reasonable length of time to obtain such statement and to investigate said matters, and had requested and been refused the delay of one week in the sale of the stock; that the plaintiff believed there was an offset against Stilz's claim; that she was informed and believed that a large amount of furniture, belonging jointly to the decedent and Stilz, had been, since the death of Yarnall, illegally removed, appropriated, and converted to the use of the defendant; that the stock, if sold at the present time, would be sacrificed, but if held would probably appreciate, as the Keely Motor machine was rapidly approaching completion; that plaintiff believed Stilz intended to force a sale and buy in the stock at a depreciated price; that the refusal of a statement had greatly embarrassed the plaintiff; and *prayed* (1) discovery of all joint and copartnership dealings had by the defendant with the decedent, and an account of the same; (2) a re-transfer of the stock and other property which might be determined to belong to the decedent's estate; (3) an injunction to restrain defendant from selling, transferring, pledging, or in any manner interfering with the stock held as collateral security.

The answer denied any community of interest with the decedent, and that anything necessitated an account; admitted the selling stock at $125, but alleged that it was at a previous date, and that the stock had since depreciated; and denied that the defendant was at any time indebted to Yarnall, and that any authority had been given to the defendant's attorney to offer to purchase the stock for the defendant.

J. J. Murphy, for the motion.

E. R. Worrell (with whom were *C. F. Stilz* and *McCabe*), contra.

THE COURT (BRIGGS, J.) dissolved the injunction, on the ground of uncertainty, and that an undefined sum could not be set off against an established indebtedness.

Common Pleas—Law.

C. P. No. 4. **Brown v. Rogers.** Sept. 18.

Affidavit of defence — When insufficient — Contract — Breach of — Contract should be stated.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on two promissory notes.

The affidavit of defence set forth that one of the notes was given for certain iron columns furnished for a building in the course of erection by the defendant, which columns were to be delivered "according to a contract made when they were ordered," but which were not in fact delivered until after the specified time; that the delay caused the defendant an expense exceeding the amount of both notes; and further, that the columns were made heavier and also shorter than the contract called for. The contract was not set out in the affidavit.

R. K. Erdman, for the rule. Damages for a non-delivery are of a remote nature. The affidavit should state what the contract was, and also the amount charged, and the amount furnished.

Haak v. Wise, 2 WEEKLY NOTES, 689.

Gendell, contra.

THE COURT. The contract should have been stated.

Rule absolute.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, OCT.* 12, 1876. [No. 2.

Supreme Court.

Jan. '75, 22. March 6.

Miners' Trust Company Bank v. John W. Roseberry.

Usury—Act of 28 *May*, 1858—*Purchaser at judicial sale of real estate sold subject to a usurious judgment, not within benefit of Act.*

The Act of 28 May, 1858, made a radical change in the consequences flowing from the receipt of more than six per cent. interest.

No one but the debtor, and creditors whom he may have defrauded, can claim the benefit of the Act. A purchaser at a judicial sale of the debtor's real estate, sold subject to a judgment, a portion of the consideration of which was usurious interest, cannot resist payment of the judgment in full.

A. gave a judgment bond for $15,000, of which $2250 was for usurious interest, and subsequently became a bankrupt. A.'s assignee in bankruptcy sold his real estate, expressly subject to certain liens of which the judgment was one. The judgment creditor having issued execution to recover the full amount of the judgment:

Held, that the purchaser could not set up the defence of usury against any portion of the judgment.

Error to Common Pleas of Schuylkill County.

James Wren & Co., in July, 1871, obtained a loan from the Miners' Trust Company Bank, giving therefor a judgment bond for $15,000, of which $12,750 represented the actual amount of the loan, and the balance, $2250, was for the use of the money for one year. Judgment was entered up on the bond on the day of its date for $15,000.

Subsequently, in the same year, the said firm was dissolved, and in October, 1871, James Wren was adjudged a bankrupt. In March, 1872, in pursuance of an order of the U. S. District Court, his assignee in bankruptcy exposed at public sale certain real estate of said Wren, notice being given at the sale that the same would be sold subject to sundry liens of record, amounting to $40,000, including the said judgment of $15,000, when the same was purchased by John W. Roseberry for $10,000, subject as aforesaid.

The Miners' Trust Company Bank subsequently issued a *fi. fa.* upon their judgment, whereupon the Court, on motion of Roseberry, on Oct. 6, 1873, granted a rule to show cause why the *fi. fa.* should not be set aside, the judgment opened, and the said Roseberry be let into a defence as to so much of the judgment as was for usurious interest. The depositions showed that the defendants in the judgment, James Wren *et al.*, claimed no deduction on the ground of usury, but, on the contrary, deemed the original agreement a fair, well considered business transaction, and wanted it carried out by the payment of the judgment in full.

By agreement of counsel these facts were admitted, and, by permission of the Court, argument was had as on an issue of law whether Mr. Roseberry, or any one except the borrowers themselves, could raise the defence of usury.

The Court thereupon made an order that the said execution be restricted as against the property in question to the collection of the principal debt of $12,750, with lawful interest and costs, PERSHING, P. J., delivering the following opinion:—

"That the defence of usury is a personal privilege of which none but the borrower can avail himself, is settled by the decisions of the courts in many of the States. Without attempting to review the numerous cases to which our attention has been directed, it is sufficient for our present purpose to say that they are decided on statutes which make all contracts void where usury enters into them. This is true of New York, upon the decisions of the courts of which State some stress was laid at the argument. All usurious agreements are there declared to be void, and the lender is subject to a penalty. In a late case, Berdan *v.* Sedgwick (44 N. Y. R. 626), decided in 1871, such agreements are said to be void, however, in a limited sense. . . . . We regard this case as applicable to the case in hand, though made under a statute much more stringent than that of our own State on the subject of usury.

"In Pennsylvania, where a debtor refuses to move for the benefit of his creditors, they will be permitted to move in his name. An insolvent man is not permitted to give away his property by means of a judgment, which, though proper at first, has become a security for less than the amount of it. (Lewis *v.* Rogers, 4 H. 18; Clark *v.* Douglass, 12 P. F. Sm. 408)

"It is claimed, however, that the direct question before us has never been decided in this State. In Verner *v.* Carson (16 P. F. Sm. 440), the question whether any one but the borrower or debtor can set up the defence of usury under the Act of May 28, 1858, is left undecided. If still an open question, there are decisions of our courts, which we think go far towards settling it. In Fisher *v.* Kahlnan (3 Phil. Rep. 213), decided by Judge SHARSWOOD in the District Court of Philadelphia, defence was taken on the ground of usury in behalf of a *terre tenant*, who became purchaser of mortgaged premises at sheriff's sale, under a judgment subject to the mortgage. It is held in that case that whenever usury avoids the contract, the defence is personal to the party to whom the loan was made. But so far as it amounts to a *pro tanto* failure of consideration, it is very clearly

Digitized by Google

settled that the plaintiff will be enjoined or precluded from the recovery of more than the just sum advanced and lawful interest thereon. (Cole *v.* Savage, 10 Paige, 583; Post *v.* Bank of Utica, 7 Hill, 391; Nisbet *v.* Walker, 4 Georgia, 221; Thomas *v.* Doub, 8 Gill, 1.) In Pennsylvania, it is said in the same case, usury does not avoid the security. It is the unlawful part only which is made null. It seems right, therefore, in this case of a purchaser, to show that the security is for more on its face than was actually advanced at the time. In Bachdell's Appeal (6 P. F. Sm. 386), on a question of distribution, the auditor decided that judgment creditors could question the validity of a prior judgment on the ground of usury, and reduced a usurious judgment accordingly. This was affirmed by the Supreme Court. (See also Lloyd *v.* Scott, 4 Peters, 205; Greene *v* Tyler & Co. 3 Wright, 361; Fitzsimmons *v.* Baum, 8 Wright, 32.)

"It has been argued that the purchase of the property sold by the assignee was made subject to the liens upon it, and that this precludes any objection to the validity or amount of the plaintiff's judgment. . . . . Where a purchaser buys expressly subject to usurious incumbrances, he will be held to their payment. But a purchaser of lands at sheriff's sale, on judgment and execution at law, subject to all prior legal incumbrances, can take advantage of usury in a mortgage of prior date to the judgment. (Cummins *v.* Wire, 2 Hals. Ch. R. 73.)

"Nor do we think the position that Mr. Roseberry is a mere stranger in this proceeding, well taken. It is decided in Cardow *v.* Kelly (59 Barb. 239), that an execution creditor, who asserts a lien upon mortgaged property, is not a stranger within the meaning of the rule that the defence of usury is a personal one, and cannot be pleaded by one having neither privity of estate nor of blood with the borrower.

"We think that Mr. Roseberry, as the purchaser of real estate bound by the lien of the plaintiff's judgment, may object to and resist the payment of that part of the judgment which is shown to be usurious."

The Bank took this writ, assigning for error the ruling that Roseberry could set up the defence of usury, and the order of the Court restricting the execution.

Hughes and *B. W. Cumming* (with whom was *John W. Bickel*), for plaintiff in error.

The Act of 28 May, 1858 (Purd. Dig. 803), after fixing the lawful rate of interest at six per cent., provides (§ 2) that when a higher rate shall be contracted for, "the borrower or debtor shall not be required to pay the creditor the excess over the legal rate, and it shall be lawful for the *borrower* or *debtor*, at *his* option to retain and deduct such excess," etc.

The question here presented is, whether, when the *debtor* has made his election *not* to retain or deduct such excess, a purchaser at assignee's sale in bankruptcy of real estate, bound by the judgment, with express notice and consent that the full amount of the judgment should remain a lien, can resist the payment and deduct the excess.

The Act of 1858 embodied the reactionary ideas of the nineteenth century on the subject of usury, which formerly was treated by lawmakers as a crime. That Act prescribes no penalty, and leaves it to the option of the *debtor* to pay or retain the excess. If he elects to retain it, it is *his* property; and if he elects not to retain it, it is the property of the creditor. A purchaser of his real estate at judicial sale, having no privity with the debtor in the transaction of loan, is within neither the letter nor the spirit of the Act, and cannot make the election as against the creditor.

Heath *v.* Page, 13 Sm. 108.

The decisions cited in other States are based on statutes not in harmony with our own, and the decisions in our own State, of an adverse character, cited by the Judge below, were made prior to the Act of 1858. In Verner *v.* Carson (16 Sm. 446), the question is suggested, but expressly left open.

John W. Ryon, for defendant in error, after reviewing the authorities in other States, to the effect that the heir or devisee of the mortgagor, or grantee of premises which are subject to the apparent lien of an usurious mortgage, may set up any defence which the mortgagee himself could have done (all of which cases are cited and discussed in Berdan *v.* Sedgwick, 44 N. Y. Rep. 626), argued that the same doctrine obtained in Pennsylvania both before and since the Act of 1858, citing:—

Fisher *v.* Kahlman, 3 Phila. 213 (D. C. of Phila.).
Greene *v.* Tyler, 3 Wr. 361.
Bachdell's Appeal, 6 Sm. 386.
Hartman *v.* Danner, 24 Id. 36.
Heath *v.* Page, 13 Id. 108.
Duquesne's Appeal, 24 Id. 438.

The Act of 1858 detaches the excess from the *debt;* such excess is illegal, and cannot be recovered at law or in equity against the borrower, the debtor, or against any other person. The courts will not lend their aid to enforce a bargain founded on an illegal consideration, and the Court below, therefore, properly restricted the execution to the debt with lawful interest.

May 8. THE COURT. The Act of 28th May, 1858, made a radical change in the consequences flowing from the receipt of more than six per cent. interest per annum. It repealed all former laws imposing a penalty. The first section still makes six per cent. the lawful rate of interest. The second section recognized the actual business wants, habits, and customs of the people. It assumes a greater rate may be charged and paid. It, there-

Digitized by Google

fore, declares, that, if it shall be reserved or contracted for, the debtor shall not be required to pay the excess. At his option he may retain and deduct it from the amount of his debt, or, if he has voluntarily paid the whole debt and an excess of interest, he may recover such excess by action instituted not more than six months after the payment. No longer can a stranger to the transaction by a *qui tam* action work a forfeiture of the whole debt. The statute professes to deal only with the parties to the proceeding. The debtor may elect whether he will withhold the excess or recover it back within the time limited. Failing to act in time, he has no remedy. No public informer can interfere either before or after the payment. The defendants in the judgment in question testify that they have no cause of complaint, and desire it to be paid according to its terms.

In the distribution of a fund judgment creditors may attack a judgment collaterally when it is a fraud on them, but not because it is a fraud on the debtor. (Dougherty's Estate, 9 W. & S. 189; Lewis *v.* Rogers, 4 Harris, 18; Thompson's Appeal, 7 P. F. Smith, 175.) But a subsequent judgment creditor cannot set aside a prior judgment merely because it is erroneous. (Hauer's Appeal, 5 W. & S. 473)

In Greene *v.* Tyler & Co. (3 Wright, 361) it was held competent for a second mortgagee to question, on distribution, the first mortgage on the ground of usury. In this case, however, the transactions were prior to 1858, and the lien of the second mortgage attached before judgment was confessed on the first mortgage. In Bachdell's Appeal (6 P. F. Smith, 386), without discussing the question, it was held that a judgment creditor on distribution could question the validity of a prior usurious judgment, and reduce it accordingly. But in Verner *v.* Carson (16 Id. 440) it was questioned and left undecided whether any but the borrower or debtor can set up the defence of usury under the Act of 28th May, 1858. In Good *v.* Grant (26 Id. 52), it was held that the payment of interest in excess of the legal rate is not necessarily fraudulent as to creditors.

Whenever the usurious contract is intended to defraud creditors, or when the circumstances of the debtor are known to be such that it can reasonably be presumed that this will be the natural effect, the right of creditors to postpone the excess of interest must be conceded.

We are aware that the New York authorities go much further in regard to usurious contracts than any cases we have cited. But they are all predicated on their statute which makes the contract void. It is radically different from our statute of 1858. We, therefore, are unwilling to give those authorities a controlling effect in the construction of our statute.

There is, however, another view of the case which we think decisive. This is not a case of distribution. The defendant in error does not claim as a creditor. He claims as a purchaser at a sale made several months after the entry of the judgment. He bought with full notice of its existence. He knew that he bought subject to its incumbrance. Presumably he paid a sum equal to the amount of the judgment, less than he would otherwise have done. He was not defrauded. He got just what he purchased. "Where an interest is subsequently acquired by a third person with his eyes open, he is not defrauded by what has been done before his time." (Hauer's Appeal, *supra.*) If any persons were injured by this judgment, it was the creditors, not the purchaser. He is in no condition to invoke their equities and claim under them for his exclusive benefit. There is no privity of contract between him and them. We think, therefore, the learned Judge erred in restricting the plaintiff to the collection of a part only of the judgment out of the real estate sold to the defendant by the assignee, and the order must be reversed. This makes it unnecessary to consider the fourth assignment. So far as the other assignments apply to this case they are substantially affirmed.

Decree reversed and order vacated at the costs of the appellee.

Opinion by MERCUR, J. WILLIAMS, J., absent.

Jan. '76, 126. March 23.

Van Auken v. Dunning.

Usury—Usurious contract made in New York, secured by a judgment in Pennsylvania—Evidence—Foreign laws, proof of.

In a feigned issue to determine the validity of a judgment in Pennsylvania, held as security for a loan made in New York, the defendant offered to show "that said loan was usurious by the laws of New York," which offer the Court excluded.

Held, that such exclusion was not error.

Per PAXSON, J. The offer was to show that the contract was usurious. Had it been to show that it was void, we should have had an entirely different question. Such a contract is void here only for the excess. We have no right to presume it is otherwise in the State of New York.

Error to the Common Pleas of Pike County.

This was a feigned issue, in which B. D. Dunning was plaintiff and D. M. Van Auken was defendant.

On June 12, 1872, the defendant made a judgment note to one Everett for $3340, payable January 1, 1873, upon which judgment was entered up in favor of Everett against said Van Auken.

The note having matured, Everett desired $2500 of the amount paid, and Van Auken borrowed

Digitized by Google

that amount from said B. D. Dunning to pay it to Everett, and, as security therefor, procured an assignment from Everett to Dunning of an interest in the judgment to the extent of $2500. Dunning was a resident of the State of New York, and the loan was made there. He afterwards caused an execution to be issued, whereupon the Court, on motion of the defendant and affidavit that the consideration of said loan and assignment was usurious, made absolute a rule to open the judgment, so far as Dunning's interest was concerned, and to let the defendant into a defence. This issue was framed to try the validity of Dunning's claim, with the same effect as if the note on which judgment was entered had been for $2500, such note to stand as the declaration. The defendant pleaded payment with leave, etc.

On the trial, before WALLER, P. J., the defendant made the following offer:—

"Defendant offers to prove by the witness (D. M. Van Auken) and others that in the spring of 1873 he made a loan of $2500 of Braddock R. Dunning, at Middletown, in the State of New York, at the rate of seventeen per cent. per annum; that said loan was usurious by the laws of the State of New York; that as security for said loan he procured an assignment of $2500 of the judgment given in evidence to be made to said Dunning, it having been paid to said Everett by money loaned of said Dunning; and that said Dunning only holds said assignment as collateral security for said usurious loan, and the judgment was only kept alive for that purpose. Offered for the purpose of defeating plaintiff's right to recover under said assignment."

Objected to. Objection sustained. Exception.

The Court instructed the jury to find for the plaintiff. Verdict and judgment accordingly. The defendant took this writ, and assigned for error the rejection of his offer.

Wm. H. Jessup, for plaintiff in error.

By the laws of New York (1 Rev. Stat. 772) all bonds, bills, and contracts wherein more than seven per cent. interest is reserved or contracted for are absolutely void. This note was made in New York, and there being no place of payment specified, the borrower was to pay where he borrowed. The fact that the loan is secured by securities in another place does not change the rule.

De Wolf *v.* Johnson, 10 Wheat. 367.
Cope *v.* Alden, 53 Barb. 350.

A bond or other security given in this State, as collateral security for a debt in New York, is controlled by the law which controls the debt, so far as relates to the rate of interest. If the debt is void the securities are void, and the holder cannot recover from the makers of the latter.

Irvine *v.* Barrett, 2 Grant, 73.
Bell *v.* Lent, 24 Wend. 230.

Our offer to show that the original debt was usurious by the laws of New York, and therefore void, should have been admitted.

F. M. Crane (with whom were *G. G. Waller* and *John Nyce*), for defendant in error.

The debt evidenced by the judgment was untainted by usury. The effort was to impeach it by showing that there was usury in another and distinct transaction. Conceding the facts contained in the offer to have been proved, they would not have defeated the recovery on the assignment of the judgment, which was a Pennsylvania contract.

2 Parsons on Contracts, 392 (3d ed.).
Chapman *v.* Robertson, 6 Paige, 627.

May 8. THE COURT. We see no error in the rejection of the defendant's offer. It was proposed to prove that in the spring of 1873 the defendant made a loan of the sum of $2500, of Braddock R. Dunning, at Middletown, in the State of New York, at the rate of seventeen per cent. per annum; that said loan was usurious by the laws of the State of New York; that with the money thus obtained the defendant paid Everett, the plaintiff in the judgment in controversy, the money due thereon; and, in order to secure the said Dunning, procured from Everett an assignment of said judgment in Dunning's favor; that the latter now holds the judgment as collateral security for said usurious loan, and for no other purpose. Conceding all this to be true, it would not amount to a defence. The plaintiff would be entitled to recover the $2500 actually loaned to the defendant, with legal interest. It was not alleged that any payment has been made on account of either principal or interest. The case was argued upon the theory that the contract was void by the laws of the State of New York. Had the offer been to show that it was void, we should have had an entirely different question before us. The offer was to show that the contract was usurious. Such contract is void here only for the excess. We have no right to presume it is otherwise in the State of New York.

The judgment is affirmed.

Opinion by PAXSON, J. WILLIAMS, J., absent.

May 19.

Washington Mutual Fire Insurance Company v. Rosenberger et al.

Charge of Court—Erroneous in tenor—Mutual Insurance Company—Forfeiture for non-payment of assessments—Waiver of condition.

A tendency to mislead in the general tenor of the charge, although no particular portion of it is clearly erroneous, is sufficient ground for reversal.

Error to the Common Pleas of Lebanon Co.

Debt, by Rosenberger *et al.* against the Washington Mutual Fire Insurance Company, upon a

Digitized by Google

policy of insurance issued to plaintiff in 1868 for $5250.

The Act of 2 April, 1860 (P. L. 769), under which the company defendant was incorporated, provided that all persons insured should be members, in accordance with its by-laws, while they remained insured, and no longer. The tenth by-law contained the following provision :—

"All assessments must be paid within sixty days after the occurrence of a fire. In case of refusal or neglect to pay an assessment after the time specified, the person so refusing or neglecting shall forfeit his policy, and immediately cease being a member of this company."

The following facts appeared on the trial before HENDERSON, A. L. J. :—

An assessment known as "No. 5" was made by the company April 29, 1871, of which notice was given to the plaintiff, requiring him to pay the same, to a person and at a place named, between the first and twentieth days of October, 1871, with which notice the plaintiff failed to comply. The plaintiff's property was burned January 27, 1872. A day or two afterwards the plaintiff offered to pay the assessment, which the secretary declined to receive on the ground that the policy was "forfeited or suspended," and the company subsequently refused to pay the loss.

In order to prove a waiver of condition, the plaintiff showed by the minute-book of the company that, at a meeting of the directors held January 6, 1872, in reference to collecting outstanding assessments, they directed notice to be given "to any who may refuse or neglect to pay that their policies will be cancelled after the 15th of February next, and the outstanding assessments collected by law." It also appeared that it had been customary to give grace by receiving assessments from members when in arrears, thereby continuing their policies; and that assessments had been accepted from other delinquents after the fire in question.

The defendant presented, *inter alia*, the following points: (2) If the jury believe that the plaintiffs failed to comply with the by-laws by the non-payment of assesment No. 5 for the period of sixty days after notice, their policy was suspended when the loss occurred, and the plaintiffs are not entitled to recover. *Ans.* The insured are members of the company; but we cannot say that the policy was suspended by reason of the non-payment of the assessment. No by-law or action of the company has been brought to our notice that would justify such a conclusion, and there is no warrant for such a construction either in the custom or practice of the company. (4) That if the plaintiffs neglected and refused to pay any of their assessments after sixty days' notice, contrary to their application for insurance, they violated their contract upon which the policy of insurance was granted by the defendant to them, and they are not entitled to recover. *Ans.* We answer, the plaintiffs may recover in this action notwithstanding they neglected to pay an assessment after sixty days. There is no evidence that they refused to pay and no evidence of any action of the company thereon, so that if in other respects they are entitled to recover, the non-payment of the said assessment does not of itself defeat their claim.

HENDERSON, J., further charged, *inter alia*, as follows :—

"If you find from the evidence that the 10th section of the by-laws was not enforced by the company, that it was a dead letter, and that it so appears from the minutes of the company, we say to you that it cannot be enforced at the pleasure of the company. The action of the company must be uniform and just towards all its members. . . . . We cannot say that the policy was suspended, and of no force and effect, because of the plaintiffs' non-compliance with that by-law. On the contrary, the fact of forfeiture of the policy by the company has not been established, even if it be that a cause of forfeiture existed. It requires the action of the company to [render] the forfeiture a fact. It does not become forfeited until the company takes action upon and declares it a forfeiture, and gives the party notice of it. Any other construction might do great injustice to the insured and cause great trouble to the companies. . . . . They might have forfeited the policy, but did not. They had no right to suspend it, either under the charter or by-laws."

Verdict and judgment for plaintiff for $6326 25. The defendants took this writ, and assigned for error the answers to their points and the charge as quoted above.

C. P. Miller, *A. R. Boughter*, and *Wm. M. Derr*, for plaintiffs in error, argued that the basis of mutual insurance is a mutual contract by each member to pay his share of other members' losses, as apportioned by the assessments; a failure by one to fulfil his part works a suspension or forfeiture of his right to contribution in case of loss. Payment of the assessment before loss is a condition precedent, and one which the directors cannot waive after loss. There would then be no mutuality between the insured. To renew a policy after loss would be to insure a building already destroyed, which is an absurdity. Upon default in payment of premium, *à fortiori* when followed by loss, the contract expires by its own limitation, and no act by the company is necessary to enforce such limitation. Before loss, the suspension of protection may be a contract means of enforcing payment of premium—

Hummel *v.* Mut. Ins. Co., 1 WEEKLY NOTES, 260; but, after loss, all rights are forfeited.

There was no evidence that the notice referred

Digitized by Google

to in the resolution of 6 January was ever sent, or that the plaintiff knew of the resolution. A waiver, if legal in this case at all, must be express and be clearly proved.

Weisenberger *v.* Ins. Co., 6 Sm. 442.
Helme *v.* Ins. Co., 11 Sm. 107.
Beatty *v.* Ins. Co., 16 Sm. 17.

Josiah Funk, for defendant in error.

The evidence showed that the tenth by-law was a dead letter. But in this case the resolution of the board of 6 January, 1872, expressly extended the time for payment until 15 February; this had the same effect as if that date had originally been fixed, and disposes of the question of forfeiture. That they did not suspend the policy—which they could not legally do—is shown by their receipt of the assessment on similar policies between the date of the fire, 27 January, and the date of the extension, 15 February.

May 29. THE COURT. There is no flagrant or plain error in the charge of the Court below, yet there is one error which enters into its entire current, though not plainly visible in any particular part. It is developed, however, by the answers to the second and fourth points of the defendants below. In these answers it is evident the learned Judge charged absolutely and unqualifiedly that the right of action of the plaintiffs was not affected or suspended by non-payment of the assessment No. 5, which was never paid by the plaintiffs nor tendered until after the loss. As an unqualified position, this was wrong. Independently of by-law No. 10, and certainly with it, a member, the consideration of whose insurance is the payment of his share of the losses of other members, cannot claim a performance of the contract in the policy while he refuses to pay its very consideration. On what principle can one whose relation to others is that of mutual benefit, who will not pay his contribution to the losses of his fellow-members, ask that they shall pay his entire loss. Independently of all by-laws, the doctrine of the mutuality of contract requires him to perform his part before he can ask mutual performance from his fellows. This lies at the very bottom of the common relation of the members of such an association. That the association may not vigorously demand performance of its members, or may actually waive performance, might be a ground of excuse, which, when clearly shown as a fact, may be used to repel the otherwise inexcusable want of performance of the insured member. But this is a question of fact which the jury must pass upon under proper instructions. The difficulty to be overcome in this case was that the general current of the charge, and especially the answers to the 2d and 4th points, tended to mislead the jury into the belief that the plaintiffs might recover at all events, notwithstanding the non-payment of the assessment No. 5. The contrary should have been clearly stated; and that his recovery depended on facts which the jury must find showing that the company had expressly or impliedly, by its course of dealing with its members, waived strict performance on the part of the insured. This qualification was probably intended to be glanced at in that part of the charge in which the Judge refers to the 10th by-law not being enforced, but treated as a dead letter. But this statement is confined to the effect of the by-law alone, and is not a full development of the nature of a defence on the ground of waiver or customary relaxation of the necessity of prompt payment of dues; while the answers to the 2d and 4th points, being without qualification, left the jury to understand that non-payment of dues was no substantial defence under the contract of mutual insurance. Had the jury been referred to the resolution of January 6, 1872, and had the facts of notice of it to or knowledge of it by the plaintiffs, and of their being misled into quiescence, under a belief that their payment would be good if made by the 15th of February then next, been passed upon by the jury, it might be supposed that the answers to the points had done no harm. But we think the tendency of the charge was to mislead, and therein there was error.

PER CURIAM. Judgment reversed, and a *venire de novo* awarded.

WILLIAMS, J., absent.

[The ruling in this case is the converse of that adopted in the class of cases of which Little Schuylkill Nav. Co. *v.* French, 2 WEEKLY NOTES, 718, and Buyers *v.* Patterson, Id. 649, are the latest, viz., that where the entire tone and scope of the charge, taken as a whole, has no tendency to mislead, the judgment will not be reversed, even though particular expressions may be apparently unfair, or even admittedly erroneous. *Cf.* Kiser *v.* Vanleer, 2 WEEKLY NOTES, 561; Manderbach *v.* Gilbert, Id. 129. The latter case appears to be on the border line.]

July, '75, 131. May 25.

Alexander Ervin's Appeal.

Injunction—Limits of jurisdiction—When injunction oppressive.

A decree which restrains a man's power of disposition over all his real estate, stocks, bonds, and other securities, without tracing the money of the plaintiff into their purchase or ownership, and which thus locks up his entire available estate, on the ground that he has received the money of another as his agent, cannot be supported by any reasonable exercise of equity powers.

Appeal from decree of Common Pleas, No. 2, of Philadelphia County, in equity.

The bill filed by Charles E. Morris, assignee of Henry G. Morris, against Alexander Ervin, the

Digitized by Google

Seventh National Bank and the Second National Bank, set forth that Henry G. Morris began business at the Southwark Foundry January 1, 1871, entrusting the control and management of the finance of the business and the receipts of moneys to Ervin as his confidential agent and business manager, at a salary, by whom the private ledger of Morris was kept, the other books being also under his charge; that Morris, confiding in Ervin's integrity, never examined the books, but received his knowledge of the business from alleged balance-sheets furnished by Ervin, which he afterwards found to be false; that, finding himself insolvent, he made an assignment for the benefit of his creditors April 29, 1875; that an examination of the books then disclosed that Ervin had received large sums of money for Morris for which he had failed to account, and had fraudulently drawn large amounts in excess of his salary, making his indebtedness to Morris about $80,000, and that, finding himself so indebted, he wrongfully credited himself on the books with the sum of $100,000, in a single entry; that Ervin failed to account for the proceeds of certain promissory notes, amounting to $62,480, made by Morris to Ervin's order for the purposes of the business; and further, that, to avoid attachments by creditors, Morris had deposited moneys in the Seventh National Bank in Ervin's name, and that the latter had also deposited in his own name in the Second National Bank money belonging to Morris, or invested it in his own name in real estate in Philadelphia, in various securities, and largely in the stock of the Seventh National Bank, all of which real estate, stock, deposits, etc. he was about to convey, assign, and withdraw, with the assent of said banks, from the reach of the creditors of Morris.

The bill prayed an account between Ervin and Morris, and, upon the same being stated, a decree that the former should pay the amount found to be due; and in the mean time, that Ervin be restrained by injunction from disposing of any real estate, stock, securities, etc., and the banks from paying over any money deposited to his credit therein, and the Seventh National Bank from transferring, or permitting to be transferred by Ervin, any shares of the stock of said bank standing in his name; and that discovery be made by all of the parties defendant.

The application to continue the preliminary injunction in the Court below was heard upon bill and affidavits.

In his counter-affidavit Ervin admitted his employment by Morris as "commercial manager" with the duty of purchasing materials, collecting and procuring money, etc., but averred that Morris had frequently examined all of the books of the concern and especially the private ledger in which Ervin's private account was kept, and had expressed his satisfaction with it; that Morris and he had entered into a special pig-iron speculation, the profits of which, estimated for the purpose of settlement between them at $450,000, were to be equally divided, and that the credit of $100,000 was entered on his account by consent and agreement of Morris, on account of his, Ervin's, share of said profits; that he is still liable by endorsement of Morris's paper for $40,000; that Morris has charged him in his personal account with the money deposited in Ervin's name in the Seventh National Bank, in which bank he had been the largest stockholder before his connection with Morris, and had not increased his stock since then; that he had never deposited any money in which Morris was interested in the Second National Bank, and that he owned no real estate. He further averred that he had no money or property belonging to Morris; that, on the contrary, Morris was largely indebted to him for a sum liable to be greatly increased by reason of his insolvency, and his, Ervin's, liability as endorsee of Morris's paper.

The Court below entered the following decree:—

And now, July 13, 1875, this cause having been argued and considered, it appearing to the Court that large sums of money, the property of Henry G. Morris, have come to the hands of defendant, Ervin, as the agent of said Morris, and are still retained by said defendant to the prejudice of plaintiff, assignee of said Henry G. Morris, and the defendant having failed to discover to the Court where the said sums are deposited, or in what property or securities the same are invested or converted, now it is ordered and decreed that the injunction heretofore granted be continued, and the said defendant, Ervin, be restrained from transferring or disposing of any real estate, stocks, bonds, or other securities of which he may be possessed; and that the defendant, the Seventh National Bank, be restrained from paying over to said Ervin any moneys standing in his name, or permitting the transfer of any shares of stock standing in his name; and that the defendant, the Second National Bank, be restrained from paying over to the said Ervin any moneys standing to his credit therein. Security to be entered by plaintiff in the sum of twenty thousand dollars.

The defendant appealed, and assigned for error the said decree.

W. S. Price, for appellant, argued the case on the merits and on the technical ground that the assignee could not maintain the bill in his own name; he also insisted that the suit being founded on a money claim, the injunction to restrain appellant from disposing of any of his property while plaintiff tries to make out his case was without warrant in equity.

Digitized by Google

Lewis Waln Smith and *William A. Porter*, for appellee, argued that upon the admissions contained in the defendants' affidavits, and by reason of Ervin's refusal or omission to disclose what disposition he had made of the funds referred to in the bill, the injunction was properly awarded.

June 5. THE COURT. We shall give no opinion on the merits of this case, but the decree of the Court below is so sweeping in its terms it cannot be supported. A decree which restrains a man's power of disposition over all his real estate, stocks, bonds, or other securities, without tracing the money of the plaintiff into their purchase or ownership; and which thus locks up his entire available estate, on the ground that he has received the money of another as his agent, cannot be supported by any reasonable exercise of equity powers. An injunction of this wide operation would be an instrument of oppression in many cases. Property or money of the plaintiff or which may be reasonably presumed to be his in fact or in trust, may have to await the result of litigation, but what the defendant has in his own right cannot thus be locked up by such a sweeping decree.

PER CURIAM. Decree reversed and injunction dissolved and record to be remitted.

WILLIAMS, J., absent.

Jan. 76, 42. June 7.

Overseers of Poor of Moreland Township v. Overseers of Benton Poor District.

Errors and Appeals—Judgment not reversed merely because evidence was weak—Paupers, settlement of—Liability for support as between different Poor districts—Onus of proving "place of last legal settlement."

A judgment, in proceedings under the Poor Laws, will not be reversed merely on account of the weakness of the evidence on which it was founded. The Appellate Court must be satisfied that the Court below should have drawn a different conclusion from the evidence.

A pauper, whose original settlement was in Davidson Poor district, became chargeable in Moreland district, where she had no settlement. In a contest over her removal to Davidson, the latter showed that the pauper had acquired a settlement in Benton district, and the pauper was, by order of Court, returned to Moreland. In a subsequent contest over her removal to Benton, the latter disproved any settlement within her borders, and the pauper was again returned, by order of Court, to Moreland. Upon writ of error to the latter judgment:

Held, that Moreland's only remedy was to resort to the "last place of legal settlement," wherever that might be found.

Error to the Quarter Sessions of Lycoming County.

This was, in the Court below, an appeal from an order of justices of the peace for the removal of one Ann Sperry, a pauper, from the Poor district of Moreland Township, Lycoming County, to that of Benton, Columbia County.

Her removal had been the subject of a previous litigation between the overseers of said Moreland township, and the Poor district of Davidson township, Sullivan County, and as a material portion of the evidence then taken was, by agreement of counsel, admitted in this, a reference to that case is necessary to an understanding of the present.

In 1868, Ann Sperry, a poor aged single woman, living for the time being in Moreland township, Lycoming County, but having no legal settlement therein, met with an accident by which she became chargeable as a pauper. In March, 1869, two justices of said county made an order directing the overseers of Moreland to receive and care for her "until she could be removed to her last legal settlement." In April, 1869, one of the overseers of Moreland, having ascertained that the pauper had, formerly, a derivative settlement from her father in Davidson township, Sullivan County, took the pauper to the latter place, but instead of handing her over to the overseers of Davidson, left her at the residence of her half brother, who subsequently became unable to support her. In March, 1870, two justices of Davidson made an order for her removal back to Moreland, which was accordingly effected, whereupon the overseers of Moreland appealed from said order to the Quarter Sessions of Sullivan County. That Court dismissed the appeal, on the ground that the appellants had failed to show that Davidson township was her "last legal settlement." The testimony upon which that finding was based—being that referred to as admitted in the present case by agreement of counsel—was that of Asa Sperry, who testified that about nineteen years ago his sister Ann, being then strong and able to do full woman's work in the house, worked a year or two in Benton township, Columbia County, in the house of a Mr. Doty, who was no relation to her. The witness further said: "I think she worked for wages there. I always so understood it. I never saw her get a cent of money from Mr. Doty. She told me once what she got there."

ELWELL, P. J. of said Court, held that this testimony raised a presumption of a contract of hiring for wages, and as it showed a residence for a year in Benton township, it sufficiently appeared that said Ann, being then of age, unmarried, and childless, acquired a settlement there, and lost her original derivative settlement in Davidson township. Upon writ of error to the Supreme Court this judgment was affirmed, the Court (per THOMPSON, C. J.) holding that it was incumbent on Moreland, and not on Davidson, to ascertain,

Digitized by Google

and send the pauper to her last legal place of settlement, which the Court below had found, though on meagre evidence, was not Davidson. (Moreland Township *v.* Davidson Township, 21 Sm. 371.)

Subsequently, in 1872, the overseers of Moreland, upon the evidence adduced in the Davidson case, obtained an order of two justices for Ann's removal to said Benton township, Columbia County, and it was upon an appeal by Benton township from that order that the present case came up in the Court below.

On the hearing, before GAMBLE, P. J., after the testimony given by Asa Sperry in the previous case had been read (above quoted), the said Asa was called by the defendants and his re-examination developed that his previous testimony had been principally hearsay evidence.

Ann Sperry, the pauper, aged 70 (who had not been examined in the previous case), was produced and testified that after she left Davidson she never worked for wages, at any one place, for any one year continuously; that there never was any contract of hiring with Mr. Doty, who merely gave her a home as an act of kindness, and never paid her anything. This testimony was corroborated by that of a daughter of Mr. Doty, who said that Ann lived there for company for her, without wages or compensation, and that she could have left at any time she chose, as there was no agreement.

The Court held that the new testimony rebutted the presumption of a contract for hire with Doty —upon which ground Davidson had, in the previous contest, prevailed against Moreland— and sufficiently showed that the pauper had never acquired a settlement in Benton. The justices' order of removal to the latter township was therefore reversed, and the pauper again remitted to the care of the overseers of Moreland.

Moreland township thereupon took this writ, assigning for error the ruling of the Court on the law and evidence, and the reversal of the justices' order of removal.

Linn (with him *Armstrong* and *B. S. Bentley*), for plaintiff in error.

In the former case, Davidson township, the admitted original settlement, evaded liability on the ground of an alleged after-settlement in Benton, and this Court held the judgment to be conclusive as between Davidson and Moreland. In this case Benton has negatived the allegation of a settlement within her borders, and if the Court now affirm this judgment, this strange anomaly will occur: Moreland township will be compelled *by law* to support a pauper who is acknowledged never to have had a settlement there, while Davidson township, in which it is admitted she once had a legal settlement, is forever relieved. The witnesses should not have been permitted to vary their testimony, and even as it stood the evidence was too weak to justify a different conclusion from that reached by the Court in the former case.

The fundamental error of the Court, we think, was in applying to the former case the principle of Williamsport *v.* Milton, that "when no settlement exists in either township, that township in which the pauper first became chargeable must bear the burden until the last place of legal settlement should be found." The principle is not controverted, but it was inapplicable, because Moreland did show an admitted prior settlement in Davidson, and the onus of support should then have rested on the latter until she could shift it by proving a legal settlement against some other locality

Whether erroneous or not, Moreland has, without fault on her part, been placed in her present position through the administration of law, and we think that this Court will find a remedy for an anomaly that would work such great injustice.

E. E. Orvis and *Robt. F. Clark*, contra, were not called on.

June 9. THE COURT. We do not see that the Court erred in their conclusions from the evidence. That the evidence is not strong is an insufficient reason for reversing. Did the Court draw from the evidence before them a proper conclusion of fact? We cannot say they did not, and in order to establish error we must be satisfied that the Court below ought to have drawn a different deduction. The evidence in the former case (21 P. F. Smith, 371) was very weak indeed. Yet this Court did not then reverse, because it was susceptible of the interpretation given to it by Judge ELWELL. The very weakness of the evidence, then, is a reason why we should not reverse now, in a different state of the evidence, which changes the conclusion. There is no sufficient evidence to charge Benton township. Moreland must resort to the last place of legal settlement of the pauper, wherever that shall be found.

PER CURIAM. The order and decree of the Court of Quarter Sessions is affirmed.

SHARSWOOD and WILLIAMS, JJ., absent.

[*Cf.* Cauffman *v.* Long, 2 WEEKLY NOTES, 695.]

Jan. '74, 141. **Lloyd v. Hibbs.** March 6.

Husband and wife—Mechanic's lien against the separate property of a married woman—What it must set forth.

A mechanic's claim filed against the separate property of a married woman must set forth that the work was done and the materials furnished at her instance and request.

Dearie *v.* Martin (28 Sm. 55; S. C., 2 WEEKLY

NOTES, 574) affirmed; Shreiffer *v.* Saum (2 WEEKLY NOTES, 575) followed.

Error to the Common Pleas of Bucks County.

This was a *sci. fa.* sur mechanic's lien, filed by Hibbs against Ella Lloyd, owner, or reputed owner, and James T. Lloyd, her husband, for work done and materials furnished "for and about the alteration, addition, and repair of the buildings," etc., on the farm of Ella Lloyd. The claim did not set forth that the work had been done or materials furnished at the request of Ella Lloyd, or by the order of any one in her behalf.

A rule to show cause why the lien should not be stricken off was discharged by the Court below, whereupon a writ of error was taken, and the discharge of the rule assigned for error.

Harrington, for plaintiff in error.

The claim should have set forth that the work was done and the materials furnished at the request of Ella Lloyd, who was a married woman.

Mahon *v.* Gormley, 12 Harris, 83.
Murray *v.* Keyes, 11 Casey, 384.
Parke *v.* Kleeber, 1 Wright, 251.
Swayne *v.* Lyons, 17 Sm. 436.

The liability of the wife must appear from the record.

Finley's Appeal, 17 Smith, 453.

Gilkeson, for the defendant in error.

It was not necessary to set forth in the claim that the work was done and the materials furnished at the request of Ella Lloyd; this was mere matter of proof, to be determined at the trial.

The record shows that the claim is filed against Ella Lloyd, a married woman, and this will suffice to charge her under the ruling in Finley's Appeal, *supra*.

March 27. THE COURT. The mechanic's lien, in this case, is worthless in that the claim on which it rests does not set forth that the work was done and the materials were furnished at the request or on the contract of Mrs. Lloyd. This very question has been but recently before us in the case of Dearie and Wife *v.* Martin (which will appear in 28 P. F. S.). [S. C., 2 WEEKLY NOTES, 574.] In that case the claim, though filed against the wife's property, failed to set forth the fact of coverture, or that the work and materials were furnished at her request. The defendant filed a plea of coverture in bar of the claim. This was followed by a replication on the part of the plaintiff, "that the work and materials were done and furnished at the request and on the authority of the said Margaret Dearie, as well as the said James Dearie, and were necessary and convenient to the preservation and enjoyment of her said estate." Defendant demurred. The Court below gave judgment for the plaintiff on this demurrer. The case was brought up to this Court on writ of error and reversed. *Held*, WILLIAMS, J., delivering the opinion, that the claim was incurably defective in that it did not set forth her coverture, and that the work and materials were done and furnished at her request, and that, as this did not appear in the claim, it did not matter that the work and materials were in fact furnished on her order. This was but following in the lead of Finley's Appeal (17 P. F. Smith, 453), in which it was held, *per* AGNEW, J., that the divestiture of a wife's title, under a mechanic's lien, must depend upon what appears by the record, and not upon proof that she had consented to the contract under which the claim was filed. So in Mahon *v.* Gormley (12 Har. 80) it was said by LEWIS, J., that, where the narr. was on a promissory note and contained no averment concerning the origin of the debt, a plea of coverture, on demurrer, must be held a good answer to it. If the plaintiff wished to avoid such effect, he must either reply setting forth the special circumstances on which he relies to bind her, or amend his declaration. As a special plea could not have helped the plaintiff in this case, inasmuch as the lien is created by the claim filed and all things necessary to its validity must appear in it, and as it is too late now to amend, it is apparent, from the authorities above cited, that the plaintiff had no lien against Mrs. Lloyd's property, and should not have had judgment on his *scire facias*.

The judgment is reversed.

Opinion by GORDON, J. WILLIAMS, J., absent.

[See Shreiffer *v.* Saum, 2 WEEKLY NOTES, 575.]

Common Pleas—Equity.

C. P. No. 1. **Bowers v. Supplee.** Sept. 23.

Building inspectors, powers and duties of—Acts of May 7, 1855, and April 11, 1876—Thickness of walls in Philadelphia.

The duties imposed on the building inspectors by the Act of 7 May, 1855, are clearly defined, but the powers given to them are by no means restricted to those which are in terms mentioned in the Act.

The directions contained in the 8th section of that Act, as construed by the 2d section of the Act of 11 April, 1856, provide only for the minimum thickness of walls. It is the right and duty of the inspectors to require walls to be of such greater thickness as, in their discretion, is necessary to render the building in all respects safe and secure for the purposes for which it is intended.

This was a petition by one of the building inspectors of the city of Philadelphia, for an

Digitized by Google

order of Court to restrain the erection of a building, the walls of which were of insufficient strength and solidity to answer the purpose for which it was designed.

The petition set forth that Supplee had contracted to erect a police station, according to the plans of which the outside walls were to be only eight and one-half inches thick; that the inspectors considered this of insufficient strength and solidity to answer the purpose of the building; and that by the 5th section of the Act of May 7, 1855 (Purd. Dig. 1123, § 5) it was the duty of the inspectors to see that all houses were erected in accordance with the Acts and ordinances in force; that they had therefore notified the respondent to construct the walls of a greater thickness, and he having refused, the petitioner now asked for an order of Court to restrain the erection of the building.

The answer denied the averments of the petition, and set forth that the respondent had built the walls of greater thickness than the Act required.

Messick, for petitioner, argued that the building inspectors were invested with a sound discretion as to the necessary thickness of the walls of buildings to be used for other purposes than dwellings, and had authority to compel them to be made sufficiently thick to render them safe.

Roney, contra, argued that the plan of the present building must have shown the walls to be sufficiently thick for safety, otherwise no permit would have been issued.

Willson, on behalf of the city, suggested that it would be well, for the sake of security, for the Court to hear proofs as to what thickness of walls is necessary for a building to be used as the present one is intended to be used.

C. A. V.

September 30. THE COURT. Upon the petition of Robert N. Bowers, one of the Building Inspectors of the city of Philadelphia, Charles D. Supplee was enjoined against proceeding with the erection of a certain building which he had contracted with the city of Philadelphia to build for the use of the city, situate on the north side of Girard Avenue, about one hundred feet east of Montgomery Avenue. The building is to be thirty-six feet front by fifty-one feet deep, and in height about thirty-five feet, and when completed is to be used for the purpose of a police station-house.

The petitioner complains that the respondent refuses to build the front and party walls of a greater thickness than nine inches; that after repeated examination of the premises, and upon consultation with his associates in office, it has been decided by them that to make the said walls safe and of sufficient strength and solidity, the outside and party walls should be of the thickness of at least thirteen inches. Of this decision Supplee has received notice in writing. The respondent makes answer that he has built the walls, so far as the same have progressed, of a greater thickness than he is by law required to make them—the cellar wall being eighteen inches, the front wall thirteen, and the party walls nine inches in thickness. This is accompanied by a general denial of an infringement of the Act of Assembly cited by the petitioner, or of any of the laws or ordinances of the city of Philadelphia relative to the regulation and inspection of buildings.

The eighth section of the Act of May 7, 1855 (Purd. Dig. 1122), directs that the thickness of all walls thereafter erected, constructed, or altered, in the city of Philadelphia (excepting from the operation of the Act the rural portions of the city), shall be as follows: In all buildings having a front of not more than sixteen feet and not more than thirty-five feet high, the foundation walls shall not be less than sixteen inches, and the front and party walls not less than nine inches in thickness. Where the front of the building does not exceed twenty feet, and the height is not more than forty-five feet, the foundation or cellar walls are required to be not less than eighteen inches and the party walls thirteen inches thick. The increased frontage of buildings is further regulated by this section to the extent of sixty-five feet; beyond that width the increased thickness of walls "shall be determined by the Board of Inspectors."

This eighth section of the Act of 1855 was, by the second section of the Act of April 11, 1856 (Purd. Dig. 1127, § 24), "construed to require the walls of buildings to be of the thickness therein mentioned when of the respective heights therein specified, without any reference whatsoever to the fronts or widths of said buildings." That this section of the Act of 1856 was intended to work a material change in the law of the previous year does not admit of doubt. In terms it professes to place a construction on the Act, to which it is in effect a supplement, but in fact it does not construe the former Act at all, but in an important respect abrogates it, and substitutes a wholly different regulation as to the fronts or widths of buildings. In express terms it declares that the minimum thickness of the walls, as specified in the eighth section of the original Act, shall be regulated by the height of the wall without reference to the frontage of the building. Upon this provision of the Act of 1856, the defendant in part grounds his resistance to the application of the Building Inspectors; assuming also, as he does, that the eighth section of the Act of 1855 determines absolutely the thickness of walls thereafter to be erected. Is this a correct interpretation of the Act of

Digitized by Google

1855, considered in connection with the change which the second section of the law of 1856 has introduced? The defendant has either not well considered the phraseology of the original Act, or, having considered it, has not given due weight to the use of the words "not less than" as qualifying the thickness of each class of walls particularly mentioned in the Act of 1855. These words are in no instance omitted; ten times are they repeated in the eighth section, showing a clear intention on the part of the Legislature to fix a minimum regulation of walls, which neither builder nor Building Inspector is at liberty to disregard. What, then, is the effect of the second section of the Act of 1856, upon this portion of the original law? We answer, none, other than to leave the question of the minimum thickness of walls as it was first established, except that the width or frontage of a building is no longer a material consideration. The minimum thickness is now determined by the height of the structure alone, so that when the height is ascertained, all parties are controlled by the statute upon the subject; no one may build, or allow to be built, a wall of *less thickness*, according to height, than is particularly prescribed by the Act of Assembly; and this is equally applicable to all portions of the wall, whether foundation or cellar walls, party and front walls, and also to the distinction, where one is made in the law, as to a differing thickness of walls for the separate stories. In this section of the Act of 1855 there is a qualification which limits the extent to which a lot may be encumbered by a party wall, prescribes the minimum thickness of party or division walls where the building is to be used for a store house, and a direction that, when a building is to be carried up to a greater height than the maximum height mentioned in the section, the increased thickness of the wall shall be determined by the Board of Inspectors. These constitute the entire provisions of the eighth section of the Act of 1855, as modified by the second section of the Act of 1856, and we fail to discover in them any intention to prescribe a maximum thickness of the walls thereafter to be constructed or built. On the contrary, the evident purpose is to lay down a positive rule, which is to every one a command, directing that walls shall not be less than the prescribed thickness, and from this is deduced the legitimate inference that, nothing appearing to the contrary, it is not repugnant to the sense of the statute, judged by this portion of it alone, that such walls might be required in certain cases to be of a greater thickness; but this law, like all other laws, is to be examined in all its parts, to be considered as a whole, and interpreted according to its spirit and intent.

The title of the Act recites that the purpose is to provide for the better preservation of life and property. The inspectors are required to possess the qualifications of having served a regular apprenticeship at house-carpentering or bricklaying, and afterwards to have worked at or carried on such business for at least seven years. Before entering upon such office they are required to make oath that they possess the prescribed qualifications; that they will faithfully perform their duties, and see that buildings inspected by them are built in accordance with legal requirements. The fifth section of the Act makes it the duty of the inspector to inspect buildings during the progress of the work; to see that they are constructed in manner adapted for the security of the same against fires, and the safety of the inhabitants. He is to require that suitable material be used; that the work is done in a substantial and workmanlike manner, and that it is of sufficient strength and solidity to answer the purpose for which it is designed. These constitute some of the most material provisions of the law, and are by no means to be overlooked in giving a construction to the other sections of it, and especially the eighth section, which is supposed by the defendant to justify him in resisting the command of the building inspectors. We gather from all this that the chief purpose of the Act is to make buildings in the city of Philadelphia more safe than they had formerly been against fire, and to guard more effectually against loss of life, which may at any time result from the erection of buildings which are not of sufficient strength and solidity to answer the purpose for which they are designed. The duties imposed on the inspectors are clearly defined, but the powers given to them are by no means restricted to those which are in terms mentioned in the Act. Much is left to their better judgment, and for the exercise of an honest, and at the same time, a sound discretion. The law does not say, nor is it possible that it should do so, what in each particular case constitutes a sufficient security against fires, nor what constitutes, in every or in such instance, a sufficiency of strength and solidity. This, the Act says, must be determined by the purpose for which the building is intended. That which would be sufficient when a building was to be used for one purpose might be wholly inadequate when intended for a different use. It entrusts the determination of these questions in the first instance to the building inspectors, and in the seventh section is found a requirement that the inspector shall give a certificate that the building *is in all respects safe and secure.* So much importance does the law attach to this certificate, that if he shall falsely certify that the law has been complied with when it has not, his bond is declared to be forfeited, the whole principal sum becomes due and payable, and the further punishment is added that he shall be forthwith dismissed from his office. How is it

Digitized by Google

possible that the inspector shall certify that the building is in all respects safe and secure if, in his belief, it is unsafe and insecure? and what answer to an application to enforce against him the severe penalty of the law would it be that the walls were of the minimum thickness particularized in the eighth section? The reply to such an answer would be: "You are required to see to it that the walls were safe; that the work was of a sufficient strength and solidity. This is your first great duty, and this you have failed to perform; you were not forbidden to require of the builder a greater thickness of walls, but to see that under no circumstances, for no kind of a building, was the thickness less than that which is specified in the Act."

Entertaining this view of the law, and holding that general oversight and control of buildings in progress of erection is entrusted to the inspectors of buildings for the most laudable and conservative of all purposes—the preservation of life and of property—we are of the opinion, for the reasons stated, as well as for others not mentioned, that this petition was proper under the tenth section of the Act of 1855, and that the order of the inspector to the defendant was within the scope of his authority, and must be obeyed, unless it be shown, upon an investigation and determination of the facts, that such order ought not to have been made. We have before us the petition, which required that an injunction should be granted, and an answer, which does not show sufficient reason to dissolve it, but the facts are still open to further investigation, if the defendant desires to contest the correctness of the order of the inspector upon its merits, and to show by proofs, that the injunction ought not to be continued. The burden of proof rests on the defendant, the case on the petition, and answer is against him, and, the order of the inspector having been made by one competent to make it, and for a purpose authorized by the Act of Assembly, it must be taken as *prima facie* correct. The case, as it now stands, is to be regarded as a motion to dissolve an injunction, and the laboring oar is with him who undertakes to show that the order of the inspector ought not to have been made, and that the injunction ought not to have been granted, or, having been granted, ought now to be dissolved.

Opinion by ALLISON, P. J., in full.

Common Pleas—Law.

C. P. No. 2. Sept. 30.

City to use of Peters v. Devine.

Municipal claim—Agreement of contractor to do the work for specified price—Affidavit of defence—Nudum pactum—Accord without satisfaction.

Rule for judgment for want of sufficient affidavit of defence.

Sci. fa. sur municipal claim. The affidavit set forth that Peters, the use plaintiff, before he procured from the city the contract to do the work charged for, solicited the defendant to sign as a property owner in favor of said Peters, as the paver to do the work; that in consideration of defendant so signing, the said Peters agreed to do the work at certain prices specified (lower than those charged in the claim); that defendant then signed a recommendation for Peters, and Peters did the work; that after the work was done Peters presented his bill at the rates now charged, but on defendant reminding him of the agreement he acknowledged it, and sat down with defendant's agent and recalculated his bill at the proper rates, and agreed upon an amount due, which amount defendant was and is ready to pay.

Hopple, for the rule.

The alleged agreement was before the use plaintiff had any contract, and, therefore, was without consideration.

The alleged restating of the account was an agreement to take a smaller sum in payment of a larger, and therefore, a mere accord, not binding without actual satisfaction.

Bowers, contra.

Rule discharged.

C. P. No. 2. **Boyd v. Bockenkamp.** Sept. 30.

Negotiable paper—Due-bill to blank payee or bearer.

Rule for judgment.

Assumpsit by holder against maker of a due-bill payable to "———— or bearer."

J. N. Brown, for the rule.

F. Rawle, contra, argued, that while a holder had authority to fill up the blank with his own name, yet he must actually do so before suit, and cited—

Greenhow *v.* Boyle, 7 Blackf. 56.
Chitty on Bills, *177.

THE COURT. The cases cited where an instrument is payable to blank *or order* are different. In those, there is no payee unless the blank is filled up, but here the bearer is the payee.

Rule absolute.

Digitized by Google

C. P. No. 4. **Nagle v. Potter.** Sept. 30.

Warranty—Representation—Sufficient averment of warranty—Affidavit of defence.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit upon a promissory note. The affidavit alleged that the note was given in payment for leather purchased upon the representation and agreement of the plaintiffs that each skin was large enough to cover two quarto bibles; that the skins were not carefully examined by the defendants until after giving the note, but a subsequent examination showed the skins to be of a smaller size and inferior quality, and that they were so packed as to conceal the imperfect ones.

B. H. Haines, for the rule. The affidavit does not set out a special warranty.

[BRIGGS, J. The affidavit says it was agreed. This is a proper word to use, and does set out a warranty.]

The defendant had time to inspect the goods. The affidavit does not state how long the skins were in defendant's possession. He should have offered promptly to return them.

[THAYER, P. J. He may keep them any length of time, or sell them without inspection, and afterwards, if they turn out defective, recover on the warranty.]

Rule discharged.

[See Dodd *v.* Kirk, 2 WEEKLY NOTES, 260.]

C. P. No. 4. **Brown v. Bliem.** Sept. 19.

Evidence—Form of action—Assumpsit will lie on promise arising out of contract, although the contract is under seal—Award of referee.

Exceptions to award of referee.

This case was founded on a declaration in assumpsit in the common counts. At the trial, a question arose as to the admission of certain sealed contracts as evidence to support the declaration, and, at the suggestion of the judge before whom the cause was being tried, a reference was made of all matters in dispute to William J. McElroy, Esq., as referee under an order of Court. Before him the specialties were offered in evidence and admitted provisionally.

After many meetings an award was made by him in favor of the plaintiff, basing the same on what he decided to be an account-stated between the parties, and excluding as evidence the said contracts under seal. To this award, the chief exception was that the referee erred in admitting the contracts under seal and proceeding to hear testimony based on them, and in not rejecting them completely at the outset.

A. Thompson, for the exceptions, argued that though the referee finally excluded said contracts and based his award on the account stated, yet from the fact that he admitted the same at all, and heard testimony as to work done under them, the presumption arose that his mind had been influenced, or may have been influenced, perhaps unconsciously to himself, in making his decision, by testimony which he had subsequently decided to be inadmissible. Besides, a referee is bound by the form of action as brought and the said sealed contracts were not admissible in assumpsit.

Bachman *v.* Reigart, 3 Penn. Rep. 270.

T. J. Ashton, in reply, contended that as all matters in dispute between the parties were included in the reference, the referee could hear and consider any evidence otherwise competent, whether it was technically admissible under the pleadings or not.

Grier *v.* Bilger, 1 Harris, 58.

THE COURT (THAYER, P. J.). The referee rejected the contracts under seal and sustained an account-stated, although the items in it were founded on contract. Assumpsit will lie on a promise arising out of a contract.

Exceptions dismissed.

C. P. No. 4. Sept. 18, 1876.

Debraham v. Walker et ux.

Husband and wife—Husband not liable for goods purchased by his wife and charged to her, other than necessaries for the family—Book of original entries not sufficient proof that the articles bought are necessaries.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on book account. The entries were headed "Mrs. General Walker, bought," and were for articles of female clothing, table linen, etc. The affidavit of Sophia M. Walker set forth that the items charged did not comprise such articles as are necessaries, nor such as were for the improvement of the separate estate of a married woman. The affidavit further set forth that the charges had not been made against the husband, and that the said John G. Walker was away from this city at the time suit was brought, and is still absent.

Hunn, for rule. The goods were bought by Sophia M. Walker, as the wife of General John G. Walker, and were charged to Mrs. General Walker. She was dealt with as a married woman, and the articles purchased were of such a character as to lead the plaintiff to believe that they were necessaries for the family.

B. F. Fisher, contra, was not called on.

THE COURT. Some further proof is necessary besides the book of original entries. The presumption is that the husband did his duty.

Rule discharged.

Digitized by Google

C. P. No. 4. **Coaler v. Schlecht.** Sept. 30.

Opening judgment by default—Laches.

Rule to open judgment.

A judgment had been entered for want of an affidavit, and a *fi. fa.* had issued and been stayed. An alias *fi. fa.* was issued and a levy made, when this rule was taken.

Depositions in support of the rule alleged that the entry in plaintiff's book was against "Schlecht and Walters," while the suit was against Schlecht alone; that Walters alone contracted for the goods; that the defendant did not contract for them nor receive any benefit therefrom; and that the defendant was a foreigner, unable to read English, or to understand the proceedings.

Depositions contra alleged that the bargain was made with Schlecht, and the name of Walters was added, upon defendant's suggestion, to a charge that had previously been made against the latter; further that the defendant had acknowledged the debt when the first *fi. fa.* was stayed.

Hunsicker, for the rule.

Callaway, contra. The rule is taken too late.

C. A. V.

Rule discharged.

C. P. No. 4. **Smith v. Hopple.** Sept. 30.

Affidavit of defence—Averment contradicted by the record.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note. The affidavit set forth that there was a prior suit between the same parties on the same note, "which suit deponent is informed and believes is still pending and undetermined."

The Court Docket showed that the former suit had been discontinued upon a day prior to the issuing of the present writ.

J. H. Stevenson, for the rule.

Rule absolute.

Orphans' Court.

Restine's Estate. May 18.

Will—Caveat—Undue influence—Demand for an issue, what evidence necessary to support—Practice.

James Restine died March 11, 1875, leaving surviving him a widow and several sons by a former wife. By his will, dated Dec. 13, 1872, he made his widow his sole devisee and legatee. Caveats were filed by his sons, alleging incapacity and undue influence. The will was proved March 30, 1875, and the contestants demanded an issue.

On April 9, 1875, the Register of his own motion certified the record to the Orphans' Court, and on April 15 a petition was presented to the Court praying for an issue and the appointment of an examiner to take testimony. An examiner was appointed, and his report having been filed, the case now came on to be heard on the prayer for an issue.

S. Davis Page, for contestants.

The Act of 15 March, 1832, § 41 (Purd. Dig. 1256, pl. 22), provides, that, whenever a dispute upon a matter of fact arises before a Register's Court, the said Court *shall*, at the request of either party, grant an issue. This is demandable of right.

De Haven's Appeal, 25 Sm. 340.
Wickersham's Appeal, Id. 336.

The Orphans' Court has all the jurisdiction and powers of the Register's Court.

Act of 19 May, 1874, § 6 (Purd. Dig. 1933).
Com. *v.* Clark, 1 Weekly Notes, 330.

If the fact in dispute be material to the validity of the will, the Court is bound to award an issue when required.

Graham's Appeal, 11 Sm. 43.
Cozzen's Appeal, Id. 199.
Bradford's Will, 1 Pars. 158.

[O'Brien, J. That was the old practice: now we have a discretion, else why take testimony and argue the case?]

The fact is in dispute when alleged on one side and denied on the other.

Knight's Appeal, 7 Harris, 494.
Beehler's Estate, 3 Philada. 254.
Hoge's Will, 2 Brewst. 444.

If undue influence be shown before and after the making of the will, a presumption that it continued will arise which ought to go to a jury.

Eckert *v.* Flowry, 7 Wr. 46.

McGrath, for respondents.

It is no longer the rule that an issue will be granted whenever there is a *scintilla* of evidence; there must be enough evidence to support a verdict against the will.

Philada. & Read. R. R. Co. *v.* Yeager, 23 Sm. 124.
De Haven's Appeal, 25 Id. 337.
Estate of Wm. De Puy, 1 Weekly Notes, 212.
In re Will of Eliza Hoge, 2 Brewst. 452.
In re Will of Ellen Shaw, 1 Weekly Notes, 332.

[Dwight, J. Previously the Court which granted the issue tried it. Since the New Constitution a different Court tries it, and this Court ought to be, if anything, more liberal in granting issues so as not to usurp the discretion of the Court which tries them.]

The test of testamentary capacity is that the testator knows and understands the business he is engaged in, and the disposition he is making at the execution of his will.

Digitized by Google

Tawney v. Long and Wife, 26 Sm. 106.
Thompson v. Kyner, 15 Sm. 378.

Undue influence means anything that destroys the free agency of the testator at the time the will was made as in the very act of devising.

Mintzner v. Baker, 5 Phil. 483.
Dean v. Negley, 5 Wright, 317.
Eckert v. Flowry, 7 Id. 46.
McMahan v. Ryan, 8 Harris, 320.

Neither importunity, advice, persuasion, nor influence gained by affection will invalidate a will.

Miller v. Miller, 3 S. & R. 267.
Moritz v. Brough, 16 S. & R. 403, 409.
Redfield on Wills, 524 and 525.

C. A. V

June 3, 1876 Prayer of petition refused. [No opinion.]

[See Cauffman v. Long, 2 WEEKLY NOTES, 695, and cases referred to in note.]

Hanbest's Estate. Sept. 25.

Orphans' Court practice—Right of petitioner to discontinue.

Sur petition to strike off discontinuance.

A petition for an inquest to make partition was granted in the old Orphans' Court, and the inquest returned accordingly, but upon exceptions being filed, the inquest was subsequently set aside in November, 1875. The original petitioners then filed a bill in equity for a partition in the Court of Common Pleas, and entered a discontinuance in the Orphans' Court in April, 1876. Certain parties respondent in the Orphans' Court proceedings then filed a petition to strike off the discontinuance.

McIntyre, for petitioners. One party cannot discontinue without leave of the others.

Campbell v. Hammett, 33 Leg. Int. 119.

Bispham (with whom was *A. V. Parsons*), contra.

A plaintiff at common law can enter a discontinuance at any time before verdict. In England, before the adoption of the equity rules of 1845, a complainant could come in at any time before the entry of the decree and have the bill dismissed, After 1845 this could be done only on payment of costs. He cited—

Dundas's Estate, 14 Sm. 325.

C. A. V.

Oct. 7. THE COURT. There is no difference between the practice at law and in equity in such a case, and a plaintiff can discontinue if no damage is done to a party in interest. The petition is refused.

Opinion by HANNA, J.

James Robinson's Estate. Sept. 23.

Will—Issue devisavit vel non—Writ of error, when a supersedeas—Result of issue should be certified from Common Pleas to Orphans' Court—Practice.

Sur petition to revoke letters of administration.

The petition of William Robinson and Harriet Barker set forth that James Robinson, the decedent, died on the 21st of June, 1874, having made a will whereby he appointed the petitioners his executors. The will was offered for probate on the 27th of June, 1874, and on July 2, a caveat, and a request for an issue were filed by John W. Robinson, a nephew of decedent, alleging that the decedent was not of sound mind, and that the will was procured by undue influence. Letters of administration *pendente lite* were then granted to the Fidelity Company, and an issue *devisavit vel non* was framed, in which the petitioners were made plaintiffs and John W. Robinson defendant. The issue was duly tried, and a verdict rendered for plaintiffs, whereupon a writ of error to the Supreme Court was taken by the defendant, but no bail in error was entered on his behalf. The petitioners averred that the writ of error did not therefore become a supersedeas to the exit of letters testamentary to them, and that they applied to the register to revoke the letters of administration to the Fidelity Company, and issue letters testamentary to them, which the register refused to do. The petitioners prayed the Court to order the register to grant their application.

D. Dougherty, for petitioners.

C. A. V.

Sept. 30. THE COURT. From the petition presented, it appears that upon the determination of the issue granted in this matter by the verdict of the jury and judgment thereon, a writ of error to the Supreme Court was taken by the defendant in the issue, whereby the entire proceedings were removed from the Court of Common Pleas.

That the writ of error is a matter of right cannot be doubted. And as the result of the issue has never been certified to this Court, we are powerless to afford any relief to the petitioner. Even if the writ of error had never been taken, the Orphans' Court could not have proceeded further until the Court of Common Pleas had certified the result of the issue, upon which a final decree would then have been entered by the Orphans' Court.

It is immaterial that the plaintiff in error has not entered the recognizance required by the Act of Assembly, and it is sufficient to say, that by his action, we are prevented from taking any further cognizance of the matter until the final disposition of the writ of error. The petition is therefore refused.

Opinion by HANNA, J., in full.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, OCT.* 19, 1876. [No. 3.

Supreme Court.

Jan. '76, 149. March 23.

Lehigh Iron Co. v. Supervisors of Lower Macungie Township.

Constitutional law—Art. IX., Sect. 1, *of Constitution of Pennsylvania—Effect on prior Acts inconsistent therewith—Such Acts not repealed per se— Uniform taxation—Special taxes—Acts of* 14 *April*, 1868, *and* 25 *Feb.* 1870 — *Schedule to Constitution, Sect.* 31— *Duty of Legislature to pass general laws and repeal inconsistent Acts.*

ART. IX., Sect. 1, of the new Constitution of Pennsylvania, of 1873, provides: "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

The SCHEDULE to the Constitution declared (§ 31) "The General Assembly at its first session, or as soon as may be, after the adoption of this Constitution, shall pass such laws as may be necessary to carry the same into full force and effect."

The prior Act of 14 April, 1868 (P. L. 1127), imposed a special tax on the owners of ore beds in Upper Saucon Township, Lehigh County, of one and one-half cents for each and every ton of ore hauled over the public roads of said township. The Act of 25 February, 1870 (P. L. 1871, 241) extended the provisions of the Act of 1868 to Lower Macungie Township in said county.

In an action by the supervisors of Lower Macungie Township to recover the amount of said tax:

Held (affirming the judgment of the Court below) that ART. IX., Sect. 1, of the Constitution did not operate *per se* to repeal the said Acts of 1868 and 1870.

Held, further, that ART. IX., Sect. 1, did not become immediately operative, but was intended to be mandatory upon the Legislature to enact general laws framed upon its special intent, and to repeal all prior laws inconsistent therewith, leaving the Legislature, in the exercise of a sound and wise discretion, to time the repeal after proper general laws shall have been passed.

Per AGNEW, C. J. Sect. 31 of the SCHEDULE also necessarily appeals to the consciences of the members of the Legislature by their oath of office to provide general laws for uniform taxation, and to bring all the laws of the State into accord with the Constitution by repealing all local and special provisions inconsistent therewith.

Error to the Common Pleas of Lehigh County.

Assumpsit by the supervisors of Lower Macungie Township against the Lehigh Iron Company. Summons issued April 7, 1875. Plaintiffs filed in addition to the narr. an affidavit of their cause of action, which set forth that defendants were a corporation created by the laws of Pennsylvania, and were lessees and grantees of certain iron ore mines in said township of Lower Macungie; that they had carted and carried over the public roads of said township a specified quantity of iron ore, for the carrying of which ore over said roads a certain tax was due and unpaid, although notice had been given of the same and payment duly demanded.

Appended to this affidavit were copies of the Act of April 14, 1868 (P. L. 1127), entitled "An Act authorizing the supervisors of Upper Saucon Township, Lehigh County, to collect an additional tax on ore beds," and of the Act of February 25, 1870 (P. L. 1871, 241), extending the provisions of the last mentioned Act to Lower Macungie Township in said county. The Act of April 14, 1868, is as follows:—

"Be it enacted, etc., that, in addition to the taxes collectible under existing laws, the owners of ore beds, situate in Upper Saucon Township, Lehigh County, shall, from and after the passage of this Act, pay, to the supervisors of the roads in said township, one and a half cents for each and every ton of ore mined and carried away with teams over the public roads in said township."

The defendants filed an affidavit of defence which admitted the facts as set forth, but averred "that the Acts of Assembly referred to have been abrogated and annulled by the provisions of the Constitution adopted in 1873."

Upon a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence, the Court entered judgment for plaintiffs, LONGAKER, P. J., delivering the following opinion:—

"The special Act under which this tax is demanded was held to be constitutional in Weber *v.* The Supervisors of Upper Saucon (23 Smith, 371). It is, however, contended by the defendant that by reason of the adoption of the Constitution of 1873, all local and special laws have been repealed. This declaration is not based upon an explicit provision, but is said to follow by implication; and ARTICLE IX., § 1, wherein it is provided that all taxes 'shall be levied and collected under general laws,' is laid hold of as authority to prevent the collection of this tax from the defendant. This tax, and the mode prescribed for its collection, exists only by a local law, and if the Constitution operates as a repeal of the statute, then the defence assumed by the defendant will defeat a recovery.

"A repeal by implication seems to be incompatible with the express language of the Constitution itself. In ARTICLE III., § 7, it is said: 'but laws repealing local or special Acts may be passed.' The Constitution prohibits the enactment of local or special laws, but this prohibition most assuredly cannot be construed to operate as a repeal.

Digitized by Google

"Again, if the provision that all taxes 'shall be levied and collected under general laws' is to be construed to repeal all special laws now in force as regards the collection of taxes, it is to be feared that many counties and other municipalities will find that there is no statute by which their taxes can be levied and collected; because for many districts special laws have been enacted; and none have yet discovered that the new Constitution has effected a change. The Supreme Court, by affirmance of the case of the City of Pittsburgh *v.* Kitty Roup (1 WEEKLY NOTES OF CASES, 254), declares that the special Act as regards the assessment of rural property is still in force. I am therefore of the opinion that the affidavit of defence is insufficient.

"And now, January 17th, A. D. 1876, it is considered, adjudged, and decreed, that the rule be made absolute, and that the prothonotary assess the amount of damages."

The defendants thereupon took this writ, and assigned for error the entry of said judgment.

H. C. Hunsberger (with whom was *Edward Harvey*), for plaintiffs in error.

The Constitution of 1790 was silent on the great subject of taxation. Under it the taxing power was assumed to be bounded only by the discretion of the Legislature.

Kirby *v.* Shaw, 7 Har. 260.
Sharpless *v.* The Mayor, 9 Id. 168.

In the course of time, this Court, when appealed to in cases of extreme abuse of power, sought to find a "limitation in the nature of things."

Hammett *v.* Philadelphia, 15 Sm. 146.
Durach's Appeal, 12 Id. 494.
In re Washington Avenue, 19 Id. 353.

But the abuses, mistakes, and injustice, actual and possible, under the then existing system of taxation were known by the Constitutional Convention to lie far beyond the corrective jurisdiction of the courts, and their action resulted in ART. IX., Sect. 1, of the new Constitution, which is as follows:—

"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

The SCHEDULE, reciting: "That no inconvenience may arise from the changes in the Constitution of the Commonwealth, and in order to carry the same into complete effect," declares:—

"§ 2. All laws in force in this Commonwealth at the time of the adoption of this Constitution, *not inconsistent* therewith, ... shall continue as if this Constitution had not been adopted."

The question of the validity of this same Act of 14th of April, 1868, under the old Constitution, was considered and decided by this Court affirmatively (though not unanimously) in—

Weber *v.* Reinhard, 23 Sm. 370.

The question now presented is, What effect has the new Constitution upon that Act? Is the Act consistent or inconsistent with the Constitution? Is the Act continued in force or repealed?

The words of the Constitution and of the Act are alike free from ambiguity; there is no room for construction. The Act imposes a *special tax* upon *special persons*, and upon a *special article*, ore, hauled over roads in a *special township*. The Act, therefore, is not a "general law;" the tax is not "uniform upon the same class of subjects within the territorial limits of the authority levying the tax." The simple and necessary conclusion is, that the Act is inconsistent with Sect. 1, ART. IX. As § 2 of the Schedule expressly continues in force all laws "not inconsistent" with the Constitution, the legal conclusion follows that all *inconsistent* laws are *not* continued in force; in other words, that such inconsistent laws are repealed by necessary implication. *Expressio unius est exclusio alterius.* "Every positive direction contains an implication against anything contrary to it which would frustrate the purpose of that provision."

People *v.* Draper, 15 N. Y. 543, per DENIO, J.

And it has been expressly decided, in New York, that if a Statute conflict with the provisions of an amended Constitution adopted since the passage of the Statute, it is repealed.

Pierce *v.* Delameter, 1 N. Y. 17.

Edwin Albright, for defendants in error.

Section 1, ART. IX., is simply the incorporation of a defined general principle into the organic law; it is not of itself an act of legislation, but, like many other provisions of the new Constitution, it requires legislation to carry it into full effect. Such ancillary legislation is provided for by the mandatory clause in § 31 of the SCHEDULE: "The General Assembly at its first session, or as soon as may be, after the adoption of this Constitution, shall pass such laws as may be necessary to carry the same into full force and effect." Until such legislation is had § 1 of Article IX. does not have full force and effect, and no laws are repealed *by implication*. All laws intended to be abrogated immediately were repealed by express words. Thus, in ART. III., § 21, relating to special statutes of limitation, it is provided "and such Acts now existing are avoided;" in § 22 of the same article, relating to special Acts permitting investments in stock of private corporations, "and such Acts now existing are avoided, saving investments heretofore made." Again, in § 27, "No State office shall be *continued* or created," etc. So in ART. XVI., § 1, all existing special charters, under which no *bona fide* organization was had, "shall thereafter have no validity," and § 2 of ART. III., immediately following that under consideration, provides that "All laws exempting property from taxation,

Digitized by Google

other than the property above enumerated, *shall be void.*" But there is no such repealing provision in relation to special Acts imposing taxes. The absence of such *fiat* is significant.

The manifest intent, deduced from the instrument as a whole, is that ART. III., § 1, is prospective, and becomes operative only as and when the Legislature shall comply with the mandate of § 31 of the SCHEDULE. Sect. 7 of ART. III. prohibits the General Assembly from passing special or local laws regulating the affairs of townships, or for altering or maintaining roads, etc., but it also provides that "laws repealing local or special Acts may be passed." If all local and special Acts were repealed *ipso facto* by the Constitution, what would be left for that power to operate on?

The principle contended for by the plaintiff in error would involve the repeal by implication of every local and special law on the Statute book, however, beneficial or necessary, and would produce anarchy in half the counties in the State.

But the question has already been decided by this Court, by the affirmance of the judgment in—

Pittsburgh *v.* Roup, 1 WEEKLY NOTES, 254.

Also, *per* ELWELL, P. J., *In re* Contested Election, Tunkhannock Borough, not reported.*

*** In the Matter of the Contested Election of William F. Terry as Justice of the Peace of Tunkhannock Borough.**

The question in this case was whether a special Act of 1868 (P. L. 729), relating to the mode of voting in the counties of Luzerne and Wyoming, was abrogated by ART. VIII., § 7, of the new Constitution, which provides that "All laws regulating elections . . . . shall be uniform throughout the State." . . .

The following opinion was delivered by ELWELL, P. J., May 14, 1874:—

"In disposing of this case I rule points as follows:—

"*First.* The provision contained in the seventh section of ART. VIII. of the Constitution was not of itself an act of legislation, taking immediate effect by way of either a repeal or restoration of laws then on the statute book; but was designed and intended, both as a limitation of power, and a command of duty binding upon the legislative branch of the government.

"By Section 7, ART. III., it is provided that 'the General Assembly shall not pass any local or special law . . . for the opening and conducting of elections, or fixing or changing the place of voting.' This is contained in the Article on Legislation. Then follows, in the 8th Article, section 7, on Suffrage and Elections, the provisions above quoted that all such laws 'shall be uniform throughout the State.'

"Now although by the first section of the Schedule that Constitution took effect on the first day of January, 1874, yet its provisions in many respects were not operative until the Legislature had performed the duty enjoined by the 31st section of the Schedule. By that section the Legislature was commanded and enjoined at its first session, or as soon as may be, after the adoption of the Constitution, to pass all such laws as may be necessary to carry the same into full force and effect. Until then, all laws in force not inconsistent with the Constitution were continued in force by the 2d section of the Schedule.

"*Second.* The requirement that laws shall be uniform means that the Legislature shall *not* pass local laws and that they *shall* pass general laws by which the uniformity required shall be obtained.

"*Third.* It is not to be presumed that the Legislature will disobey this injunction, as they are bound not only by their duty but by a solemn oath to support that instrument.

"*Fourth.* These views lead to the conclusion that the mode of voting in Wyoming County as provided by the Act of 1868 was in force at the election, and will continue in force until the laws are made uniform on the subject of elections throughout the State by an Act of Assembly." . . . .

And many analogous authorities may be cited—

Cass *v.* Dillon, 2 Ohio State Rep. 607.
Bowie *v.* Lott, 24 La. Ann. Rep. 214.
Bank *v.* Smith, 3 S. & R. 63.
Street *v.* Commonwealth, 6 W. & S. 209.

Harvey, in reply.

Certain Acts, inconsistent with the Constitution, are expressly continued in force as well as others repealed, so the argument derived from the instances of express repeal cited has no weight.

A constitutional convention, unlike a legislature, is fettered by no obligation to respect existing personal or local rights, and where the intent is plain the argument of inconvenience is inadmissible. Mere inconvenience cannot impute ambiguity to plain words: the duty of the Court is simply to declare *ita lex scripta est.* The law is thus well stated by BRUNER, J., in Oakley *v.* Aspinwall (3 Comst. 558): "If the fundamental law as it is written does not work well, the people can amend it: and inconvenience can be borne long enough to await that process. . . . It is not for us, but for those who make the instrument, to supply its defects. If the Legislature or the Courts may take that office upon themselves, or if, under color of construction or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set a boundary to the powers of the government; written constitutions will be worse than useless."

See, also—

Cooley on Constitutional Limitations, 55.
Story on Conflict of Laws, 17.
Newell *v.* The People, 7 N. Y. 97.
Abley *v.* Dale, 11 C. B., 390, per JERVIS, C. J.
Gibbons *v.* Ogden, 9 Wheat. 188, per MARSHALL, C. J.
Manly *v.* The State, 7 Md. 135.
Oliver, Lee & Co.'s Bank, 21 N. Y. 12.
Cantwell *v.* Owens, 14 Md. 215.
People *v.* Draper, 15 N. Y. 543.
Sedgwick on Stat. and Const. Law, 107, 411.
In re Clinton Street, 2 Brews. 601.
Com. *ex rel.* Lewis *v.* Randall, 2 WEEKLY NOTES, 210.
Beebe *v.* State, 6 Ind. 501.

March 20. THE COURT. When the question upon the constitutional power to levy such a

Digitized by Google

special tax as this was here before, this Court affirmed it, with a very positive dissent, however, by the present CHIEF JUSTICE, and a qualified concurrence on the part of READ, then C. J.; and WILLIAMS, J. excepting to the extension of Hammett *v.* Philadelphia (15 P. F. Smith, 146), beyond the case itself. It was believed by the majority that the former decisions of the Court supported the power, though its exercise was apparently unjust and unequal. For the same reasons the Court, as now constituted, feel bound by that decision, especially in view of the constitutional restrictions upon the power of taxation, which, it is hoped, will hereafter prevent local and unequal impositions. The only question now before us is, therefore, upon the effect of the first section of the 9th Article of the new Constitution upon such legislation. It is contended that this section is a repeal *per se* of the Act under which this tax is sought to be levied and collected.

It is a question of very great concern to the whole State, for if the position taken by the plaintiff in error be true, some of the most important laws of the State have fallen long since, and all acts done under others have been unlawful and void. An example may be found in the Act known as the Venango County Tax Law, enacted many years ago, and extended from time to time to other counties, until now it is the law of, probably, one-third of the counties in the State. This is the law which makes the treasurer of the county the collector of the State and county taxes, sends him out into the different townships to receive from the people, and requires him to place all uncollected taxes on the first day of September in the hands of the several constables for collection, with an addition of five per cent. to the taxes of each person to pay the expense of collection. It allows the taxpayer a reduction of five per cent. for prompt payment before the 1st August, and grace by payment of the simple amount between the 1st August and the 1st September. The constables give bond and sureties for collection. This is undoubtedly the cheapest and best system of collection in the State. But it is unquestionably special. Many other laws for particular localities might be mentioned.

In view of the wide and extended effects of an immediate repeal *ipso facto* by the adoption of the new Constitution, it behooves us to be careful in the interpretation of the section mentioned. Upon all the consideration we can give to the subject, after a very able argument to assist us, we are of opinion that Sect. 1, Art. IX., is not immediately operative, but was intended by the convention to be mandatory upon the Legislature to enact laws framed upon its special intent, and to repeal all laws inconsistent therewith, leaving the Legislature in the exercise of a sound and wise discretion to time the repeal after proper general laws shall have been passed. Any other interpretation would lead to most ruinous results.

So much may be deduced from a comprehensive view of the section itself and its consequences in the absence of any language in it to evidence an intent to make it a repeal *per se*. But beyond this there is strong evidence in the immediate context that the convention had a different intention. A part of section 1 is the declaration, by way of exception to its generality, of the power of the Assembly to exempt certain classes of property from taxation. This is followed immediately by section 2, which provides that "all laws exempting property from taxation, other than the property above enumerated, shall be void." Thus the subject of repeal was directly before the mind of the convention, and limited to laws relating to exemption only. The subject of the second section, being directly connected with the subject of the first, indeed, might have been incorporated with it, and, this subject being that of repeal, it is conclusive evidence to our minds that the convention did not intend to repeal special tax laws, but to let them stand until the Legislature had enacted a proper general system of taxation to take their places. The eminent men who composed that body could not fail to perceive the utter confusion into which the State would have been thrown by a repeal *per se*.

These views derive confirmation from other portions of the instrument. The exception in the 7th section of Article III., relative to legislation, giving power to *repeal local and special acts*, strongly indicates the intent that such local and special acts should remain until legislation had been adopted to harmonize these local and special provisions with the general laws so adopted. There are also instances of immediate repeal of existing laws; for example, Article III., section 21, relating to damages for personal injuries, and section 22, relating to investments by executors, etc., Article XVI., section 1, relating to certain existing charters of incorporation, and the section relating to exemption laws, already alluded to (section 2, Article IX.). Then we have the 2d and 31st section of the Schedule bearing directly upon the question. The former continues in force all laws not inconsistent with the Constitution, and all rights, actions, prosecutions, and contracts. This express provision must have its due operation, unless inconsistency plainly appear. The latter makes it the duty of the Legislature at its first session, or *as soon as may be*, to pass such laws as may be necessary to carry the Constitution *into full force and effect*. This section also necessarily appeals to the consciences of the members by their oath of office to perform this necessary duty, and to bring the laws of the

Digitized by Google

State into perfect accord with the Constitution, which is the highest evidence of the will of the people. With the Legislature, therefore, this duty remains, to provide general laws for uniform taxation, and to harmonize all parts of the State by repealing all local and special provisions that stand out upon the body politic as incongruous excrescences.

Judgment affirmed.

Opinion by AGNEW, C. J. WILLIAMS, J., absent.

July, '74, 21. March 20.

Borough of Mauch Chunk v. McGee.

Constitutional law—Title of Act of Assembly—When subject expressed with sufficient clearness.

If the title of an Act fairly gives notice of its subject, so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary under Art. XI. § 8, of the Constitution.

The test of the validity of a particular section is whether it is germane to the subject of the Act as expressed in the title.

The title of the Act of 24 March, 1869 (P. L. 514), was: "An Act giving the right to the town council of the borough of Mauch Chunk to build drains and sewers, and to file liens for the building of the same." The second section of the Act authorized the borough authorities to impose a yearly charge on property owners "who may have tapped or may hereafter tap any sewer culvert, or drain which was built or may hereafter be built at the expense of the borough," until the borough should be reimbursed for the cost of building such sewers; which charge should be collected by an action of debt.

In an action of debt against one who had, previously to the passage of the Act, tapped a sewer theretofore built:—

Held (reversing the judgment of the Court below), that the second section of said Act was not unconstitutional.

Allegheny Home's Appeal, 27 Sm. 77 (S. C., 1 WEEKLY NOTES, 213), and Com'th *v.* Green, 8 Sm. 226, affirmed.

Error to the Common Pleas of Carbon County.

Debt by the borough of Mauch Chunk against Bernard McGee, brought in 1872, to recover one year's rent for the use of a sewer, built by the borough in 1868, and shortly thereafter tapped and used by the defendant.

On the trial, before DREHER, P. J., the plaintiff, to maintain the issue on his part, relied on the Act of 24 March, 1869 (P. L. 514), entitled "An Act giving the right to the town council of the borough of Mauch Chunk to build drains and sewers, and to file liens for the building of the same," and upon an ordinance of said borough passed April 12, 1869. Section 1 of said Act authorized the building of such drains and the collection of the cost thereof from owners of premises in front of which the same should be laid. Section 2 is in the following words:—

"SECTION 2. That the borough authorities are hereby authorized to impose such charge as they may deem reasonable upon the owner or owners of any lot or lots who may have tapped, or who may hereafter tap, any sewer, culvert, or drain which was built or may hereafter be built at the expense of the borough: *Provided*, the charge shall not exceed at the rate of one dollar yearly per foot of the lot or lots fronting on said sewer, culvert, or drain; and the said charge may be discontinued when the borough is fully reimbursed for all the expenses and costs incurred in building and maintaining the said sewers, culverts, or drains; the said charge or charges may be collected by action of debt, as ordinary actions of debt are now recoverable: *And provided further*, That twenty days' notice shall be given to the owner, reputed owner, or occupier of lot or lots against which the charges may be imposed, and then upon failure of the payment of the same, suit may be brought as above specified; and if the owner or owners of said lot or lots cannot be found in the county of Carbon, service upon the occupier or occupiers or agent or attorney shall be deemed sufficient; and if no owner or agent can be found in the said county of Carbon, then notice may be posted up on the lot or lots with the same effect as if personal notice were given.

The said ordinance substantially adopted and re-ordained the provisions of the Act.

The Court, being of opinion that the second section of the Act of 1869 was unconstitutional, on the ground that its subject was not clearly expressed in its title, directed the jury to find for the defendant. Verdict and judgment accordingly. The plaintiff took this writ, assigning for error the instruction of the Court.

Albright (with whom was *Freyman*), for plaintiff in error.

The Act of 1869 does not offend against the true construction of Art. XI. § 8 of the Constitution, requiring the subject of all acts to be clearly expressed in the title.

Yeager *v.* Weaver, 14 Sm. 428.
Dorsey's Appeal, 22 Id. 195.
Allegheny County Home's Appeal, 27 Id. 77; S. C., 1 WEEKLY NOTES, 213.
State Line & J. R. R. Co.'s Appeal, Id. 429.
Penna. R. R. Co. *v.* Riblet, 16 Id. 164.
Blood *v.* Mercelliott, 3 Id. 391.
In re Church Street, 4 Id. 353.
Commonwealth *v.* Green, 8 Id. 226.

Edward J. Fox (with whom was *Allen Craig*), for defendant in error.

The tendency of the title was to mislead. It affords no indication of the power given by the 2d section of the Act, to impose on individuals an exorbitant charge for public works theretofore constructed. The title is prospective: "An Act giving the right . . . . *to build* drains and to *file liens* therefor"; the enactment is retrospective, charging those who *may have tapped* drains *already built*. The title refers to filing liens, the Act authorizes an action of debt. The enactment not only is not "clearly expressed" in the title,

Digitized by Google

it is not expressed at all, or rather, the reverse is expressed. None of the authorities cited apply to this case, except Dorsey's Appeal, which is in our favor. See also—

West Phila. P. R. Co. *v.* Union P. R. Co., 9 Phila. 495.

May 8. THE COURT. The Court below thought that the second section of the Act of 24 March, 1869 (P. L. 514) was unconstitutional because too foreign to the title of the Act. The title is,

An Act giving the right to the town council of the borough of Mauch Chunk, to build drains and sewers, and to file liens for the building of the same." It is settled in this State that a part of an Act not within the subject stated in the title may be declared to be unconstitutional, leaving the portion within the title to stand. (Dorsey's Appeal, 22 P. F. Smith, 192; Allegheny Home's Appeal, 27 P. F. Smith, 77; Smith *v.* McCarthy, 6 P. F. Smith, 359; Com'th *v.* Green, 8 P. F. Smith, 234; Cooley's Constitutional Limitations, 178.) The first section is conceded to be constitutional. The real question then is, whether the second section is germane to the same subject, giving to the second section the interpretation it may reasonably have. We think it falls within the general subject of the title. It is the duty of the Court to reconcile the different parts of a law, if it can be reasonably done, rather than to declare any part void, and thus frustrate the legislative action. The subject of the title is the building of drains and sewers in Mauch Chunk, and securing the expense of so doing. The true purpose of the second section is to enable the borough to collect the expense of building sewers and drains, built or to be built, from those who use them. The words "and the said charge may be discontinued when the borough is reimbursed for all the expenses and costs incurred in building and maintaining the said sewers, culverts, and drains," were intended to put an end to the special yearly charge per foot when the owner of a lot had paid his proportion of the expense. This must be treated as mandatory to guard against a continuing charge for *construction* beyond the time of full payment; leaving the borough under its general powers, which are ample, to collect a reasonable and uniform charge from lot holders for the *use* of the sewer if they continue to use it. The purpose, as thus interpreted, being to enable the borough to collect the cost of construction from those who use the sewer, it is not so foreign as to be declared unconstitutional.

The variations in the circumstances referred to in the second section are not an absolute departure from the subject itself. A sewer built before the passage of the Act was not illegal, for the structure falls clearly within the powers conferred in the second section of the general borough law of 3 April, 1851 (Purd. Dig. 167), this borough being under that act. The sewer being legally built, it was substantially, though not literally, within the intent expressed in the title, that is to authorize the borough to file liens for the building of the same, which substantially expresses the idea of securing and collecting the expense. The difference in the time of the construction of the sewer is evidently immaterial, not being absolutely repugnant to the main intent to authorize the building of sewers and collecting the expense.

It is also objected that the remedy given in the second section is not by way of filing a lien, but by action of debt. This, however, is only modal. The purpose of filing a lien is to secure the expense. Yet it does not expressly give any remedy for collection. But as collection is the substantial fruit intended of the authority to file the lien, no one could contend that any remedy for collection given by the Legislature in the body of the Act, would be foreign to the title; it might be debt on the lien, a *scire facias*, or other writ suitable to accomplish the purpose. A judgment in debt would itself be a lien, and becomes efficient for collection by execution.

Upon the whole section we cannot, in view of its evident purpose, say it is not substantially germane to the subject of the title. It will not do to defeat useful and honest legislation by too rigid an adherence to the letter of the Constitution. As remarked by C. J. GIBSON, following C. J. TILGHMAN, a constitution is not to be interpreted as articles of agreement at common law, and where multitudes are to be affected by the construction of an instrument, great regard should be paid to the spirit and intention. (Monon. Nav. Co. *v.* Coons, 6 W. & S. 114) "It is a cardinal rule," said the late C. J. THOMPSON, "that all statutes are to be construed so as to sustain rather than ignore them, to give them operation if the language will permit, instead of treating them as meaningless," and I may add, or treating them as invalid. (Howard's Appeal, 20 P. F. Smith, 344) It is not the purpose or the duty of the Court to catch at pretexts to avoid legislation, when it can be fairly reconciled with the Constitution. This has been the current of decision in this State in many cases. (Blood *v.* Mercelliott, 3 P. F. Smith, 391; Case of Church St., 4 P. F. Smith, 353; Com'th *v.* Green, 8 P. F. Smith, 226; Allegheny Home's Appeal, 27 P. F. Smith, 77; State Line *v.* Juniata P. R. Co. App., Ibid. 429.) In the Commonwealth *v.* Green, Justice SHARSWOOD remarked that the intention of the constitutional amendment was to require that the real purpose of a bill should not be disguised or covered by the general words "and for other purposes," which was formerly so common, but should be fairly stated; and it must be

Digitized by Google

a clear case to justify a court in pronouncing an Act, or any part of it, void on this ground. So it was said in Allegheny Home's Appeal, "If the title fairly gives notice of the subject of the Act so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary." An exception to this general rule is when the title tends to *mislead*, and to draw off intention from a covert purpose contained in the body of the bill. Such was the case of the Union Pass. Railway Co.'s Appeal (29 Legal Intelligencer, 1872, p. 380). The case before us has no such features. We think the Court below erred in holding the second section of the Act to be unconstitutional.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by AGNEW, C. J. WILLIAMS, J., absent.

May, '75, 119. May 15.

Brown's and Wood's Appeal.
Bare's Estate.

Recording acts—Index—Mortgage—Lien—Duty of mortgagee—Searches.

The lien of a mortgage is effectual from the time of its being left for record and entered by the recorder upon his entry book.

The failure of the recorder to record and index a mortgage for nine months after entry, does not affect its lien, although in the interval judgments have been obtained against the mortgagor.

Appeal from the Common Pleas of Huntingdon County.

Bare, being the owner of real estate, on July 15, 1872, executed a mortgage of it to Shaver and Gayton for $533. On the same day the mortgagees left it with the recorder of deeds, who immediately entered it on the entry book, but did not actually record it till December 4, 1872, nor index it till April 15, 1873. On November 15, 1872, a judgment was obtained by Brown against Bare for $258, and on December 4, 1872, one by Woods for $200. On June 2, 1873, the real estate was sold by the sheriff under the mortgage. The fund remaining after paying the expenses of sale, amounting to about $650, was paid into court, and an auditor was appointed to distribute it. The fund being insufficient to pay in full the claims of all the lien creditors, he reported that the judgment-creditors, Brown and Woods, should be paid in preference to the mortgagee, upon the ground, that, in consequence of the delay in indexing, the mortgage acquired no lien as against subsequent purchasers, or judgment-creditors, whose liens were obtained prior to the actual indexing of the mortgage. To this report the mortgagee filed an exception, that the auditor erred in awarding the fund to Brown and Woods before appropriating it to the payment of the mortgage. The Court below (DEAN, P. J.) sustained this exception, and awarded the fund first to the mortgagee, and the small balance remaining to the judgment-creditors, who appealed from this decree.

W. H. Woods, for the appellant.

Indexing a mortgage is essential to the validity of its lien. Without it, notice is not given to subsequent purchasers or creditors. In Speer *v.* Evans (11 Wright, 144), WOODWARD, J., referring to the mortgage index, said, "as a guide to inquirers, the index is an indispensable part of the recording, and without it the record affects no party with notice." In Luch's Appeal (8 Wright, 519), READ, J. said, "Mortgages are and must be recorded in mortgage books, and are of course not properly recorded in any other species of book, where they cannot be found by means of the mortgage index. Any other construction would render our registry system valueless and impossible." It is well-settled that a judgment not properly indexed is not a lien upon lands as against a subsequent *bona fide* purchaser. (Bear *v.* Patterson, 3 W. & S. 233; Mann's Appeal, 1 Barr, 27.) The remedy of a party aggrieved by the failure of the recorder or prothonotary to properly index his lien is against such officer. It therefore behooves mortgagees to see that their mortgages are properly indexed and recorded. It is not enough to have them entered at the recorder's office.

Brown and *Bailey*, contra.

The only statute regulating the entry of mortgages and the priority of their liens is the Act of 28 March, 1820, Purd. Dig. 231, which provides as follows:—

"All mortgages or defeasible deeds in the nature of mortgages. . . . . shall have priority according to the date of recording the same without regard to the time of making or executing such deeds, and it shall be the duty of the recorder to endorse the time upon the mortgages or defeasible deeds when left for record, and to number the same according to the time when they are left for record, and when two or more are left for record on the same day, they shall have priority according to the time they are left for record, and no such mortgage or defeasible deed shall be a lien until recorded or left for record as aforesaid."

The duty which the Act requires of mortgagees is simply to leave their mortgages with the recorder, and to have them entered in regular order. This was done in this case, so that the recording was valid and complete. The statutory provision for indexing is found in the Act of 29 March, 1827 (Purd. Dig. 1248), which Act makes no allusion to any question of lien or priority, but provides a penalty of $50 to be recovered from the recorder in case he fails to keep an index.

The citation from Speer *v.* Evans, *supra*, upon examination will be found to be an *obiter dictum* upon a question not before the Court, and all its

Digitized by Google

force is taken away by Schell *v.* Stein (26 Sm. 398). The cases relating to the indexing of judgments are not analogous.

May 22. THE COURT. We are of opinion that the entry for record in the proper book kept for the purpose, of the mortgage of John S. Bare to Shaver and Gayton, gave it a lien which was not divested by the delay of the recorder of deeds in recording and indexing the mortgage. Under the law the lien of the mortgage begins when it is left for record and entered in this book, which the law requires to be kept for the purpose of showing what deeds or mortgages are left for record.

It is not easy to see on what principle a duty rests on the mortgagee to supervise the actions of the recorder, and to see that he makes the record and indexes it immediately. The law having provided the entry book to give notice of the fact that the instrument is left for record, the rest depends on the number to be recorded, and the force of the recorder to write up the record books.

PER CURIAM. Decree affirmed with costs, and appeals dismissed with costs to be paid by the appellants.

WILLIAMS, J., absent.

[*Cf.* Act of 18 March, 1875, P. L. 32.]

Jan. '70, 56. Feb. 29.

Evans et al. v. Borie et al. and The Keystone Zinc Company.

Corporation—Liability of directors or promoters making purchase of lands from themselves at an advance—Equitable estoppel—Laches.

A., B., C., and others, being owners of land, organized a company, elected directors from their number, and authorized a purchase for the Company of the lands at a large advance. K. and E. became stockholders, and at a stockholders' meeting obtained information of alleged mismanagement by the directors. At a subsequent meeting K. and E. voted their stock on the question of the acceptance of an amendment to the charter. Four years and a half after their knowledge of the illegal sale, they filed a bill to make the defendants account to the Company for their illegal profit. Y. and Z., two years after the filing of the bill, and more than six years after their knowledge of the facts, joined in the original proceeding:

Held (affirming the decree of the Court at Nisi Prius), 1. That K. and E. were estopped by their action at the stockholders' meeting. 2. That Y. and Z. were to be considered parties only from the date of their intervention, and were consequently barred by the Statute.

Certificate from the Nisi Prius upon the entry of a decree dismissing the complainants' exceptions, and confirming the Master's report (reported on the hearing at Nisi Prius, 1 WEEKLY NOTES, 127).

The bill, filed by Manlius G. Evans and Hartman Kuhn, for themselves and for all other stockholders of the Keystone Zinc Company who should join with them, against Borie, Maitland, Wister, Hopkins, and others, and The Keystone Zinc Company, averred that the individual defendants had made an illegal profit from a sale to the Company of lands and leasehold rights, and that the defendants owning a majority of share would not permit the corporation to take action against themselves for the purpose of obtaining relief. The bill *prayed* that the defendants should account for their illegal profits, and should pay the amount thereof, when ascertained, into the treasury of the Company.

Subsequently Wells and Kenney, other stockholders, on their own application were made parties complainant to the bill.

The facts found by the Master (Edward Olmsted) were as follows:—

In March, 1864, Wister, Borie, and Hopkins, three of the defendants, held the option to purchase certain lands and leases of land containing zinc ore, at the price of two hundred thousand dollars. On March 24, they determined to purchase them, and to organize a zinc company, or make a resale, if they could make a profit of fifty thousand dollars. Accordingly, on that day, they obtained subscriptions from the other defendants for a large amount toward the price at which they held the option to purchase ($200,000), and then subscribed themselves the balance necessary to make up the purchase money; it being stipulated among all the parties to this agreement that certificates of stock should issue to them in the proportion of their subscriptions towards the purchase money as soon as a company, into which the property could be put, should be organized. It was also agreed that Borie, Wister, and Hopkins should be paid their expected profit of fifty thousand dollars in forty thousand shares of the projected company, at one dollar and twenty-five cents per share. On March 25, the parties to the agreement of the previous day met and decided to organize a company, under a charter controlled by Wister, incorporating The Keystone Zinc Company; the capital to be one million dollars divided into two hundred thousand shares at five dollars each.

It appeared at this meeting that several of the parties had already sold at five dollars per share part of the stock they expected to get upon organization. This was disapproved by others, and all agreed that future sales should be made for joint account only, and a committee was appointed to sell one hundred thousand shares at par, which sales were made. The receipt given to purchasers was in the following form:—

"Received of dollars in full for a subscription to shares of stock in a company

Digitized by Google

hereafter to be organized under the title of The Keystone Zinc Company, with a capital of one million dollars, divided into two hundred thousand shares at five dollars each."

In this manner the complainants bought before any organization the stock held by them.

The proceeds of the sale of the one hundred thousand shares were distributed as follows: Two hundred thousand dollars were paid to the owners of the property purchased; two hundred and fifty thousand dollars were paid as profits to the parties to the agreement of March 24, and fifty thousand dollars were retained to be used for speculating in the stock of the Company, and the profits of this speculation were paid to the same parties.

The corporators named in the Act "to incorporate The Keystone Zinc Company" met on April 6, accepted it, and opened subscription books. The subscriptions made were of ten thousand shares, all subscribed for by a number of the parties to the agreement of March 24, and the money therefor was paid by Borie out of the fifty thousand dollars previously retained for the purpose of speculating in the stock.

On the following day these subscribers to the stock met and resolved that the stock of the Company be divided into one hundred thousand shares of the par value of five dollars each, and after electing a president and directors, all of whom were among the purchasers of March 24, adjourned to the next day. At the adjourned meeting the capital stock was increased to two hundred thousand dollars, and the directors were directed to purchase for the Company the property which had been sold for $200,000 by Lewis and Tatham (the previous owners), and pay for the same in one hundred and ninety thousand shares of stock. At a subsequent meeting the president reported that a conveyance to the Company had been made on April 8, 1864.

On April 8, certificates were issued for the ten thousand shares subscribed at the organization. There were also issued at the same time to Borie the one hundred and ninety thousand shares in payment for the property. Of these Borie divided among the parties to the agreement of March 24 ninety thousand shares as part of their profit on the resale of the land to the Company. The remaining one hundred thousand shares were transferred to the parties' broker for distribution and delivery to the parties who had bought stock, and received the receipt above mentioned. These last mentioned parties were not present at the meeting at which the Company was organized, nor at the meeting of the subscribers to the ten thousand shares of stock when the purchase of the land was determined on. The only parties present were some of those who had entered into the agreement of March 24. The Master reported, on the authority of McElhenney's Appeal (11 Smith, 188), that the individual defendants were liable to account, on the ground that the sale and purchase by the directors of the Company by and from themselves for the Company at a price beyond that which they paid, was "a transaction so incorrect that it was quite impossible that any court of justice could permit it to stand."

He reported, however, a decree, dismissing the bill, because of the complainant's laches and estoppel under the following state of facts:—

In the winter of 1864-65, Mr. Kuhn, being informed that something was wrong in the organization or management of the Company, urged one of the directors to cause a meeting of the stockholders to be called that they might have an opportunity of inquiring into its affairs. At such a meeting on October 3, 1865, he learned that which was of such a damaging character to the concern, and to those having the management of it, that he consulted counsel with reference to bringing an action to recover his subscription. This, however, was not done. At a meeting on the 17th following, both Kuhn and Evans were present, and voted against the acceptance of an amendment to the charter authorizing the Company to create a mortgage. The bill was filed March 19, 1870. The other complainants, Wells and Kenney, did not become parties to the bill until 1872, more than six years after they knew the facts which entitled them to relief.

Exceptions to the Master's report, filed by the complainants, were dismissed, and the report confirmed, whereupon the case was certified to the Court in banc.

G. T. Bispham and *E. S. Miller*, for the complainants.

To create an estoppel against a party, there must be some wilful, intentional, or careless misleading of another.

Commonwealth *v.* Moltz, 10 Barr, 531.
Hill *v.* Epley, 7 Casey, 334.

It is also established by all the authorities that the act or omission of the party estopped must have directly induced some action on the part of the person protected by the estoppel, which will lead to injury if the estoppel be not enforced.

It is absurd to say that two stockholders by attending a meeting could estop the whole body. The same vigor is not to be expected from a class of persons as from individuals.

Perry on Trusts, 170.

Wells and Kenney are not barred by the statute, for they are to be considered as parties from the original filing of the bill.

O'Kelly *v.* Bodkin, 2 Irish Eq. 361.
Sterndale *v.* Hankinson, 1 Sim. 393.

R. C. McMurtrie and *G. W. Biddle* (*James W. Paul* with them), contra.

The only remedy in this case would have been rescission. But a majority of stockholders must

Digitized by Google

elect to rescind. Even if the remedy here sought were proper, it has been barred by lapse of time.

The facts material for the complainants to know were in the minutes of the Company at or immediately after the time of the transactions, and they have waited too long to be entitled to relief in this proceeding.

May 8. THE COURT. This is substantially a corporation bill. It was filled by Evans and Kuhn, who are stockholders in the Keystone Zinc Company. Some two and a half years thereafter the bill was amended by adding two other stockholders as complainants.

The ground of complaint is that, in the formation of the company, both the defendants and the plaintiffs were associated together, that the defendants purchased certain mineral lands, and sold them to the corporation of which they were directors for a sum many times greater than they actually paid for them; that the price they had paid was concealed from the plaintiffs, whereby a resulting trust has arisen, and the defendants are liable to account for the profits which they have made. The Master found the evidence all-sufficient to establish a constructive trust, but reported that the bill be dismissed by reason of the laches of the plaintiffs in filing it. The Court confirmed the report and dismissed the bill.

We will therefore consider the sufficiency of the laches and attending circumstances to justify the decree of the Court.

In March, 1864, the agreement for the formation of the company was made and the defendants entered into a contract for the purchase of the land. The necessary Act of incorporation was procured in a few days thereafter. Early in the next month the defendants obtained a conveyance of the land, and sold it to the corporation (of which they were then directors), and certificates of stock were issued thereon in pursuance of a resolution of the stockholders. At a meeting of the stockholders early in 1865, Kuhn swears that he obtained information "of such a damaging character to the concern and those having the management of it, that I at once determined to take legal measures for the recovery of my money, which I considered had been improperly made use of." With that view he consulted counsel, but in consequence of other persons occupying a similar position having brought actions in the case, which were then proceeding, he postponed instituting any proceedings. At another meeting of the stockholders held in October of the same year, Kuhn and Evans were both present and participated in the proceedings; they voted their stock on the question of the acceptance of an amendment to the charter, authorizing the company to borrow money, issue bonds, and secure the same by a mortgage on the estate and franchises of the corporation.

It is true they voted against the acceptance of the amendment, but that fact in no wise changes the legal effect of their action for the purposes we are now considering. The amendment was adopted by a vote of the majority of the stockholders representing a majority of stock. At the same time a resolution was also passed authorizing the directors to borrow money on the security of the mortgage. This bill was not filed until nearly four and a half years after that meeting. If the case rested in the lapse of time alone, that would be insufficient to bar the plaintiff's right to file this bill. As a general rule a constructive trust in regard to personal rights or personal property may be asserted at any time within six years after a knowledge of the facts creating it. At the expiration of that time it is barred by the analogy to the time fixed by the Statute of limitations. (Ashhurst's Appeal, 10 P. F. Smith, 290.) But laches for a much shorter time than six years, aided by other circumstances, will bar the right. (*Idem.*)

There is another aspect of this case: the relief prayed for is not that the defendant shall pay anything directly to the plaintiffs, but that they shall pay into the treasury of the corporation, whereby the plaintiffs may be benefited by the increased property of the company. The attempt is to obtain relief through the equitable rights of the corporation. Then the knowledge and conduct of the latter must be considered. The bill is not to repudiate, so much as it is to enforce a constructive or implied contract. The land was conveyed to the corporation 8th of April, 1864; nearly six years thereafter the bill was filed. The minutes of the corporation of the same month of April, show the facts on which the present complaint mainly rests. The manner in which the certificates of stock were issued and payment of the lands made were sufficient to make inquiry a duty of all who were unsatisfied. No steps were taken to establish a resulting trust.

The October following, the company accepted the amendment to its charter, and authorized a loan, predicated thereon, to be made. The plaintiffs had full knowledge of this action, both present and prospective. They instituted no proceedings to prevent it; they acquiesced in it; they thereby encouraged the directors to borrow money in pursuance of the resolution of the stockholders. They thereby induced the defendants to believe that no legal proceedings would be instituted predicated on the original purchase of the lands. Afterwards the defendants lent money to the corporation, but not under authority of the amendment. The Master has found that they seem to have fairly and honestly endeavored to manage its affairs for the advantage of the stockholders. Nevertheless the company became embarrassed, judgments were recovered against it by creditors.

Digitized by Google

All its property, both real and personal, was sold and bought in for the benefit of the creditors. Hence, since the plaintiffs had full knowledge, new business arrangements have been made, and other rights have intervened. These proceedings were delayed, under the attending circumstances, an unreasonable time. Having been so delayed, the laches are fatal to the plaintiffs' bill. This view is fully sustained by Ashhurst's Appeal, *supra*, and the numerous authorities there cited. Although the contract was originally voidable, yet having been acquiesced in by the parties who might have avoided it for a length of time less than six years, but by their conduct having induced the offending parties to believe it was not to be questioned, they are now debarred from avoiding it. The two other stockholders, who became plaintiffs by amendment, are in a worse condition than the original plaintiffs; their first action was more than six years after they had full knowledge. This is not a creditor's bill in which a creditor has come in during the progress of a suit which one creditor has instituted on behalf of himself and others. We are now dealing with a constructive trust. These later plaintiffs are to be considered as such with like effect only as if they had filed an original bill at the time they applied by petition to be added to the record as co-complainants.

Decree affirmed and appeal dismissed at the cost of the appellants.

Opinion by MERCUR, J. AGNEW, C. J., and WILLIAMS, J., absent.

March, '75.

The Delaware, Lackawanna, and Western Rail oad Company v. Mulherin.

Railroad company—Injuries to person unlawfully on track—Act of 4 *April*, 1868, § 1—*Employés—Negligence per se.*

Except at crossings, where the public has a right of way, railroad companies are entitled to a clear track. One who is not an employé of a railroad company has no right to be on its track, and if injured on such track has no right to recover damages except for wanton injury.

Under § 1 of the Act of 4 April, 1868 (P. L. 58), a person employed by a railroad company whose track adjoins that of another railroad company, cannot recover from the latter company for an injury suffered while on its track.

A., an employé of the L. and B. Railroad Company, whose track adjoined a track on which the D., L., and W. Railroad Company had a right of way, while walking on the latter track was struck by a train and injured. In an action for damages by A. against the D., L., and W. Railroad Company:

Held (reversing the judgment of the Court below), that plaintiff, not being an employé of the company defendant, had no right to be on its track, and his presence there was negligence *per se*, and precluded his right to recover damages.

Held, further, that under § 1 of Act of 4 April, 1868, the plaintiff had no right of action against the defendant other than would exist if he had been an employé of the defendant, and he, therefore, could not recover.

Error to the Common Pleas of Luzerne County.

Case, *ex delicto*, brought in 1872 by Patrick Mulherin against the Delaware, Lackawanna, and Western Railroad Company for injuries resulting from alleged negligence. Plea, Not guilty.

At the trial, before HARDING, P. J., the plaintiff, Mulherin, testified that he was a brakeman employed by the Lackawanna and Bloomsburg Railroad Company, who owned the track on which the accident occurred; that on 29th June, 1871, being on his train going north and approaching Scranton, he got off to turn a switch, and the train proceeded so fast that he could not get on again; that, after some delay at a watchman's house beside the track, he walked along the railroad to rejoin his train, which had stopped on a siding at a distance of about half a mile. It appeared there were two tracks at this point, one used by trains going toward Scranton and called the northern bound track, and one by trains going toward Pittston and called the southern bound track; and that the Delaware, Lackawanna, and Western Company had a right, by contract with the Lackawanna and Bloomsburg Company, to use these tracks under certain restrictions, for so-called wild-cat or irregular trains. On leaving the watch-house, Mulherin testified he looked up and down the road, and seeing only a train coming from Scranton, and at that moment passing on the further track, he walked a few steps along the northern bound track, when he was struck by a train of the Delaware, Lackawanna, and Western Company coming up behind him, and received the injuries for which the suit was brought. It was conceded that this train was lawfully upon the track.

The watchman testified that Mulherin did look up and down the road, and he and another witness, as well as Mulherin, swore they heard no bell, and that the rate of speed of the train which struck Mulherin was greater than four miles an hour, which was the rule of the company at this point, which was within the limits of the city of Scranton.

The defendants relied on the Act of 4 April, 1868, § 1 (P. L. 58), which is as follows:—

"That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé."

The engineer testified that he did not see Mulherin, but had been ringing the bell for some

Digitized by Google

time before the accident, and that the speed was not more than four or five miles an hour. It was proved that there was a space of about seven feet between the tracks where a man might have walked between two trains, and a space beyond the southern bound track where Mulherin might have walked if he had waited till the train which he saw had passed. The testimony of the engineer on Mulherin's own train showed it was not necessary for Mulherin to rejoin his train at the time he attempted to do so.

The defendants requested the Court to charge, *inter alia*, (5) That if the plaintiff was not an employé of the company using the railroad, then under the rule of Railroad *v.* Norton (12 Harris, 465) he had no right to be on the track, and his presence there was of itself negligence which concurred in producing the injury, and he could not recover. *Answer.* This point we cannot affirm. If you find that he was improperly on the track, or there without exercising reasonable caution, brakeman though he was, then, of course, he cannot recover. But this is a question of fact for you under all the testimony in the case. (6) That, under the Act of 4 April, 1868, § 1 (P. L. 58), the plaintiff had no right of action against the defendant other than would exist if the plaintiff had been an employé of the defendant at the time of the accident, and he, therefore, could not recover. *Answer.* We decline to affirm this proposition. (9) That, as the plaintiff was an employé of the railroad, well acquainted with the running of the trains, and therefore bound to exercise a high degree of care, it was negligence on his part to walk on the track on which he knew trains were constantly running so as to approach him in a direction in which he could not see them. *Answer.* If any other person than a brakeman had gone upon that track, as the plaintiff admits he did, unquestionably it would have been negligence *per se*, and if such person had been run down, it would have been the fruit of his own folly, and he could not recover. Whether the plaintiff was guilty of negligence or not is for you to determine in view of all the evidence in the case, amongst which is the fact that he was a brakeman and that it was his duty to close the switches near the watch-house, his train moving on meantime; and the further fact that he was seeking to join it when he was struck, though with full knowledge on his part that the defendant was running trains every hour in the day over the road at that point.

Verdict and judgment for the plaintiff. The defendant took this writ, assigning for error, *inter alia*, the refusal of the Court to affirm his points.

Stanley Woodward, for plaintiff in error.

If Mulherin was not within the rule governing employés, and if there was a place of safety at hand, he was bound to put himself on it.

Railroad Company *v.* Norton, 12 H. 465.

The Court should say, as a matter of law, it is negligence to walk on the track. In clear cases the question of negligence is for the Court.

Pittsburg & Connellsville R. R. Co. *v.* McClurg, 6 Sm. 294.
Phila. & Reading R. R. Co. *v.* Hummel, 8 Wr. 378.
O'Brien *v.* Phila., Wilmington & Balt. R. R. Co., 3 Phila. 76.

The Act of 4th April, 1868, § 1 (P. L. 58) is conclusive against the right to recover.

C. L. Lamberton, for defendant in error.

R. R. Co. *v.* Norton (*supra*) was decided by a divided Court, and its ruling has never been extended beyond the facts of the case. It is clearly distinguishable from this case. Questions of negligence are for the jury when the measure of duty is ordinary and reasonable care. Whether Mulherin omitted any duty defined or prescribed by law was here for the jury to determine.

R. R. Co. *v.* McElwee, 17 Sm. 315.

He was entitled to all the signals. A railway company owes a duty to persons walking along the track to whistle at crossings, because a crossing is a highway; the track is a highway for employés. Though a trespasser on the road, his right of recovery would not be defeated.

Catawissa *v.* Armstrong, 13 Wr. 186.
R. R. Co. *v.* Lewis, 1 Weekly Notes, 550.

The Act of 1868 is unconstitutional, containing several distinct subjects not expressed in the title. In its retroactive effect it has been declared "a flat denial of right and a violation of the due course of law."

Kay *v.* Pa. R. R. Co., 15 Sm. 269.

The second section has been decided unconstitutional even before the new Constitution.

Central R. R. of N. J. *v.* Cook, 1 Weekly Notes, 319.

But the first section, even if valid, is inapplicable, as the plaintiff, not having been hurt on the defendant's railroad, is not within its words or purview.

Catawissa R. R. Co. *v.* Armstrong, 13 Wr. 187; S. C., 2 Sm. 282.

McClintock, in reply.

The first section of the Act of 1868 has been expressly declared constitutional in—

Kirby *v.* R. R. Co., 32 Leg. Int. 21.

Central R. R. of N. J. *v.* Cook (*supra*) involved only the constitutionality of the second section. A portion of an Act may be held unconstitutional without affecting the validity of the remaining portion.

May 8. The Court. This was an action of trespass on the case for injuries resulting from alleged negligence on the part of the employés of the railroad company in moving their cars. The undisputed facts of the case are substantially as follows: The injury was caused by the train of the Delaware, Lackawanna, and Western Railroad Company. The track was owned by the Lackawanna and Bloomsburg Railroad Com-

Digitized by Google

pany; the former company had the right of trackage over the road by virtue of an agreement between the two companies, and the train of the Delaware, Lackawanna, and Western Company was lawfully upon the track. There are two tracks at the point where the injury occurred. Between the inside rails of said tracks there is a space of seven feet in width, leaving a clear space between passing trains of about three and a half feet, while outside of the southern track there is room to walk without danger. Patrick Mulherin, the plaintiff, was in the employ of the Lackawanna and Bloomsburg Company as a brakeman. On the morning of the 29th June, 1871, he was on his train approaching Scranton from a northerly direction, when near Jackson Street he got off from his train to turn the switch, and, having performed this duty, he went to the watchman's house near the switch, where he remained some time in conversation with the watchman, then lighted his pipe and started towards Scranton to join his train, walking on the northern track. When he stepped on said track, a train was passing him on the southern track. Instead of waiting until the train had passed and then crossing over both tracks to the outside of the southern track where there was clear space to have walked with safety, he continued walking on the northern track until he was overtaken by the defendants' train moving in the same direction, struck and badly injured. Upon this state of facts he seeks to recover from the defendants damages for the injuries sustained.

It was held in The Railroad *v.* Norton (12 Har. 465), that, where a person places himself on the track of a railroad, he can claim no damages except for wanton injury, and not for injury sustained in the pursuit of the company's lawful business in the ordinary manner, even though the negligence of the company's agent contributed to the result. It was said by Mr. Justice WOODWARD, in delivering the opinion of the Court, that, in order to enable railroad companies to carry safely, "the law insists upon a clear track." This doctrine cannot be too emphatically asserted or rigidly enforced. We hold these corporations to a strict line of responsibility wherever passengers are injured by accidents to their trains. It follows that we should be equally emphatic as to their control of their tracks. Except at crossings, where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril. The company have not only a right of way, but such right is exclusive at all times and for all purposes. This is necessary not only for the proper protection of the company's rights, but also for the safety of the travelling public. It is not right that the lives of hundreds of persons should be placed in peril for the convenience of a single foolhardy man who desires to walk upon the track. In England it is a penal offence for a man to be found unlawfully upon the track of a railroad. It would add materially to the public safety were there a similar law here.

These remarks do not of course apply to employés of railroad companies whose duties require them at certain times and for certain purposes to be upon the track. They go there in the course of their employment; and under the well-settled rules of law they take the risk. In cases of personal injury they have no redress against the company employing them, and by the act of whose servants it is occasioned. In this case the plaintiff was not in the employ of the defendants, but was a brakeman of the Lackawanna and Bloomsburg Company. The evidence clearly shows that he was not necessarily on the track when he was struck by the train. He got off his train to perform a duty, to wit, the adjustment of a switch. That duty had been performed when he sought to rejoin his train. If in doing this he saw fit to walk upon the track, he did so at his own risk. His obligation to join his train involved neither a duty nor a necessity to walk where he was struck. It was clearly proved that there was ample opportunity of reaching his train without incurring such peril. It is true some of his witnesses say he could not have avoided the track without taking a circuitous route. But a careful examination of the testimony shows that this was based upon the fact that when he started there was a train upon the southern track. It appears from the cross-examination of the plaintiff that if he had waited for a few moments until the southern bound train had passed, he could have passed over and walked along the outside of the southern track to his train in perfect safety. It was a mere matter of passing from one given point of the road to another. Whilst so engaged he had no higher protection than a stranger walking over the same ground. It was correctly said by the learned Judge in another portion of his charge: "If any other person than a brakeman had gone upon that track as the plaintiff admits he did, unquestionably it would have been negligence *per se;* and if such a person had been run down, it would have been the fruit of his own folly, and he could not recover." Yet in what better position was the plaintiff than a mere stranger? He was not injured while engaged about the switch, or in any other duty which required his presence *on the track.* Passing from one point to another point on the road was not such a duty unless there had been no other place for him to walk, which was not the case. We think, therefore, that, as applied to the facts of this case, the defendants' fifth point ought to have been affirmed, and that it was error to decline it.

There was also error in not affirming the defendants' sixth point. The case comes clearly with-

Digitized by Google

in the terms of the first section of the Act of 4th April, 1868 (P. L. 58), which provides, "that when any person shall sustain personal injury or loss of life, while lawfully engaged or employed on or about the roads, works, depots, or premises of a railroad company, or in or about any train or car thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé." This Act was passed shortly after the decision in the Catawissa Railroad Company *v.* Armstrong (13 Wright, 186) was published, in which it was held, that, where a person in the employ of one railroad company was injured by the cars of another company who had the right to run their trains over the other road, the person so injured was not precluded from recovery on the ground that he was in the same general employ with the servants of the company whose cars caused such injury. It is highly probable the Act of 1868 was passed in view of this decision. Be that as it may, it is our duty to give it effect according to its plain meaning. The plaintiff's case comes precisely within its terms. He was not an employé of the defendants, but he was employed on or about their road. The fact that the defendants were only entitled to track rights on the roads is not material. This is not a question of the extent of their title. It was the road of the defendants for the purpose of moving their trains, which is sufficient to bring the case within the Act of 1868. This is decisive of the plaintiff's case, and renders it unnecessary to discuss the remaining assignments of error.

Judgment reversed. Opinion by PAXSON, J. WILLIAMS, J., absent.

[See Gerety *v.* Phila. W. & B. R. R. Co., 2 WEEKLY NOTES, 387.]

Common Pleas—Equity.

C. P. No. 3. Sept. 16.

Fulton v. O'Donnell et al.

Discovery in aid of execution—Bill filed as an original bill, and not as of the suit in which judgment has been obtained—Discovery prayed as to a deed which was on record—Remedy at law—Practice.

Sur demurrer to bill in Equity.

The bill, filed to June Term, 1876, No. 694, set forth that plaintiff recovered a judgment in this Court against defendant, to December Term, 1875, No. 382; that execution issued, under which certain personal property of defendant had been sold for $15.85; that the defendant did, and still does, fraudulently conceal his personal property, and that he had fraudulently conveyed certain real estate to his co-defendant, McDowell, by deed dated August 19, 1875, recorded in Deed Book F. T. W., No. 211, p. 363, and that McDowell subsequently mortgaged said premises by mortgage dated January 18, 1876, recorded in Mortgage Book D. H. L., No. 15, p. 62. The bill averred that said conveyance had been made upon a secret trust, and that said mortgage had been made for the use of the defendant O'Donnell, and prayed discovery of the matters set forth.

Demurrer for want of equity, etc.

Pierce Archer, Jr., for demurrer. The bill prays discovery of a deed duly recorded. This will not be compelled.

Rose *v.* Lloyd, 1 Penn. L. J. Rep. 333.
Baker *v.* Biddle, 1 Bald. 394.

The plaintiff has an adequate remedy at law by execution against the real estate. The bill is filed as an original bill, and no *scire facias* issued thereon. The bill does not comply with the requirements of the Act of 16 June, 1836 (Purd. Dig. 593-4).

Phillips *v.* Kern, 6 Phila. Rep. 9.

J. J. Ridgway, Jr. (with whom was *J. Parker Norris*), contra.

Demurrer sustained.

Common Pleas—Law.

C. P. No. 1. Sept. 30.

Lindsey v. Casselberry.

Affidavit of defence—Promissory note—Endorsee not affected by agreement made between maker and payee at the time of signing note.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note by endorsee against maker. The affidavit set forth, "that at the time of making the note there was a distinct agreement and understanding that the note would be renewed at maturity or real estate taken in payment thereof; that the deponent has been and now is ready and willing to fulfil his part of the said contract, and so notified plaintiff's counsel."

Sinn, for the rule. The written instrument cannot be contradicted by a parol agreement.

McNeil *v.* Calligan, 1 WEEKLY NOTES, 282.
Auspach *v.* Best, 2 Sm. 356.
Bearne *v.* Brandeis, 1 WEEKLY NOTES, 102.

Grier, contra.

This note was not given for a money consideration, but with the understanding that it was to be paid in real estate, and therefore the

Digitized by Google

defendant should have the opportunity of carrying out his part of the contract, which he says he is ready and willing to do.

Rule absolute.

C. P. No. 1. Sept. 18.

Schlecht v. Watson et al.

Misjoinder of parties—Husband and wife.

Rule to open judgment and let the defendant into a defence.

Appeal from the judgment of an alderman in which the defendants were named as "W. W. Watson, and A. C. Watson, trading as A. C. Watson."

The copy of book entries filed, showed a charge against W. W. Watson. Judgment having been entered against the *defendants*, for want of an affidavit of defence, an execution was issued against W. W. Watson alone and personal property of A. C. Watson (who is the wife of W. W. Watson), levied on.

The affidavit of A. C. Watson set forth that there was no such firm as W. W. Watson and A. C. Watson, trading, etc.; that she was a married woman and incapable of entering into such a copartnership; and further that the copy of book entries had not been filed within two weeks after the return day of the appeal.

M. H. Todd, for the rule.

J. R. Sprague, contra.

Rule absolute.

C. P. No. 1. **Rezende v. Berques.** Sept. 18.

Affidavit of defence — Unliquidated set-off — Vague and indefinite averments—Insufficiency.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit for a loan of money. Plaintiff's affidavit set forth a loan of $250 to the defendant, to be returned in eight days. The affidavit of defence denied that the loan was made upon the terms set forth by the plaintiff, and claimed an off-set for "services rendered to the plaintiff at his request in the Custom House, in this city, also assisting in procuring a concession for him from the Board of Finance of the Centennial Commission, in making translations, in procuring articles to be written for him in the newspapers, and in other matters, which were worth at least $200." And further, that the plaintiff "agreed to associate the defendant with him as a partner in the Brazilian Coffee House in the Centennial Exposition, but subsequently broke his contract," whereby the defendant suffered "loss and damage to an amount in excess of the whole claim in this case."

King, for the rule. The affidavit is vague and indefinite, and does not sufficiently set forth the services alleged to have been rendered; nor is there any consideration mentioned for the promise of partnership, nor any valid agreement between the parties.

Junkin, contra.

Rule absolute.

C. P. No. 1. **Sanders v. Sanders.** Sept. 30.

Opening judgment for want of an appearance—Practice.

Rule to open judgment and let defendant into a defence.

Ejectment for property sold under an execution, in which the present plaintiff had been defendant; the defendant was a purchaser from the sheriff's vendee.

Judgment was entered for want of an appearance.

Maloney, for the rule.

Although the sheriff has made a return of service "by leaving a copy, etc.," yet in point of fact the defendant had no notice whatever, and never knew of the suit. He has a just and meritorious defence, and it would be a hardship to allow this judgment to stand. A judgment for want of an appearance when there is a good defence, will nearly always be opened by the Court.

Hannis, contra.

The sheriff's return is conclusive, and if false, the defendant has his right of action against him.

Rule absolute.

C. P. No. 2. **Schlecht v. Ristine.** Sept. 30.

Appeal—Return days in September—Laches—Mistake of counsel.

Rule to strike off appeal.

On Sept. 1st, judgment had been obtained before an alderman. Sept. 7th, affidavit and appeal. Sept. 20th, appeal filed. The return-day was Sept. 18th.

Harrity, for the rule, contended that the appeal was too late, and cited—

Act of May 1, 1861, P. L. 535.
Smith *v.* Walker, 1 Weekly Notes, 415.
Gambier *v.* Justice, C. P. 1874 (MS.).

Stein, contra, contended that the return-day of Sept. 18 was not one of the monthly return-days.

The Court said they were bound to make the rule absolute, but inasmuch as the appeal was delayed by mistake of counsel, they would give defendant leave to file his appeal *nunc pro tunc*.

Digitized by Google

C. P. No. 2. **Smith v. Hopple.** Sept. 30.

Affidavit of defence—Separate suits on two notes pending at same time—Consolidation of actions.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note. The affidavit set up that defendant was on the same day served with two writs, one from C. P. No. 4, the other from this Court; that both actions were founded on notes then due, and defendant claims the suits should be consolidated.

Jas. H. Stevenson, for the rule. One of these writs was an *alias*, and its original was issued before the note now in suit was due.

Rule absolute.

C. P. No. . Sept. 23.

Hollinshead v. Shallcross.

Affidavit of defence law—Copy of promissory note omitting an endorsement which had been erased.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note made by J Albert Brous to the order of John B. Stevenson, Jr., and endorsed as follows:—

"Without recourse to me. John B. Stevenson, Jr.
Isaac E. Shallcross.
John B. Stevenson, Jr."

The copy filed did not show the last endorsement and its erasure. The affidavit of defence set up that the "copy filed with the endorsements thereon is not a true and correct copy of the said note," that alterations had been made on it since protest, and that the defendant was not legally an endorser.

Sloan, for the rule.

Rule absolute.

C. P. No. 3. October 7.

Hallahan v. Murray, Garnishee.

Security for costs—Non-resident plaintiff—Rule taken after case at issue and on trial list—Practice.

Rule on plaintiff, a non-resident, to enter security for costs.

Grace, for the rule.

H. M. Dechert, contra. The application is too late. The case is at issue, and on the trial list for November 1.

Troubat & Haly's Pr. p. 741.
Cantelo *v.* Binns, 2 Miles, 86.
Shaw *v.* Wallace, 2 Dall. 179.

Rule absolute.

C. P. No. 3. **Ryan v. McDonough.** October 7.

Practice—Appeal from Alderman in an action for wages of manual labor—Security—Act of April 20, 1876.

Rule to show cause why appeal should not be stricken off.

The claim before the alderman was for wages of manual labor. The defendant gave no bail for the payment of debt and costs.

Lawrance, for the rule.

Dougherty, contra.

THE COURT. Under the Act of 20 April, 1876 (Purd. Dig., Supplement, 2083), the defendant should have given security for the debt and costs.

Leave given defendant to perfect his appeal within one week.

C. P. No. 3. **Elliott v. Adams.** Sept. 30.

Affidavit of defence—Promissory note—Want of consideration—Contemporaneous parol agreement—Contradiction of written instrument.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note by payee against maker. The affidavit set forth that the defendant had never been indebted to plaintiff, and that the note had been given without any consideration under the following circumstances: The defendant was in negotiation with a third party, one Millett, to buy or take from him in trade certain unfinished houses, when they should be clear of liens and encumbrances. The plaintiff, a creditor of Millett, learning of such negotiation, importuned the defendant to give him a note in part payment of Millett's indebtedness to him (plaintiff), which the defendant at first refused to do, but finally consented, on the express agreement and understanding that defendant would not be liable to pay the note unless the arrangement with Millett should be consummated before the maturity of the note; and that Millett had failed, on his part, to complete the transaction.

Jenkins, for the rule. There is no allegation of fraud or mistake. An alleged contemporaneous parol agreement contradicting the written promise is no defence.

Heist *v.* Hart, 23 Sm. 286.

Stillwell, contra. When a promise is made by one party, in consideration of the execution of a written instrument by the other, it may be shown by parol evidence. In a suit between the original parties a written instrument may be explained, varied, or even contradicted, where it is shown that but for the oral stipulations made at the time, the party affected would not have executed it.

Shughart *v.* Moore, 1 WEEKLY NOTES, 598.
Caley *v.* R. R. Co., 2 Id. 313.

Rule discharged.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, OCT.* 26, 1876. [No. 4.

Supreme Court.

May '76, 98. May 26.

Pennsylvania Railroad Company v. Shay.

Evidence—Fraud—What evidence insufficient to go to a jury—Parol evidence to affect sealed instrument—Negligence by illiterate person in executing sealed instrument.

In a question of fraud, where it is sought to impeach a sealed instrument by parol, the evidence of fraud must be clear and precise, otherwise it should be withdrawn from the jury.

It is negligence for an illiterate person to execute a written instrument without demanding to have it read, and he cannot, in such case, impeach the instrument by his uncorroborated testimony of fraud or misrepresentation as to its contents.

Where the Judge below submitted to the jury evidence which he stated in his charge was, in his opinion, insufficient to justify a conclusion of fraud to set aside a release under seal:

Held, that it was error to submit the evidence to the jury.

Error to the Common Pleas of Dauphin County.

Case, by Oliver Shay against the Pennsylvania Railroad Co., to recover damages for the death of his son, aged ten years, caused by the alleged negligence of defendants in running a train by which the boy was killed. The plaintiff having proved the death of the child, the speed of the train in a populous district, etc., the defendant put in evidence the following release and receipt, executed by the plaintiff:—

"KNOW ALL MEN by these presents, that I, Oliver Shay, in consideration of the sum of sixty-nine dollars and fifty cents, to me paid by the Pennsylvania Railroad Company, do hereby release and forever discharge the said Company from all liability to me, for or on account of the accident to my son, resulting in his death, by being struck by Niagara Exp. West, June 6, 1874, near Lochiel Iron Works. Witness my hand and seal the 18th day of June, 1874.

OLIVER SHAY. [L. S.]

"Witness present—ROBT. E. WILLIAMS.

"Received June 18, 1874, of Thomas T. Firth, Treasurer of the Penn. R. R. Co., sixty-nine $\frac{50}{100}$ dollars in full of the above account.

$69.50. OLIVER SHAY."

Williams, an employé of the defendants, and the subscribing witness to the release, testified: "Shay came, and I explained to him why I wanted him to sign twice. He took paper and held it up for two minutes. I then explained it to him and he signed. I read the release portion to him."

The plaintiff offered, in rebuttal, to show that he "can neither read nor write, and did not know the contents of the paper signed by him, and understood it to be simply a receipt for the funeral expenses of his son, and did not intend to release his claim for damages arising from the killing of his son by defendants, and that the witness told him at the time he signed the paper that it was for the funeral expenses, and that he should take the money received to the undertaker and pay it over to him, which he did on the same day." Objected to. Admitted. To sustain this offer the plaintiff testified: "I went to see him (Williams)—paper lying before him. He told me, here is receipt of funeral. I signed and he paid me. I can't read or write. This is my name. I signed it twice."

The defendants, in their points, requested the Court to charge that "the release signed by the plaintiff, being in full of all damages occasioned by the death of the plaintiff's son, bars the plaintiff's right to recover in this case;" and "that it is not competent for the plaintiff, by his own testimony alone, to invalidate a release in writing signed by himself." The Court (HENDERSON, A. L. J.) qualified and affirmed these propositions in the following language:—

"We now come to the release. This we say to you is in law what it purports on its face to be, a release by the plaintiff to the defendant, and for all damages by reason of or arising out of the death of this boy, by the alleged accident on defendant's railroad. It is in writing; it is signed. It is under seal; it is witnessed. The consideration is expressed in the writing, and imported by the seal. It is valid in law, and a complete bar and full defence to the plaintiff's right to recover in this case, unless you are satisfied from the evidence that he was induced to sign it by false statements, or fraudulent representations—that, being ignorant, he was deceived as to the contents of the paper, that it was not read to him, its import and effect misrepresented to him, so that the execution of the release was a fraud upon him.

"Whilst the credibility of the witnesses and weight of the evidence is for you, we do not hesitate to say that we fail to see any sufficient evidence to justify the jury in a conclusion of fraud to set aside the written evidence—the release in this case. You have, on the one hand, attacking the release, the plaintiff, the party interested. He stands alone and seeks to set aside his solemn deed. He says it was only intended by him as a receipt, but you will observe he signed twice. He says he can neither read nor write, but you will have the paper out with you, and may examine his signature, which he admits he wrote.

Digitized by Google

He says the paper was not read to him, but Williams, the witness to the execution, says he read over and explained it to him, and that it was executed in pursuance of an understanding or agreement that he would so execute it, if the defendant would pay the funeral expenses. If there is any truth at all in the testimony of Williams—a witness, it is true, in the employ of the defendant, but he is in no way interested directly in the result of this suit—it overcomes, certainly meets squarely the testimony of the plaintiff. It explains, and when we consider that the defendant claimed immunity from any damage, it explains the small amount in the release, simply the funeral expenses, which was all that they would consent to pay. But even if we set off oath against oath, we must then let the paper speak for itself. And so speaking, does it not deny the right of the plaintiff to recover in this action? Now, we submit this case to you to find such verdict as you think right under the evidence. . . . Again we say to you, that unless the release was fraudulent in its execution, or obtained by fraud, it is a defence to the plaintiff's entire claim, and your verdict should be given for the defendant."

Verdict and judgment for plaintiff. A rule for a new trial was discharged by the Court.

The defendants took this writ, and assigned for error the answer to their points, and the part of the charge above quoted.

Hall and *Jordan*, for plaintiffs in error. The parol proof required to vary or affect a written instrument must be full, clear, and satisfactory. When the paper is under seal, expressing the final conclusion of the contracting parties, the party is estopped from destroying it by his own testimony.

Brawdy *v.* Brawdy, 7 Barr, 157.

If the plaintiff cannot read, and signed the release without requesting to have it read to him, he cannot ask for relief.

Seeright *v.* Fletcher, 6 Black, 380.
Greenfield's Estate, 2 Harris, 489.
Hallenbeck *v.* De Witt, 2 Johnston, 404.
Weisenberger *v.* Ins. Co., 6 Sm. 442.
2 Kent's Com. 646.
1 Story's Eq. § 200 *a*.

The evidence of fraud was not sufficiently "clear, precise, and indubitable" to leave the question to the jury.

Stine *v.* Sherk, 1 W. & S. 195.
Irwin *v.* Shoemaker, 8 Id. 75.
Dean *v.* Fuller, 4 Wright, 474.

The necessity for adhering to these rules is more imperative since the Act of 1869, allowing parties to testify in their own behalf.

Martin *v.* Berens, 17 Sm. 459.
Faucett *et al.* *v.* Currier, 109 Mass. 79; S. C., 115 Mass. 21.

J. C. McAlarney and *J. W. Simonton*, for defendant in error. The facts of the case were for the jury, and were fairly left to them. The Judge went as far as he could without giving a binding instruction to find for defendant. The plaintiff was a competent witness to show fraud in obtaining the release.

June 2. THE COURT. The only error assigned to the charge of the Court is on the subject of the release by the plaintiff given in evidence by the defendants. Its execution was not denied. It was submitted to the jury to find whether it was obtained by fraud There was no evidence given upon the trial, as far as appears upon this record, to justify such a submission. The learned Judge himself said in his charge: "Whilst the credibility of the witnesses and weight of evidence is for you, we do not hesitate to say that we fail to see any sufficient evidence to justify the jury in a conclusion of fraud to set aside the written evidence—the release in this case." Why, then, should it have been submitted? The scintilla doctrine has been long exploded. If believing the plaintiff's witnesses, there was not enough upon which to found a reasonable conclusion, it is not a question of the weight of evidence, but there is no evidence at all.

Putting aside entirely the testimony of Williams, the subscribing witness, who swore that Shay had agreed before to execute such a release if he was paid the funeral expenses of his child—that he read to him the release portion—explained it to him—that he thereupon took the paper in his hand for the two minutes, and then signed—there was nothing in Shay's own testimony to raise the question. All he said was: "I went to see him (Williams)—paper lying before him. He told me, here is receipt of funeral I signed, and he paid me. I can't read or write. (Release shown witness.) This is my name. I may have signed it twice. The paper was not read to me." He does not pretend that he told Williams that he could not read, and asked to have it read or explained. There was nothing untrue in what he says Williams told him. Below the release was a receipt for the funeral, which he also signed. As he wrote his name, Williams had a right to presume that he could read, and had read it. He was not required to read or explain it to him, unless requested. As is said by Chief Justice GIBSON, in Greenfield's Estate (2 Harris, 496), "If a party who can read will not read a deed put before him for execution; or if, being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or at law." Shay did not even deny that he knew what he was signing—that it was a release of all his claim upon the company, in consideration of a sum of money sufficient to pay the funeral expenses.

It has been more than once held that it is

Digitized by Google

error to submit a question of fraud to the jury upon slight parol evidence to overturn a written instrument. The evidence of fraud must be clear, precise, and indubitable, otherwise it should be withdrawn from the jury. (Stine *v.* Sherk, 1 W. & S., 195; Irwin *v.* Shoemaker, 8 W. & S. 75; Dean *v.* Fuller, 4 Wright, 474.)

Since parties are allowed to testify on their own behalf, it has become still more necessary that this important rule should be strictly adhered to and enforced.

Judgment reversed.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

Peter v. Schlosser. March 20.

Justice of peace—Want of jurisdiction—Claim over $100 reduced by admitted set-off—Transcript of justice's record—Evidence—Act of 20 March, 1810.

In a civil suit before a justice of the peace, the *sum demanded* is the test of jurisdiction. If the plaintiff's demand exceeds $100, the justice has no jurisdiction. It is immaterial that the plaintiff admits a set-off reducing it below that amount, even though he so informed the justice before suit brought.

The true spirit and intent of the Act of 1810 (Purd. Dig. 847, pl. 30) is, that the justice shall not investigate and consider any claim exceeding $100. It is not the amount of the judgment which gives jurisdiction—it is the "sum demanded." No delay in making the objection can cure the defect; as consent cannot give jurisdiction, the objection may be made after appeal, trial, and verdict in the Common Pleas.

Error to the Common Pleas of Lehigh County.

This was an appeal from the judgment of a justice of the peace, in favor of Benjamin J. Schlosser, against Santee Peter, for $37.44.

On the trial, before LONGAKER, P. J., the plaintiff, Schlosser, testified, on cross-examination, that he claimed before the justice the sum of $137.78 for goods sold and delivered; that the defendant claimed a set-off of $107.34, part of which was allowed and part disallowed; that he, plaintiff, did not deny certain credits, but entered no credit in his books; that he made the whole of this claim before the justice, and said the defendant might bring in his set-off.

The justice's transcript showed, also, that the plaintiff's whole claim was $137.78; and that on the trial before him, after hearing the parties and witnesses, he (the justice) made certain deductions, leaving the plaintiff's claim $128.28; that the defendant made a further claim of set-off amounting to $90.84, leaving a balance of $37.44 in favor of plaintiff, for which amount he entered judgment for plaintiff. The justice testified that the record was correctly made out, but that, before suit was brought, plaintiff said there was a set-off to reduce the claim to about $50, and admitted that he owed defendant for hauling logs.

The defendant, at several stages of the trial, moved for a non-suit, on the ground that the justice's record and the testimony showed that the plaintiff's claim before the justice was for more than $100, and therefore the justice had no jurisdiction. These motions were denied by the Court. The defendant requested the Court to charge that the record showed conclusively want of jurisdiction. This point was answered in the negative.

The charge of the Court was not brought up with the record; but it appeared by a supplemental paper-book of the plaintiff that, after the jury had come in, and pending a discussion respecting some disputed items, alleged to be on a partnership account, the defendant, after the result was known, but before verdict rendered, excepted to the charge, which exception the Court refused to allow, on the ground that it was too late. A bill was, however, sealed to such refusal.

Verdict and judgment for plaintiff for $32.50. The defendant took this writ, and assigned for error the overruling the motions for a non-suit and the refusal of his point.

John D. Stiles, for plaintiff in error.

This was an adverse proceeding, in which all the evidence, record and parol, shows that the plaintiff's original claim before the justice exceeded $100. The set-off likewise exceeded $100, and, whether admitted or proved on the trial before the justice, there was no jurisdiction as to either the claim or the set-off.

Collins *v.* Collins, 1 Wr. 387.
Stroh *v.* Uhrich, 1 W. & S. 57.
Milliken & Co. *v.* Gardner, 1 Wr. 456.
Funk *v.* Ely, 2 Sm. 442.

The justice's record must determine the sum demanded, and it cannot be contradicted or varied by parol.

Coffman *v.* Hampton, 2 W. & S. 387.

Edmund J. More, for defendant in error.

The plaintiff told the justice, before suit brought, that his claim *was* $137.78, but that he admitted a set-off, which would reduce the claim to about $53. This was substantially telling him that the "sum demanded" was $53. The judgment of the justice was for $37.44. It is a quibble of words to deny jurisdiction where the net sum actually claimed is a balance under $100, of a claim originally above that amount. Jurisdiction of such a claim, where there has been mutual dealings between the parties, is recognized in Collins *v.* Collins, and the other cases cited on the other side, and also in—

Darrah *v.* Warnach, 1 Penna. Rep. 22.
Cleader *v.* Yeates, 5 Wh. 94.

Digitized by Google

May 8. THE COURT. The record does not show any exception to the charge, nor to the answers of the Court on the points submitted. The only question, then, is whether the record shows want of jurisdiction? The case originated before a justice of the peace, by summons under the Act of 1810. By that Act jurisdiction is given to a justice of the peace only "in cases where the sum demanded is not above one hundred dollars." But a creditor who has a claim on his debtor exceeding one hundred dollars cannot give jurisdiction to a justice by allowing a credit to the defendant of a distinct and independent debt so as to reduce his own demand below $100. (Stroh *v.* Uhrich, 1 W. & S. 57.) However large the claim may have been, yet, if it has been reduced by direct payments to a sum not exceeding one hundred dollars, the justice has jurisdiction. (Collins *v.* Collins, 1 Wright, 387). But no part of the principal can be thrown away in order to give the justice jurisdiction. (Evans *v.* Hall, 9 Idem, 235.)

The true spirit and intent of the Act is, that the justice shall not investigate and consider any claim exceeding the sum mentioned in the Act. It is not the amount of the judgment which gives jurisdiction. It is in the words of the Act "the sum demanded." When the defendant is brought before the justice by adverse process, and the amount in controversy exceeds the jurisdiction of the justice, no mere delay in making the objection can give jurisdiction. As consent cannot give it, the objection may be made after trial and verdict in Court. (Collins *v.* Collins, *supra.*)

The question then in this case is, did the "sum demanded" exceed one hundred dollars? The transcript shows that the summons issued December 9, 1861, returnable on the 16th. December 11th, plaintiff filed his claim for goods sold; "whole amount of claim $137.78." On a second meeting of the parties, and after hearing testimony, the transcript further states that the justice made a deduction, "leaving the plaintiff's claim the amount of $128.28." The defendant below claimed set-off, and the judgment was in favor of the plaintiff for $37.44. Thus it is shown by the record, the only sum demanded or claimed by the plaintiff was $137.78. The justice examined and investigated that claim. On the trial the justice, not the plaintiff, reduced the claim or sum demanded to $128.28. At no time was the sum demanded brought within the limits fixed by the Act of Assembly. The plaintiff's claim was not reduced by any evidence given either by himself or by the defendant of payment. It was reduced solely by separate and distinct items of set-off. Jurisdiction cannot thus be given. (Bower *v.* McCormick, 23 P. F. Smith, 427.)

Judgment reversed.

Opinion by MERCUR, J. WILLIAMS, J., absent.

July, '74, 108. Feb. 18.

Burke v. Maxwell et al.

Province of Court and jury—Charge of the Court—Right of the Judge to express an opinion on the evidence—Limits of such right.

Although the right of a Judge to express an opinion on the evidence is undoubted, yet a charge so forcible in its character as almost to sweep away the jury's freedom of decision will not be sustained.

A final instruction to the jury that matters of fact are entirely for them will not validate a charge otherwise unfair and one-sided.

Error to the District Court of Philadelphia Co.

Assumpsit by Michael R. Burke against Anna G. Maxwell, Van Camp Bush, and William E. Smith, administrators of Ebenezer Maxwell, for $4000, the par value of 800 shares of stock of the Tarr and Scott Farm Oil Company. The narr. alleged that in consideration of the purchase of this stock by Burke from Maxwell, the latter guaranteed that within six months from the time of the purchase it would sell in the market for seven dollars per share; and that the stock never sold for the price warranted, but became utterly worthless. Pleas, non-assumpsit, statute of limitations, payment with leave, etc.

Ebenezer Maxwell, of the firm of Bangs and Maxwell, was one of the projectors of the Tarr and Scott Farm Oil Company. He employed M. R. Burke, the bookkeeper of the firm, to sell stock at the par value of $5 per share. Burke alleged that he himself purchased 800 shares on the guarantee set forth in the narr., offering as evidence of the transaction the following certificate:—

PAPER "A."

James Wood	500 shares.
Howard D. Thomas	500 "
Edw. J. Heraty	500 "
M. R. Burke	500 "
J. L. McCartney	250 "
John F. Gannon	200 "
Hugh Fitzpatrick	100 "
Thomas Wilson	100 "
M. R. Burke	250 "
James Gibbon	75 "
John D. Baily	25 "
Total	3000 shares.

I have authorized M. R. Burke to issue my guarantee for the value of the above shares to the parties named therein, when organized, viz., $7 per share.

E. MAXWELL.

Philadelphia, 12mo. 7, '64.

J. L. McCartney testified as follows: "I asked him (Maxwell) if he sold Burke any of the stock. He said several hundred shares. I asked him what he had charged Burke. He said five dollars per share; he said that he would give me the stock on the same terms; that he had given

Digitized by Google

Burke a guarantee that if the stock did not bring from $7 to $10 in six months he would refund the money. I then took 250 shares, and paid $1250 to Maxwell, and got his receipt, I think; I cannot tell what became of the receipt, I suppose I must have given it up at the time I got my certificate. Maxwell said Burke had bought 800 shares; I paid particular attention, and the stock never brought a cent after that, either at private or public sale."

Two certificates dated March 15 and 16 for 600 and 200 shares Tarr and Scott Farm Oil Company, in the name M. R. Burke were put in evidence; also receipts from the oil company to Burke, showing payments for 2250 shares of stock. It was shown by the stock ledger of the company that certificates therefor were issued to him; but it was admitted that these included the shares sold by him as agent for Maxwell.

Maxwell died September 10, 1870, and on April 25, 1871, Burke brought this suit against his administrators.

The defendants alleged that Burke never paid anything for his shares, but that Maxwell transferred them to him in consideration of his service in selling stock, it being understood that the guarantee did not apply to them. Witnesses testified that Burke overdrew $1400 on his account with Bangs and Maxwell during the latter part of the year 1870, and that, when attempts were made to collect this sum, he said that unless the claim was withdrawn, he would cause oil suits to be brought against Maxwell's estate, which would make it suffer more than the amount of the claim.

Lynd, J., said in his charge: ["The burden of proof in this case is on the plaintiff. It would be on the plaintiff in any event. It would be in any event if an ordinary case. It is much more upon him when the circumstances are so unusual. . . . Burke must satisfy you he had $4000 to put into it. . . . With all that I have stated, it by no means follows that the important element of the plaintiff's case has been made out: that in point of fact he did buy of Mr. Maxwell 800 shares of the stock and pay him $4000. . . . McCartney testifies that Maxwell told him that Burke had paid him, and Burke held receipts which would indicate he had bought 800 shares, and a much greater number of shares, and got certificates for the stock. If these two elements stood alone, if the certificates were for 800 shares, I think you would have no difficulty in reaching a conclusion that plaintiff's contention is right. But unfortunately, as I view the case, these elements of testimony don't stand alone. They are accompanied by other facts and considerations which modify and nullify them. And one of the most important facts is a negative one, that is to say, there is no proof before you or attempt to prove that Mr. Burke ever had $4000 to put into the stock. In an ordinary case, it would be obvious, you could decide the case with much more satisfaction if it was shown that Mr. Burke had that money at any time. It is a very patent and pregnant circumstance that this case is presented to you without any circumstances to show where the money came from with which he purchased, if he did purchase from Maxwell this stock. The only fact we do have in this connection is against him. For, years after, when he demanded a larger salary, we find him to have been receiving before only $1200 a year. We find he had a wife and family depending on him. A man who only had a wife depending on him might save, but with a family in these times it would be rather difficult. I may say, gentlemen, in this connection, in the absence of evidence to the contrary, you are at liberty to regard your own experience in making inferences from evidence. As to the matter of salary, you are at liberty to regard your own experience. If you believe that Burke did not get more than $1200 a year, you might find that he could not well save much. The absence of that evidence is negative testimony of a very damaging character to plaintiff's case. . . . Again, Mr. Burke's relations to Mr. Maxwell were very confidential. Mr. Burke understood the whole enterprise very well; we may assume he did. We may assume that Burke knew that Mr. Maxwell was not engaged in the enterprise without making a handsome profit, even if Burke did not know the figures. We may ask ourselves with this assumed knowledge whether he would have paid a full price which was charged to others in the general market, whether if he did buy he would not have been put on better terms. And yet he claims that he bought not only 800 shares, but paid the full $5 per share. Again, we may naturally assume that he knew well these transactions of Mr. Maxwell, and was a helper with him. He assisted him to get off these shares. The men whose names you find on the paper were the friends and acquaintances of Mr. Burke. You may assume he made considerable efforts to induce them to subscribe to 2250 shares.

"We may naturally suspect he was paid in oil stock, and would have taken his chances whether this stock would be worth $7 per share. Under such circumstances he would not be entitled to any guarantee. Burke admits, as to the guarantee part of it, this paper is a sham. . . . If paper 'A' is without meaning as to the guarantee, is it any use as to the purchase, or proof of the fact that there was any purchase at all? But did not the paper make it necessary that Maxwell when applied to by McCartney and other people should not falsify it by word of mouth? Did not Burke and Maxwell understand just what the paper was for? Did not they fully understand one another? When Maxwell stated to

Digitized by Google

McCartney that Burke had bought, was it not the same sham that the paper itself was? Is it fair now for Burke to set it up as a verity?] . . . .

"It is proper to call your attention here to the fact that I have not instructed you as to any matter of law. In all I have said, substantially, there is no law, and I am simply giving you my impressions of this case. You are not bound at all by anything I have said. It may be for want of explanation I have entirely mistaken the whole subject matter; that what I have regarded as points being against plaintiff are without force. If on consultation with each other you reach such conclusion, you may disregard all I have said; all this is for you exclusively. Instructions as to mere matter of fact—as to what the evidence has been—as to the weight of it, or inferences it will bear, are all for your consideration. You are the judges of the whole matter.

["You may have noticed that very rarely in the cases brought before you have I instructed you as to facts; I have instructed you as to the law, but left the facts to you. This case, however, is a remarkable one and an important one, and I have deemed it important to present views which, were I in the jury-box, would control me in giving my verdict against the plaintiff.] You are not bound by it; if it don't accord with your own reflections, you may disregard it. . . . [I think Burke's sole fault consists in using this paper for a purpose for which it was never made. He is using it to give corroboration to another branch of his case. There are a great many degrees of wickedness in this world. I don't think that Burke's wickedness amounts to a capacity for direct crime, while if my impressions are correct his fault is very considerable. . . . Should you find against plaintiff as to the oil stock guarantee, you will have still to consider the question of set-off, and if you find there was an overdraft of $1400, you will have to find, not merely a verdict for defendants, but will find due them so much as the overdraft amounts to."]

Verdict and judgment for defendant for $1702.40, the amount of the overdraft with interest. The plaintiff took this writ, assigning for error (in numerous specifications) the portions of the charge in brackets.

J. G. Johnson, for the plaintiff in error.

A charge such as this, in many respects unsupported by the evidence, and so forcible in its character as almost to sweep away the jury's freedom of decision, far transcends the Judge's powers.

Ins. Co. *v.* Walden, 12 Johns. 513.
Ditmars *v.* Com'th, 11 Wr. 337.
Mohney *v.* Evans, 1 Sm. 84.
Ralston *v.* Groff, 5 Id. 278.

G. Junkin (with him *C. E. Morgan*), contra.

It is not only the right but the duty of the Judge to express an opinion on the facts of the case in his charge, provided he does not mislead the jury as to their duty and power, or control their deliberations and decision.

Ditmars *v.* Commonwealth, 11 Wr. 337.
Mohney *v.* Evans, 1 Sm. 84.

March 13. THE COURT. The right of a Judge to express an opinion upon the evidence has been recognized in a number of cases. In Ditmars *v.* Commonwealth (11 Wright, 335), it was said by THOMPSON, J.: "It is not error upon the part of the Court to express an opinion merely upon the facts of the case, if they are properly referred to the jury. It is often very proper to do so. It aids the jury, and subserves the ends of justice. Care must always be taken, however, not to infringe the province of the jury, so as to relieve them from the full responsibility of pronouncing an intelligent judgment upon them for themselves." The Judge has a right to aid the jury by an expression of his opinion upon the effect of the evidence, but not so as to mislead them or control their deliberations (Mohney *v.* Evans, 1 P. F. S. 80.) And it must be done in such a manner as not to be one-sided or unfair. (Ralston *v.* Groff, 5 P. F. S. 276.) The learned Judge who tried this cause in the Court below, went far beyond any recognized rule in his discussion of the evidence. It may very well be that he regarded it as a case which to some extent justified him in influencing the jury. But even if such were his views he went too far. There can hardly be a doubt but that his charge controlled the jury. It is true that near its close he told them that they were not bound by his views, and might disregard them, yet almost in the same breath he informed them that if he were in the jury-box he would find against the plaintiff. This, taken in connection with the whole tone and tenor of the charge, bore so heavily upon the plaintiff as to leave him scarcely a chance. This was practically controlling the verdict. Where there is sufficient evidence upon a given point to go to the jury, it is the duty of the Judge to submit it calmly and impartially, and if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him Deductions and theories not warranted by the evidence, should be studiously avoided. They can hardly fail to mislead the jury and work injustice. Tested by the principles I have indicated, there was error in the portions of the charge referred to in the first, fourth, fifth, sixth, seventh, eighth, ninth, and tenth assignments. We have no doubt the learned Judge intended to do exact justice, but he unwittingly stepped over the

Digitized by Google

line. So far from the charge being a calm impartial presentation of the evidence, some portions of it at least went far beyond the evidence.

Deductions and theories are drawn, which if not wholly unsupported, should have been left for the jury. I have looked in vain through the testimony for anything to justify such expressions as these: "Again we may naturally assume that he knew well these transactions with Maxwell, and was a helper with him." . . . "You may assume he made considerable efforts to induce them to subscribe to 2250 shares." . . . "We may naturally suspect he was paid in oil stock, and would have taken his chances, whether this stock would be worth $7 per share," and again, "Burke admits, as to the guarantee part of it, this paper is a sham." Mr. Burke was not examined, and the record utterly fails to disclose any such admission. It is needless to particularize further. Similar errors run all through the charge.

There was also error in the instruction contained in the third assignment. It was not essential for the plaintiff to prove that he had $4000 to put in this stock. It was no part of his case. He may have purchased it without the money; a large proportion of the business transactions of the world are based upon credit. The validity of a contract does not depend as a matter of law upon a cash consideration. We perceive no error in the remaining assignments.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by PAXSON, J. WILLIAMS, J., absent.

[*Cf.* Musselman *v.* R. R. Co., 2 WEEKLY NOTES, 105; Central R. R. Co. of N. J. *v.* Green, Id. 590.]

May, '76, 36. **Shirley v. Entricken.** May 17.

Practice — Costs — Jurisdiction of Common Pleas — Demand exceeding $100*—Set-off—Direct payments—Act of* 10*th March,* 1810, § 26.

If a plaintiff's claim for a sum exceeding $100 be reduced below that amount by the allowance of a set-off and not by evidence of direct payments, he may recover costs; in such case an affidavit that plaintiff believed that the debt exceeded $100 is not essential to a recovery.

A credit claimed by an agent for compensation for services, in an action against him by his principal for the balance in his hands, is to be regarded as a set-off and not as evidence of direct payments.

Error to the Common Pleas of Huntingdon County.

Case stated for the opinion of the Court below in the nature of a special verdict, in which Entricken was plaintiff, and Shirley defendant, each party reserving the right to a writ of error. The defendant was the plaintiff's agent, for the sale of land, and collection of rents and debts. The plaintiff believing him to be considerably in debt, after repeated demands for a settlement, brought an action of assumpsit, and filed a declaration containing the common counts, laying the damages at $2000. No affidavit that the plaintiff believed that the debt exceeded $100, was filed. There was a reference to arbitrators, before whom upon the plaintiff's call the defendant's books were produced, containing, in addition to the payments therein credited, an item of $900 as compensation for services as plaintiff's agent. This entry was made subsequently to the bringing of the suit. The charge was resisted by the plaintiff as exorbitant, but was allowed by the arbitrators, who awarded to the plaintiff the sum of $77.45. This sum the defendant then offered to pay, but refused to pay costs. If the Court should be of the opinion the plaintiff is entitled to costs, then judgment was to be entered against the defendant for the amount of costs taxed in the case, otherwise judgment was to be entered for the defendant.

The Court below said: "It is evident from the case stated that plaintiff's claim was reduced below one hundred dollars by off-set on part of defendant, and, this being the case, plaintiff is entitled to costs, and judgment is ordered to be entered accordingly."

The defendant took this writ, and assigned for error the entering of judgment for the plaintiff on the case stated.

R. B. Petriken, for the plaintiff in error.

The Act of 20 March, 1810 (Purd. Dig. 848, pl. 31), is imperative, that, if the plaintiff fail to file an affidavit that his claim exceeds $100, he shall not have costs if the verdict be for less than that amount. The only exception to this is that if the amount be reduced below $100 by a set-off, the plaintiff may still have costs, but it is otherwise where the amount has been reduced by direct payments.

Stroh *v.* Uhrich, 1 W. & S. 57.
Barry *v.* Mervine, 4 Barr, 330.

The credit claimed by the defendant was in the nature of a direct payment on account, and not a set-off, because it arose out of the same subject matter as the plaintiff's demand. Set-off arises where the counter claim arises out of a new subject matter.

J. R. Simpson, contra.

The defendant's definition of set-off and direct payment is erroneous, and as that definition is the only foundation of his argument, the writ of error must fail.

Wharton's Law Dictionary, tit. "Set-off."

May 22. THE COURT. The facts set forth in the stated case show that the controversy related

Digitized by Google

to matters of claim and defence far exceeding one hundred dollars. The plaintiff's claim was reduced, not by direct payments, but by a counter claim exceeding one hundred dollars.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

Jan. '75, 60. **Johnson's Appeal. In re North's Estate.** Feb. 24.

Wills — Interpretation of — When explanatory parol evidence is admissible — Latent ambiguity.

When the description of a devisee applies with exactitude to one person, parol evidence is inadmissible to show that another person, less exactly described, is the intended object of the testator's bounty.

Appeal from the Orphans' Court of Philadelphia County.

This case was heard in the Court below on exceptions to the report of an auditor (George Junkin, Esq.) in the matter of the estate of Elizabeth R. North.

The facts of the case were as follows: Elizabeth R. North, a maiden lady possessed of considerable property, lived with Mrs. Eliza Burk from 1814 until her death in 1873. Mrs. Burk's children were W. E. Burk, Jas. Burk, Rosamond Burk, Caroline E. Burk, Mrs. Eleanor Simes, and Mrs. Julia Johnson. By a will made in 1869, and a codicil thereto, dated May 4, 1870, Miss North gave the bulk of her estate to Mrs. Burk for life, and, at her death, $10,000 to Caroline Burk, $2000 to Julia Johnson, and $6000 to Rosamond Burk for life, to be divided at her death equally between William and James Burk's children. On January 15, 1873, shortly before her death, she executed a second codicil, as follows: "*Whereas*, I now own $18,000 of the loans of the city of Philadelphia instead of $16,500, and as I desire to make some changes in the dispositon of my estate, I hereby make and declare this codicil to be added and explanatory of my last will and testament, confirming all that is therein contained, except so far as I now alter and change it. I bequeath to Caroline E. Burk, as hereinbefore stated, two shares of the stock of the Philadelphia National Bank, and $8000 of city loan. I hereby revoke the bequest of $2000 to Mrs. Julia Johnson, and leave her $500 of said loan. I hereby limit the bequest to the children of James Burk, after the decease of Rosamond Burk, to and among his sons only, instead of all his children. I revoke the bequest of five shares Philadelphia National Bank stock to Mrs. Louisa McKee, and leave her two shares of said stock instead. I hereby give and bequeath to Mrs. Eleanor Simes, two shares of stock in the Philadelphia National Bank. To Edwin M. Lewis, one share of the Philadelphia National Bank, in addition to the one share of the Farmers' and Mechanics' National Bank. I hereby give and bequeath to Julia Burk, William E. Burk, and James Burk, to each, $500 of the city loan; and I hereby direct that all my bequests be paid clear of collateral inheritance tax. All the rest, residue and remainder of my estate and effects, personal, real and mixed, I hereby give and bequeath to Caroline E. Burk, except my books."

The account of the executors of Miss North's will was referred to George Junkin, Esq., as auditor, and before him there appeared two claimants for the $500 bequeathed in the second codicil to Julia Burk. One of them was Julia Burk, the daughter of James Burk, the other Mrs. Julia Johnson, whose maiden name was Burk. In support of the latter's claim, Edwin M. Lewis was called, who testified that he attended to Miss North's financial affairs during the latter years of her life; that on January 15, 1873, three days before her death, she sent for him to write a codicil to her will; that in directing him how to draw it up, she said, "I want to leave Mrs. Johnson $500, instead of $2000 of city sixes. . . . I wish you to put in very strongly that I desire that the daughters of James Burk shall not get anything at all; they have behaved very badly to mother (or *their* mother); I wish to limit the bequest to James Burk's sons, not his children;" that when he reminded her, after she had finished her directions, that all her city sixes were not disposed of, she said, "I want to leave Julia, William E., and James, $500 each of city loan;" that when she mentioned these names, she did not follow them with the name Burk, but that he supposed she meant Burk, as she had been speaking of the Burks; that he then wrote out the codicil, which he read over to her; that immediately afterwards witnesses were called in, and it was executed; that no one was present while Miss North was giving him the above directions, and that during the whole interview she was very much excited, especially about the daughters of James Burk.

In the rough draft of Miss North's wishes, which Mr. Lewis wrote at her dictation before making out the codicil, the bequest was to Julia, William E., and James, each $500 city stock, no surname being added.

The auditor decided in favor of Mrs. Johnson's claim, on the ground that there was a latent ambiguity in the second codicil as to the object of this bequest sufficient to justify the admission of parol evidence of the circumstances which attended the making thereof, in order to get at the testatrix's true meaning.

Digitized by Google

Exceptions were filed by Julia Burk to this finding of the auditor. These were sustained in the Orphans' Court, and the legacy awarded to Julia Burk. Julia Johnson appealed, assigning for error this decree of the Court.

J. G. Johnson (with him *W. K. Shryock*), for appellants.

The latent ambiguity in a will which will justify the admission of parol evidence to fix the object of the testator's bounty, exists not only when the description applies *equally well* to two or more persons, but whenever each person might be held to be described *with legal certainty*, if it were not for the existence of hostile claims, although perhaps the words apply more exactly to one than to the other. In this case, if there had been no Julia Burk in existence when the codicil was made, Mrs. Johnson would have taken under that description; therefore she had the right to produce evidence to show that she was the person really intended thereby, even though the words more exactly applied to her brother's daughter.

Grant *v.* Grant, L. R., 2 P. & D. 8; 5 Com. Pleas, 380; 18 Weekly Reporter, 576, 951.
In re Fry, 22 W. R. 679.
Redfield's American Cases upon the Law of Wills, 595, note.

B. Sharkey, contra.

Parol evidence to explain a testator's intent can only be admitted where ambiguity exists. But in this case there is no ambiguity whatever; in a brief codicil each of the claimants, Julia Johnson and Julia Burk, receives a legacy in her own name. But even if admissible, the evidence does not establish Mrs. Johnson's claim, for Mr. Lewis expressly says that the codicil, with the bequest to Julia Burk, was read to Miss North before she executed it.

Kelley *v.* Kelley, 1 Cas. 460.
Wallize *v.* Wallize, 5 Sm. 242.
Tucker *v.* Seaman's Aid Society, 7 Metcalf, 188, 204.
1 Redfield on Wills, 498.

March 13. THE COURT. There is no ambiguity in the codicil to the will of Elizabeth R. North. Having bequeathed to Julia Johnson $2000 of the city loan, in the codicil she revokes this legacy, and in lieu of it bequeaths to her $500 of the same loan. Thus, Mrs. Johnson was immediately before her thoughts. After this she had gone but a few sentences until she bequeaths to Julia Burk, William E. Burk, and James Burk, each $500. If, as it is contended, she meant Julia Johnson, whose maiden name had been Burk, and who was a sister of William E. and James Burk, it is a little surprising that when she revoked her legacy of $2000, she had not at once given her in lieu $1000, instead of $500 and then going forward to give her another $500. The idea of mistake seems to be inconsistent with the matters clearly before her mind, and the presence of the name of Mrs. Johnson, as well as that of Julia Burk. There is no reason to doubt that Julia Burk was the intended legatee of the second $500, all these bequests being of the city loan.

PER CURIAM. Decree affirmed, with costs, and the appeal dismissed. WILLIAMS, J., absent.

Jan. '75. Jan. 24.

Reed, Assignee of Lerch, v. Clement.

Mechanic's Lien—Northumberland County—Act of 17th February, 1858 (P. L. 29)—Leasehold estate—"Improvements" construed to embrace wagon-maker's shops.

Under the Act of 17 February, 1858 (P. L. 29), relating to mechanic's liens in the counties of Luzerne and Schuylkill, extended by the Act of 12 March, 1867 (P. L. 404) to the county of Northumberland, a mechanic's lien was filed against a blacksmith and wagon-maker's shop erected for the purpose of manufacturing all kinds of vehicles, on a lot leased for a term of years: *Held* (affirming the judgment of the Court below), that the provisions of the Act embraced said buildings, and were not confined to coal lease estates and fixtures. Thomas *v.* Smith (6 Wr. 68) affirmed.

Error to Common Pleas of Northumberland County.

Scire facias sur mechanic's claim by Ira T. Clement against S. O. Reed, assignee of J. F. Lerch. The claim was for the value of lumber and other materials furnished to the said Lerch, and used by him in the erection of a large blacksmith and wagon-maker's shop, upon a lot of ground in Sunbury, in which he had a leasehold interest for the term of seven years, and was filed under the Act of 17 February, 1858 (P. L. 29), the provisions of which were extended to Northumberland County by the Act of 12 March, 1867 (P. L. 404). The act of 1858 is as follows:—

"The provisions of an act relating to the liens of mechanics and others upon buildings, approved the 16th June, 1836, and the several supplements thereto, are hereby extended to all *improvements*, engines, pumps, machinery, screens, and fixtures erected or put up by tenants of leased estates on land of others in the counties of Luzerne and Schuylkill, and to all mechanics, machinists, and material-men doing work or furnishing the articles or materials therefor. Provided, that the lien hereby created shall extend only to the interests of the tenant or tenants, lessee or lessees therein, and to the improvements, engines, pumps, machinery, screens, and fixtures, erected, repaired, or put up by the mechanics, machinists, persons, or material-men entering liens thereon."

On March 2, 1874, a rule to show cause why the lien should not be stricken from the record was obtained by the defendant upon the following grounds: (1) It is entered against a leasehold estate for the ordinary purposes of business, etc.,

Digitized by Google

which is against both the policy and express letter of the law, the tenant being in no wise connected with the coal or oil business. (2) Because such leasehold estates are no other than personal property, and cannot, therefore, be bound by such pretended lien. (3) The building it proposes to bind by such pretended lien, is erected and constructed on a lot or piece of ground in which the defendant, J. F. Lerch, had, and his assignee now has, only a term of years as an interest.

The COURT (ROCKEFELLER, P. J.) discharged the rule, saying: "The Act of 12th March, 1867 (P. L. 404), extends the act relative to mechanic's liens, in the counties of Luzerne and Schuylkill, approved 17th February, 1858, to the county of Northumberland. This latter act has had a construction put upon it by the Supreme Court, which I am bound to follow. In the case of Thomas *v.* Smith (6 Wright, 68), it was decided that a mechanic's lien may be filed against an ice house erected for the purpose of carrying on the business of storing and selling ice on a lot leased for a term of years, and that the act does not apply to coal lease estates only. This is a mechanic's lien upon a large carriage and blacksmith shop, as the lien shows; it is, of course, erected and used for purposes of manufacturing carriages and vehicles of all descriptions, and in every sense a building or improvement, not as an outhouse or appurtenant to a man's residence, "but as an independent and separate structure for purposes of commerce," and until the Supreme Court expressly overrules the said case of Thomas *v.* Smith, I think this building must be held to be subject to a mechanic's lien. In shops of this kind it is more likely that machinery, fixtures, etc., would be used than in or about an ice house. The cases of Schenly's Appeal (20 Sm. 98), and Schmidt & Co. *v.* Armstrong (22 Sm. 355), do not overrule Thomas *v.* Smith, but only limit it to the kind of improvements and structures mentioned by Judge WOODWARD, to wit: 'independent and separate structures for purposes of commerce.' The two cases in P. F. Smith decide that the law of 1858 does not apply to ordinary dwelling houses, and expressly leave the case of Thomas *v.* Smith where it was. It is not overruled, as some have supposed from reading the case of Schenly's Appeal. By that case it was thought that the Supreme Court intended to limit the act to coal lease estates, but in Schmidt & Co. *v.* Armstrong, Chief Justice AGNEW says 'this was an error.' The rule in this case to strike off the mechanic's lien is discharged."

To this opinion the defendant excepted, and a bill was sealed. The defendant then, by leave of the Court, filed an affidavit of defence, setting forth at length the reasons given on the motion to strike off the lien, and alleging that the building was used merely for hand work, contained no such improvements as "machinery, engines, pumps, screens, and fixtures," and was many miles from the coal or oil regions where such improvements are located. On December 29, 1874, a rule for judgment for want of a sufficient affidavit of defence was made absolute, the Court adopting the opinion given upon the motion to strike off the lien as the basis of its decision, and judgment for $497.07 with interest was entered for the plaintiff.

The defendant took this writ, assigning for error the action of the Court in discharging the rule to strike off the lien, and in entering judgment for want of a sufficient affidavit of defence.

S. Malick and *Sober*, for the plaintiff in error.

It has often been decided by this Court that such a lien as this cannot be filed against a leasehold estate under the general law of 1836, and no special or later legislation has rendered such a lien valid. The Act of 1858 extends only to such improvements as are mentioned therein, viz, "engines, pumps, machinery, screens, and fixtures," and is applicable to the coal regions only.

Schenly's Appeal, 20 Sm. 98.
Schmidt *v.* Armstrong, 22 Sm. 355

Thomas *v.* Smith (6 Wr. 68) is distinguishable from this case.

[AGNEW, C. J. No, it comes to this—you wish us to overrule Thomas *v.* Smith and construe this Act to relate only to the coal regions.]

Yes.

T. H. Purdy, contra, argued that the Act of 1858 made "improvements" a separate class of objects from engines, pumps, etc., and that nothing in the Act restricts its operation to the coal regions. This case comes under the express ruling of Thomas *v.* Smith (*supra*), which was neither overruled nor materially modified by the cases cited by the other side.

Jan. 31. THE COURT. This case is governed by the decision in Thomas *v.* Smith (6 Wright, 68). It is as much an improvement under the Act of 1858 as the ice house described in Thomas *v.* Smith. The cases of Schenly's Appeal (20 P. F. Smith, 98) and Schmidt & Co. *v.* Armstrong (22 P. F. Smith, 355) left Thomas *v.* Smith unimpaired.

PER CURIAM. Judgment affirmed.

WILLIAMS, J., absent.

May '76, 52. May 18.

Swift v. Allegheny Building and Loan Association.

Practice—Judgment for want of an affidavit of defence—Building Association mortgage—Sci. fa. containing no sufficient averment of breach.

The *scire facias* in a proceeding on a mortgage takes the place of a declaration, and must show on its face

Digitized by Google

an immediate cause of action. A breach of a condition in a mortgage will not be inferred; it must be distinctly averred in the *scire facias*.

Error to the Common Pleas of Blair County.

Scire facias sur mortgage by the Allegheny Building and Loan Association against Swift. Judgment was entered in the Court below for want of an affidavit of defence. The *scire facias* contained no averment of breach of the special condition stipulated in the mortgage. The defendant took a writ of error, assigning for error this entry of judgment.

S. S. Blair, for the plaintiff in error.

Neff & Clark, and *Alexander & Herr*, contra.

May 29. THE COURT. The *scire facias* recites that the mortgage was to secure a bond conditioned for the payment of six hundred dollars, "with interest thereon, payable on the third Friday of each and every month thereafter, together with the monthly dues on three shares of the capital stock of the Association aforesaid, now owned by the said William Swift, and such fines as might be imposed thereon under the constitution and by-laws of the Association aforesaid, with a proviso that if at any time default be made, and six consecutive months are suffered to elapse without paying up all instalments of interest and monthly dues on said stock, and all fines for non-payment thereof, as aforesaid, or any or either of them, then and in such case the credit given on said principal sum shall cease and determine, and the same with the interest, the monthly dues, and the fines for the non-payment thereof shall be taken as due and payable, and may be recovered forthwith." The only averment of a breach of this condition is that "the said sum of six hundred dollars with the interest thereof as yet remains unpaid." This averment is the usual one in the case of an ordinary bond, with a condition for the payment of money. It is inapplicable to the case of a special condition such as that contained in the bond as recited in this *scire facias*, and it is insufficient to ground a judgment for want of an affidavit of defence upon. The *scire facias* takes the place of a declaration, and it should show on its face an immediate cause of action. It does not allege a failure to pay any instalment, and it cannot be inferred that there has been a failure to pay such instalment for six consecutive months.

How, then, does it appear that the principal sum has become immediately recoverable by action? This it was incumbent on the plaintiffs below to aver and set forth in the *scire facias* with reasonable certainty. This the averment contained in this *scire facias* does not do, and the judgment below was therefore erroneous.

Judgment reversed, and procedendo awarded.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

May, '76, 37. May 23.

Berlin Beneficial Society v. March.

"Funeral benefits" to widow or relatives—To whom payable under by-law of Beneficial Society—Widow living separate from her husband not entitled to.

A by-law of a beneficial Society provided that at the death of a member the sum of $25 should be paid "to his widow or relatives towards his decent interment."

In an action against the Society by the widow of a deceased member (who, it appeared, had lived apart from her husband for some years prior to his decease), to recover the stipulated sum, the Court below rejected an offer by defendants to show that they had already paid the amount to the decedent's son-in-law, who alone had attended to and incurred the expense of the funeral:

Held **(reversing the judgment of the Court below), that the evidence should have been admitted.**

Held, further**, that the widow, having voluntarily separated from her husband, and living apart from him at the time of his death, was not entitled to the bounty of the Society.**

Error to the Common Pleas of Adams County.

Assumpsit by Barbara March against the Berlin Beneficial Society, incorporated. The following facts appeared on the trial: Daniel March married the plaintiff in 1857, and lived with her in Berlin until five or six years before his death, when, by mutual agreement, they separated, the husband assigning all the property to his wife, who paid him one hundred dollars. They never lived together afterward, the wife testifying: "He lived in Berlin by himself; did his own cooking and housekeeping; I didn't go to see him." He died suddenly while going to the house of his son-in-law, and was buried from there. Plaintiff attended the funeral, but took no part in any arrangements for it, and gave no orders concerning it. At the time of his death Daniel March was a member of the Society in good standing. The by-laws contain the following provision:—

"At the death of a member . . . the Association shall pay to his *widow or relatives* twenty-five dollars for and towards his decent interment, and at the next stated meeting each member shall pay an extra contribution of fifty cents, which shall be given to *the widow* of such member."

The action was brought by the widow to recover only the twenty-five dollars for funeral expenses, the money raised by the contribution of fifty cents by each member having been paid to her.

At the trial the Society defendant offered to prove that the funeral was held from the house of the son-in-law; that he had paid for the shroud, etc., and ordered the coffin, and that the defendants had paid the twenty-five dollars to him before plaintiff brought suit. The Court re-

Digitized by Google

jected the offer as insufficient to constitute a defence, and instructed the jury to find for the plaintiff. Verdict and judgment accordingly. The defendants took this writ, and assigned for error, *inter alia*, the rejection of their offer of evidence, and the instruction of the Court.

H. B. Woods, for plaintiff in error.

The defendant, in the exercise of a sound discretion, might pay the money either to the widow of a deceased member, or to any other relative who would undertake his decent interment.

David Wills, for defendant in error.

A reasonable construction of the by-law gives the right to the twenty-five dollars first to the widow, if any; and if the decedent left no widow, then to the relatives. The Society has not the option to pass by the widow, and give the amount to more remote kindred.

June 5, 1876. THE COURT. Daniel March died at, and was buried from, the house of his son-in-law, who seems to have provided all things necessary for the funeral. Mrs. March, the plaintiff, wife of Daniel, was not living with her husband at the time of his decease, nor had she been for some six or eight years previously thereto. According to her own testimony, the separation resulted from a mutual understanding between themselves, and not from any coercion or ill-treatment upon his part. Following the analogy afforded us in the case of Hettrick *v.* Hettrick, (5 Sm. 290), in which it was held that a widow, separated from her husband under like circumstances to those above stated, was not entitled to the three hundred dollars exempted by the Act of 1851, we cannot see how the plaintiff was entitled to the bounty of the Society defendant. This bounty was intended for the benefit of the widow of the deceased, or, in case he should leave no widow, then for his children; the obvious intention being to aid and abet those who had been immediately dependent upon him for sustenance and support, and who, by his death, would be left helpless. This, however, cannot be predicated of the plaintiff, for she was not of his family at the time of his death, nor had she been for many years; she had not performed the duties of a wife to Daniel March, and was in no wise dependent upon him for maintenance.

This reasoning would apply to the donation she has already received from the treasury of the Society, but it has all the greater force when considered in connection with her claim for the twenty-five dollars, which she seeks, in this suit, to recover. That sum of money was, by the rules of the Society, especially designed to aid in the "decent interment" of the deceased; but about this she put herself to neither expense nor trouble. The son-in-law, to whom, it was proposed to show, the twenty-five dollars were paid, bore the burden of the funeral; and if it be so that the coffin is not yet paid for, clearly she is not liable therefor, whoever else may be. In this matter she has incurred neither cost nor liability, and it would be strange indeed if she were entitled to money devoted to an object which she in no degree assisted to promote. The defendant's offer of evidence should have been received; but the exceptions taken to the narr. are not sustained.

The judgment is reversed, and a new *venire* awarded.

Opinion by GORDON, J. WILLIAMS, J., absent.

May, '76. **Weaver v. Zimmerman.** May 18.

Covenant—Breach of—Land, defective title—Evidence—Bankruptcy.

W., having contracted, under seal, to purchase land of Z., clear of encumbrances, before the time fixed for the execution of the deed, gave notice that he would not take it. Upon the day fixed for its execution a deed was tendered to him, but he refused to accept it. In an action to recover the damages stipulated in the agreement for its breach:

Held, that, after W.'s notice of his intention not to take the property, Z. was not bound to satisfy a mortgage against it before tendering a deed.

Held, further, that an offer by the defendant to show that the plaintiff was insolvent at the date of the execution of the agreement and the tendering of the deed, for the purpose of showing that the title might have been impeached by an assignee in bankruptcy, was properly rejected, because not accompanied by proof of fraudulent intent in the plaintiff, and knowledge in the defendant.

Error to the Common Pleas of Lebanon County.

Covenant by Zimmerman against Weaver to recover the amount of damages stipulated for the breach of a covenant to purchase land. Plea, *non est factum*, covenants performed, *absque hoc*, etc. Upon the trial, before HENDERSON, A. L. J., it appeared that the parties, on September 29, 1873, executed an agreement under seal, containing, *inter alia*, the following clauses:—

The said Wm. Zimmerman, for the consideration hereinafter mentioned, doth for himself, his heirs, executors and administrators, covenant, promise and agree, to and with the said Daniel Weaver, his heirs and assigns, by these presents, that he, the said Wm. Zimmerman, will, on or before the 1st day of April, A. D. 1874, at the proper costs and charges of the said Daniel Weaver, his heirs and assigns, by good and lawful deed or deeds, fully and sufficiently grant, convey, and assure unto the said Daniel Weaver, his heirs and assigns, in fee simple, clear of all encumbrances, all that certain messuage and tract of land, etc. . . . And for the true performance of all and singular the covenants and agreements aforesaid, each of the said parties bindeth himself, his heirs, executors, and administrators, unto the other, in the sum of one thousand dollars, lawful

Digitized by Google

money of the United States, to be taken as stipulated damages, and not as a penalty.

About a month after making the agreement, Weaver notified Zimmerman that he would not take the land. Nothing more occurred till April 1, 1874, when Zimmerman went to Weaver's house, and tendered a deed; but Weaver, seeing him coming, ran out of sight, and avoided him. The deed was then read aloud in the house in the presence of Weaver's wife, and Zimmerman did all in his power to make a formal tender. On September 29, 1873, there was a $1200 mortgage against the land, which remained unsatisfied on April 1, 1874.

The defendant offered to prove that Zimmerman was hopelessly insolvent on September 29, 1873, and on April 1, 1874; and that this fact was discovered by the defendant after entering into the contract to purchase; for the purpose of showing that the defendant had reasonable cause to believe that the sale was made to avoid the operation of the Bankrupt Act; that thereby such a cloud rested on the title as would absolve the defendant from accepting the deed. Objected to, because there was no evidence of fraudulent intent by Zimmerman to prefer any creditor. Objection sustained. Exception.

The defendant presented the following points:—

(1) Under the articles of the agreement, the plaintiff must show that, at the time he called to make a tender of the conveyance, as stated in the first point, he was able to make a good fee simple title, clear of all encumbrances, to the property; otherwise he cannot recover. *Answer.* There is no pretence that the title offered was not a good fee simple title, clear of all encumbrance, except the mortgage, which would not prevent a recovery if you should find that the acts, conduct, and notice of defendant excused the plaintiff from removing it. (2) There is no evidence in the cause to show that the plaintiff was able to remove this encumbrance at the time he called at the defendant's house to tender the deed for the property, if the defendant had accepted the conveyance. *Answer.* We submit to you the evidence to determine whether the plaintiff was excused from paying off the mortgage as we have explained to you.

Verdict for the plaintiff for $1090, and judgment thereon. The defendant took this writ, and assigned for error the rejection of his evidence and the answers to his points.

Josiah Funck, for the plaintiff in error.

If the defendant had known the facts set out in his offer of evidence before the agreement of sale was made, it is clear that the plaintiff's assignee in bankruptcy could have recovered the land from him, because the sale would have been a fraud within the 35th section of the Bankrupt Act. We contend the same rule applies in this case, where the condition of the vendor became known after the signing of the agreement, but before the payment of the purchase-money. It is not necessary to show that the title tendered was bad; it is enough if it was doubtful, or attended with circumstances which must, in all probability, involve the purchaser in a lawsuit to vindicate it.

Colwell *v.* Hamilton, 10 Watts, 413.
Gans *v.* Renshaw, 2 Barr, 34.
Swayne *v.* Lyon, 17 Sm. 436.

The refusal of the defendant to take this title did not relieve the plaintiff from the necessity of exhibiting a good title. In a similar case, Hampton *v.* Speckenagle (9 S. & R. 212). TILGHMAN, C. J., said: "Although the defendant had declared that he would not take the land, yet, before the plaintiff would be entitled to recover damages, it was incumbent on him to show that it was in his power to make a good title. He has averred in his declaration, that he was ready to do all things necessary to be done, and that averment cannot be supported if he was unable to make title. If the encumbrances were of such a nature that the jury might be satisfied, from the plaintiff's evidence, that he could and would have removed them, had the defendant been willing to accept a conveyance, the case would fall within the principle of McMurtrie *v.* Bergasse (cited 9 S. & R. 212), and the plaintiff might recover. But the ability to discharge the encumbrance was a point which lay upon the plaintiff to establish *beyond a doubt.* If he failed there, he would not be entitled to damages."

A. R. Boughter and *C. P. Miller* for defendant in error.

The evidence rejected was irrelevant, because not accompanied by an offer to show that the sale was intended to effect a preference or withdraw fraudulently any property from the plaintiff's creditors. Two things must concur to avoid a sale, the fraudulent design of the bankrupt, and the knowledge of it on the part of the vendee.

Tiffany *v.* Lucas, 15 Wall. 410.

There was no offer to show either of these. This case is within the exception stated by TILGHMAN, C. J., *supra.* The encumbrance was of such a nature that the plaintiff could and would have removed it had the defendant been willing to accept a conveyance. There is a distinction between a defective title and a good title encumbered with a pecuniary charge. Equity will not compel a vendee to take the former, but the latter presents no objection, provided the purchaser can be protected from it.

Tiernan *v.* Roland, 3 Har. 429.

This protection could have been afforded in this case, for the satisfaction of the mortgage would have been contemporaneous with the payment of the purchase-money.

Digitized by Google

May 29. THE COURT. This was not an action for purchase-money in affirmance of the contract of sale, but was an action for damages on the ground of non-performance, leaving the contract dissolved. The fact that the damages were liquidated by the parties does not change the character of the action, which was founded on the defendant's absolute refusal to perform his contract. In doing so he subjected himself to his own stipulation to pay a liquidated sum as the consequence of his abandonment of the contract. We perceive no error in the instructions to the jury.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

[*Cf.* Gast *v.* Miller, 2 WEEKLY NOTES, 361.]

Quarter Sessions.

Commonwealth ex rel. Nathaniel McKay v. Alex. K. McClure and Frank McLaughlin.

Libel—Publication in newspaper—New Constitution of Pennsylvania, Art. I., § 7, construction of—Privileged publications—Justification—Truth of charge—Malice or negligence, absence of—Evidence—Burden of proof.

Any malicious publication injurious to the reputation of another is a libel.

The new Constitution introduced an entirely new principle into the law of libel of this State, to wit: that where the matter complained of as a libel is matter proper for publication, and it is established that it was published without negligence and without malice, a criminal prosecution cannot be maintained for such publication.

The Press, in making statements which reflect upon the personal character and integrity of individuals, are bound to exercise the greatest diligence in ascertaining, by reliable testimony, the truth of what they print. The neglect of that diligence is the negligence intended by the Constitution.

Where the defendant, having charged in the alleged libel a criminal offence committed by the relator, justifies by reasserting its truth, the evidence must be sufficient to have convicted the latter upon an indictment for such offence.

Where the defendant reasserts the truth of the matter charged, evidence of investigation and other acts by defendant before publication, is admissible, within a wide range, to show absence of malice and of negligence.

Indictment for libel.

CHARGE OF THE COURT.

Oct. 21. THAYER, J. Gentlemen of the Jury: The defendants are charged in this indictment with publishing a false, malicious, and defamatory libel of Nathaniel McKay. Let us first settle what a libel is. There are many definitions of libel in the law books. I will give you some of them, which seem to me to be the best. An eminent English writer on criminal law, Sir WM. RUSSELL, has defined it to be "a malicious defamation of the character of another, expressed in printing or writing, or by signs or pictures, tending to blacken the reputation of a person, and thereby to expose him to public hatred, contempt, or ridicule."

Mr. Justice DANIEL, of the Supreme Court of the United States, in White *v.* Nicholls (3 Howard Sup. Ct. Rep.), said: "Every publication which, either by writing, printing, or pictures, charges or imputes to any person that which renders him liable to punishment or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice."

Mr. Justice STORY, in Dexter *v.* Spear (4 Mason's Rep.), gave the following definition: "Any publication, the tendency of which is to degrade or injure another person, to bring him into contempt, ridicule, or hatred, which accuses him of a crime punishable by law, or of an act odious and disgraceful to society, is a libel."

Chief Justice TILGHMAN, of our own State, described it as "Any written or printed slander which tends to expose a man to contempt, ridicule, hatred, or degradation of character."

A statutory definition is contained in the Act of March 31, 1860, Revised Penal Laws of Pennsylvania: "If any person shall write, print, publish, or exhibit any malicious or defamatory libel, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, or ridicule, such person shall be guilty of a misdemeanor." These definitions, you will perceive, all agree in their description of the essential features of the offence. Any malicious publication injurious to the reputation of another is a libel. Malice is an essential element of the offence. The very publishing of the libel is *prima facie* evidence of malice, and will require the defendant to rebut the presumption of it. Though malice in common acceptation means hatred, a desire of revenge, or a settled anger against a person, yet, in its legal sense, it means the doing an act without a just cause, wrongfully and wilfully or recklessly. The man who publishes slanderous matter, calculated to defame another, must be presumed to have intended that which the publication is calculated to bring about, unless he can show the contrary; and it is for him to show the contrary.

The article alleged to be libellous, and for which the defendants are now on trial, was published in the *Times* newspaper, in this city, on the 25th of April, 1876. The defendants have

Digitized by Google

admitted that it was written and published by them.

[His Honor here referred to the article alleged to be libellous, and directed the attention of the jury to the principal charges against the prosecutor contained in it.]

No one can doubt that this is a libel upon Nathaniel McKay, if the charges contained in it are not true, unless it was a privileged publication, made without negligence or malice. What publications in the newspapers are privileged? The question is answered by the seventh section of the Declaration of Rights: "No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury."

By comparing this section as it now stands in the new Constitution with the similar provision in the old Constitution, you will perceive that something was added to the new Constitution, which was not in the old. [Judge THAYER here read the similar provision in the Constitution of 1838.] The old Constitution contained no provision for immunity from criminal responsibility where the publication was not due to malice or negligence. The new Constitution, you will observe, contains an express provision exempting from criminal prosecution, where it is established to the satisfaction of the jury that the publication was not maliciously or negligently made.

The effect of this provision (which, so far as I know, now for the first time comes under discussion in a court of justice) was, to bring into the law of libel in this State an entirely new principle. That principle is, that where the matter complained of as a libel is matter proper for public information, and it is established that it was published without negligence and without malice, a criminal prosecution cannot be maintained for such publication.

But let us consider for a moment the true meaning of these words in the Constitution. The defendants are protected by the Constitution from prosecution if they have satisfied you by the evidence that the matter was proper for public information, and was not malicious or negligent. Now the matter embraced in this publication was undoubtedly proper for public information *if it was true*. If it was not true it is *prima facie* presumed to have been malicious. Then the burthen is upon them to remove that presumption by proof that it was not malicious or negligent. Have they done so? That is for you to decide.

What degree of care were they bound to exercise in such a matter? Newspaper proprietors and editors certainly cannot publish without responsibility every story or charge which may be brought to them by their reporters, employés, or others. A public press which should be sustained in doing that would not be the free press of the Constitution—protected because it is intended for the "free communication of thoughts and opinions, which is one of the invaluable rights of man," but it would be an engine of intolerable tyranny—an instrument of oppression and wrong, at war with the plainest principles of justice, and destructive of the peace and security of society.

The Press, in making statements which reflect upon the personal character and integrity of individuals, are bound to exercise the greatest care and diligence in ascertaining the truth of what they print, before they print it. The neglect of that care and diligence is the negligence intended by the Constitution. If they print false statements, injurious to the character of individuals, without having exercised such care and diligence, they are guilty of negligence, and are not protected by the Constitution. They are, it is true, justified in acting upon reliable human testimony; the testimony of credible persons, who allege that they have knowledge of the facts which they communicate. All the transactions of life are based upon such testimony. But they must be held to the highest degree of good faith and of care. If this were not so every man's reputation would be at their mercy, no matter how upright and stainless he might be. The Constitution is a shield for the honest, careful, and conscientious press. It will not permit itself to be made a cover for malice, or for negligent or malicious slanders. With these remarks, gentlemen, upon the true nature and character of the constitutional provision, I leave it to you to determine, upon all the evidence in the case, whether the defendants have acted with that degree of care and good faith in the publication of these statements which the law and the Constitution demand of them. If they have, then they have a right to claim immunity for this publication and to be acquitted of this charge. If they have not, and the publication is false and malicious, then they ought to be convicted.

An important inquiry in this case is, what was the offence with which the defendants charged the prosecutor? Was it larceny, or only illegal, immoral or improper conduct in procuring or executing his contracts with the Government? Did they intend to charge a larceny of personal property of the United States, or something other than that, or both? That is a question of fact for you, which you will determine by reading and examining the article carefully, and by the evidence in the case.

Words ought in general to be taken according to their natural import, according to the meaning which people in general would put upon them,

Digitized by Google

according to the effect which they would naturally have upon the public mind. You have also the right to bring to your assistance in interpreting their meaning the course which the defendants have pursued upon the trial. If they have attempted to justify the publication by proof here that the prosecutor was guilty of larceny, it is fair to presume that that is what they intended to charge him with in the article in their newspaper calling him a thief. Now let us look for a few moments at the charge in that aspect of it. If they justify the charge that the prosecutor was guilty of larceny, the proof to sustain such a justification must be strong enough to convict him of larceny if he were on trial for that offence. That was decided by the Supreme Court in 6 Barr, 170. Now if that were the present condition of affairs—if McKay were on trial by you for stealing Government property, could you, upon the evidence before you, convict him of larceny? I said *if* he was upon trial. I may say he *is* upon trial, for they reiterate now the charges which they made against him originally. They assert now that they are true. They have endeavored to prove them, and they ask you, by your verdict, to enforce the truth of these charges. [His Honor here referred to the evidence adduced by the defendants to show that the matters charged were true.] Now, would you convict a man of larceny upon the evidence which the defendants have produced here to fix that crime upon McKay? If the offence imputed to the prosecutor was larceny, can you say upon your consciences it is proved? proved in such a manner that if he was indicted for it you would find him guilty? If it is, then you ought undoubtedly to acquit the defendants. If it is not, then, if they intended by their article to charge him with that offence, they are guilty and ought to be convicted, unless they have satisfied you by their evidence that "the publication was not maliciously or negligently made."

There is another aspect of the case upon which the defence is partly founded, to which I will now pass. The defendants say they have adduced evidence to show that the prosecutor was guilty of corrupt collusion with subordinate naval officials to obtain government contracts and information relative to bidders, estimates, and contracts; that he obtained contracts by such means, and particularly by corrupt collusion with Naval Constructor Hartt and Assistant Naval Constructor Hoover; and that he attempted to buy off competition for government contracts, and that therefore they were justified in calling him a public thief and plunderer; and that such epithets, applied to the prosecutor, were properly descriptive of such conduct.

The first inquiry with regard to that is, Is this charge true? If it is not proven to be true, you may dismiss this part of the inquiry from your thoughts, for if it is not true, of course it was libellous to charge the prosecutor with these practices in any form of expression. If you should be opinion that these charges *are* true, then the question is whether that was what they intended to impute to the prosecutor by calling him a public thief, etc. Did they intend in this article in their paper to charge the prosecutor merely with immoral or unlawful proceedings in his manner of obtaining contracts, or did they intend to charge him with stealing the public property? If they only intended the former, and if they have established *that* by satisfactory proof, then the defendants are entitled to be acquitted. But if they intended to charge the prosecutor with stealing public property—that is, with having committed the crime of larceny—then they cannot justify that by proof which falls short of proving that he did steal public property—for it is a rule in the law of libel, that, when a man undertakes to justify himself by proving the truth of the alleged libel, he must prove the truth of all the substantial parts of the libel; that is, the truth of all the charges contained in it. The justification must be as broad as the charge. It is not a sufficient justification to show that part of the libellous matter is true. The proof must be as broad as the charge against the prosecutor. If they really intended, therefore, only to charge the prosecutor with immoral practices in obtaining contracts, and have proven that he was guilty of these practices, then the defendants ought to be acquitted. If they have not proved it, they ought to be convicted, unless they have satisfied you by the evidence that the publication was not malicious or negligent. But if they intended to charge the prosecutor with the crime of stealing public property—with the commission of the felony of larceny—they cannot justify that by proving immoral practices in obtaining contracts. If they charged him literally with being a thief, they cannot justify that by proving him figuratively a thief.

What the defendants really intended by their article is to be ascertained from the language which they used in connection with the subject matter of which they were writing, and, from all the circumstances and all the evidence in the case. You will determine for yourselves, and you will also say by your verdict, whether they have proved the truth of the charges which they made against the prosecutor, in the sense in which these charges were conveyed to the public in their paper, or whether they have failed to do so; and, if they have failed to do so, then how far they have made good their claim to immunity under the Constitution. Upon the true nature of that immunity, I have already expressed the views of the Court. I have told you that the protection

Digitized by Google

of the Constitution is not a protection to the publishers of malicious or negligent slanders, but a shield for honest and careful journalists, who, in the exercise of their calling, remember that other people have rights to be respected as well as themselves, and conduct their investigations and their publications upon that principle. If the defendants have, in making this publication, acted with that caution which they were bound to observe, and with that regard for the rights of the prosecutor which the nature of their duty and the law of the land demanded; if, in short, they fully discharged the obligations which the law imposes upon every editor and publisher, before he undertakes to write or publish statements or charges injurious to others, then the Constitution is an impenetrable shield of defence for them. If they did not do that, and if they have not substantiated by proof the charges which they made against the prosecutor, then they cannot hold up the Constitution as a protection against a verdict of conviction. Some pains have been taken to impress upon you the fact that you have a right to render such a verdict as you choose, and that you are not to be subject to the control of the Court. That is a very old controversy, gentlemen, and one long since settled. It may now well be remitted to the domain of legal history and antiquities. There can be no conflict between you and the Court. You have an undoubted right to return a general verdict, for which you are answerable only to your own consciences, and to that dread tribunal where all human actions are judged. The Court desires that no control should be exercised over you except that which is founded in reason and justice, in truth, and the law of the land.

However independent you may be in the estimation of counsel, or in your own estimation, you cannot throw off your allegiance to these without being derelict in the discharge of your duty and false to the oaths which you have taken. Gentlemen, discard from the case all considerations which do not legitimately belong to it. Do not suffer your judgments to be clouded or your consciences to be blunted by passion or by prejudice. Decide the case according to the law and the evidence, and under a sense of the importance and solemnity of the public duty which is imposed upon you.

Give us, gentlemen, a verdict which will, at all hazards, and whatever the consequences may be, vindicate the truth, and do justice between the parties to this proceeding.

Upon the trial, THAYER, J., made the following ruling upon a question of the admissibility of certain evidence of investigation by defendants before publication, offered for the purpose of negativing the allegation of negligence and malice:—

"In this case the defence presents two aspects. In the first place they say that what they published is true; and in the second place they say, that if it was not true, it was not maliciously or negligently made; that they published it upon proper information and after thorough investigation, and that thus they are protected from responsibility by the seventh article of the Declaration of Rights.

"The framers of the Constitution have thought proper to embody in it a section relating to this special subject—prosecution for libels which appear in the public press—and they have defined under what circumstances such a prosecution shall be maintained, and under what circumstances it shall not be maintained. There is the general declaration, in the first place, that the press shall be free, and that it shall be untrammelled; that nobody shall undertake to prescribe what a newspaper shall publish nor what it shall refrain from publishing; that there shall be no censorship of the press. There is, on the other hand, the counterbalance that they who do publish shall do it upon their responsibility. That responsibility is of a twofold kind.

"If they publish what is false, or if they publish even what is true upon an occasion which is not justified by law, or what is not a privileged publication, they do it upon their personal responsibility, and they may be sued for it in a civil court, or held to answer for it in a criminal court.

"With regard to the criminal procedure for a libel there is an express provision in the Constitution, and one so clear that it admits of no doubt. That provision is that no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in a public capacity, or to any other matters proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury. Now how is it possible for the Court to say to the defendants that they shall not adduce evidence to satisfy the jury that this publication was not maliciously or negligently made?

"The Constitution guarantees to the defendant the right to prove to a jury that the publication was not maliciously or negligently made. In other words, the Constitution guarantees the press against public prosecution for charges that they make if they have been made upon plenary evidence, upon full investigation, and in the absence of malice. Such publications are protected by the Constitution.

"If, on the other hand, these accusations are false, if they were made without sufficient investigation, or if they were made maliciously, then the defendants must answer. It is not competent

Digitized by Google

for the Court, because the defendants now reassert the truth of their publication, to deprive them of their defence under the Constitution, which is founded upon their right to show that the publication was neither negligent nor malicious. Now if their proof fall short, and they can prove to the satisfaction of the jury that the charges were founded upon proper and thorough investigation, and that they were not negligently or maliciously made, then they have a right to shelter themselves under the constitutional provision.

"If, on the other hand, it appears that the charges were false; that they did not exercise sufficient care in making them—in other words, that they made them negligently or maliciously, then the defence must fall, and they must, in the language of the Constitution, take the responsibility. But it is quite apparent, I think, from the words of the Constitution, that the defence which is to be made, or which may be made, by the public press against a public prosecution for a libel, is not limited to proof of the truth of the charges made. They may defend themselves upon the other branch of this section of the Constitution, and may show that the publication was not negligently or maliciously made, because the Constitution prohibits a conviction where the defendants make it to appear to the jury that the publication was neither malicious nor negligent. I cannot, because the defendants now, by their counsel, here at the bar reiterate the truth of the charges which they originally made, rightfully deprive them of the other branch of their constitutional privilege and exclude the evidence which is now offered to show that the publication was not negligently or maliciously made. I conceive that, under the Constitution, they have a plain right to show, if they can, that the publication was not negligent or malicious."

Common Pleas—Equity.

C. P. No. 2. Oct. 7.

West Philadelphia Passenger Railway Co. v. Dougherty et al.

Ordinance of Councils authorizing interference with chartered rights—Injunction against parties claiming under such ordinance.

Motion to continue special injunction.

The bill set out the incorporation of the company complainant, and that a supplement to the Act of incorporation authorized it to extend its railway to any part of the Twenty-fourth Ward, in the city of Philadelphia, along any of the public streets or highways thereof, provided it should first present to the Councils of the said city a plan and statement exhibiting the route of any such proposed extension; and if Councils should not, within sixty days thereafter, by ordinance, disapprove thereof, their consent should be deemed to be given thereto; that in conformity therewith complainant caused a plan to be prepared setting forth the proposed extension of its railway on 32d Street, northwardly of Lancaster Avenue, in the city of Philadelphia; and caused said plan, together with a statement in writing, fully describing the route of the said proposed extension, as laid down on the plan, together with a draft of an ordinance approving the same, on July 1, 1875, to be presented to the said Councils of the city of Philadelphia; and that said Councils had taken no action whatever thereupon; that complainant, on February 7, 1876, submitted to the board of surveys of the said city, for its approval, an accurate copy of said plan, which was on same day by said board duly approved; that 32d Street, northwardly of Lancaster Avenue, is laid down as a part of the route on said plan, and was approved by said board of surveys, both as to the two lines of track and as to the siding; that said sidings were located in the manner shown in the said plan at the suggestion and request of the said board of surveys. The said tracks and sidings were then constructed by complainant as laid down on said plan, and it has since used and enjoyed the same until prevented by the defendants.

The bill further set forth that by an ordinance of the city of Philadelphia, approved July 14, 1876, the west side of 32d Street, from Lancaster Avenue 200 feet northwardly, was established as a stand for cabs or hacks, and that, under color of the said ordinance, and by virtue of its pretended authority, the defendants, who are hackmen, doing business in the city of Philadelphia, have occupied the said space on the west side of 32d Street, for the distance of 200 feet northwardly from Lancaster Avenue, as a stand for their cabs or hacks, and threaten to continue to so occupy the said space, by which occupation complainant's use and enjoyment of its tracks and sidings on 32d Street have been interfered with, and its franchises injured. The bill averred that the said ordinance violated complainant's chartered rights, and *prayed* that the same be declared void, and that defendants be enjoined from such occupation, or interference with complainant's use of its tracks or sidings on said 32d Street.

Thos. De Witt Cuyler (*C. S. Patterson* with him), for the motion, cited—

The State *v.* Jersey City, 5 Dutcher, 170.
State *v.* Noyes, 47 Me. 214.

Digitized by Google

W. H. Shakspeare, contra.

THE COURT. The Councils having given consent to the route by failing to disapprove it within sixty days, and the complainants having occupied the street with their rails, Councils could not afterwards grant any right to hackmen which would substantially impair the rights of complainants.

Injunction continued.

Common Pleas—Law.

C. P. No. 1. **Bank v. Ervin.** Oct. 7.

Affidavit of defence—Sufficiency—Promissory note—Collateral security for loan—Renewal note.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit by holder against endorser on several promissory notes. The affidavit set forth that the notes in suit were given as collateral security for a loan to defendant, and that since making the loan, one of the notes now sued on had been renewed and that another had been settled since commencement of suit, and was no longer held by plaintiff, and, further, that on continuance of the loan by plaintiff, other notes had been substituted for those now sued on. A supplemental affidavit, being ordered, set forth: that, in May, 1876, the plaintiff loaned defendant $2500, taking as collateral security three of the notes now sued on, and two others not in suit; that, on June 10th, the said loan was continued for an indefinite period, and subsequently other notes had been substituted for the ones now in suit, which had not yet matured.

Gilpin, for the rule, contended that the affidavits were vague and indefinite.

W. S. Price, contra. Th loan, being for an indefinite period since June last, is equivalent to a call loan, and the affidavit is sufficiently explicit.

Rule discharged.

C. P. No. 2. **Veite v. McFadden.** Oct. 14.

Foreign judgment—Presumption in favor of jurisdiction—Affidavit of defence should deny service if defendant relies upon that fact.

Rule for judgment for want of a sufficient affidavit of defence.

The suit was brought upon the transcript of a judgment, duly certified, from Hunterdon County, New Jersey. The transcript did not show that the defendant had ever been summoned or had ever appealed by himself or by counsel.

The affidavit set forth that the instrument sued upon was not such an instrument as entitled the plaintiff to judgment.

Bowman, for rule.

Pettit, contra. The transcript should nave shown that the defendant was within the jurisdiction of the Court.

THE COURT. The record, *prima facie*, imports jurisdiction. (See 2 Am. Leading Cases, 632.) If defendant relies on the want of service, he should deny it in his affidavit.

Supplemental affidavit allowed.

C. P. No. 2. Oct. 14.

Pastor et al. v. Hicks et al., trading, etc.

Affidavit of defence—Bankruptcy of individual members of firm defendant—Evasive averments.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit by Henry Pastor *et al.* against J. Rodman Hicks, Isaiah Hicks, Charles Magee, and Charles O. Swope, copartners, trading as Hicks, Magee & Co., on two promissory notes made by *Hicks, Magee & Co.*

The affidavit of defence set forth that J. Rodman Hicks, Isaiah Hicks, and Charles O. Swope of the defendants were adjudicated bankrupts on the 12th day of July, A. D. 1876, by the United States Court.

Diehl, for the rule.

The affidavit does not say the makers of the note, the defendant firm, has been adjudicated bankrupt. The bankruptcy of some of the partners is no defence if the firm is not bankrupt.

Rule absolute.

C. P. No. 2. **Torry v. Bast.** Oct. 14.

A suitor on his way from Court is privileged from service of process in a new action.

Rule to set aside service.

The defendant, a non-resident, came to Philadelphia upon notice from his counsel to attend the argument of a rule in the Circuit Court of the United States for the Eastern District of Pennsylvania, in which he was defendant. Shortly after leaving the Court room, while on his way back to his hotel, he was served with a writ of summons in the present case.

G. Heide Norris, for the rule.

Suitors are privileged from arrest or service while attending Court.

Digitized by Google

Miles *v.* McCullough, 1 Binney, 77.
Wetherill *v.* Seitzinger, 1 Miles, 240.

Schick, contra.

The attendance in this case, being only to hear an argument, was not a necessary one. The privilege is the privilege of the Court, not of the party. Where the party's presence is not required, he cannot claim the privilege.

8 Bacon's Abr. 168, title "Privilege."
Cameron *v.* Lightfoot, 2 Wm. Blackstone, 1190.
Starrett's Case, 1 Dallas, 357.

Rule absolute.

C. P. No. 2. **Bryan et al. v. Paul.** Sept. 21.

Debtor and creditor—Execution is prima facie satisfaction.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a book account. The affidavit of defence set forth that the plaintiffs had filed a lien for their said claim upon the property upon the credit of which the goods charged were sold, in Atlantic City, in the State of New Jersey, upon which there was due process, and the said property was sold by the sheriff of Atlantic County, at Absecom, and realized the sum of $1200, which was more than sufficient to pay the claim of said plaintiffs against deponent, whereby deponent's personal obligation was discharged.

Bowman, for the rule.

THE COURT. A levy and sale is *prima facie* satisfaction.

Rule discharged.

C. P. No. 2. Sept. 30.

Harmstead v. Kingsley, Deft., and Fidelity Co., Garnishee.

Attachment execution—Lunatic defendant.

Rule to dissolve attachment.

On July 18, 1876, an inquisition of lunacy was issued in this county, and on July 25 the defendant was reported as a lunatic without lucid intervals from June 10, 1876. On July 28, 1876, plaintiff, having previously obtained a judgment in Delaware County against defendant, filed a transcript in this court, and issued the present attachment.

O'Byrne, for the rule. C. A. V.

Oct. 7. THE COURT, referring to Wright's Appeal (8 Barr, 59), made the rule absolute.

C. P. No. 2. **Burns et al. v. Bowers.** Sept. 30.

Foreign attachment—Presence of defendants within the jurisdiction when writ issued.

Rule to quash foreign attachment.

Depositions showed that the defendants, although not citizens, were in the county when the writ issued.

Hunsicker, for the rule.

Price, contra, admitted that the writ must be quashed, but contended that defendants should be put on terms to appear, or accept service of a summons. C. A. V.

Oct. 7. THE COURT. The plaintiff's demand that defendants should be put on terms would be equitable and convenient, but we do not find any warrant for it in the statute.

Rule absolute.

C. P. No. 3. **Steinwick v. Salter.** Sept. 30.

Replevin—Motion to quash writ—Practice.

Rule to show cause why writ of replevin should not be quashed.

This was an action of replevin brought to recover goods levied on under a landlord's warrant of distress. The motion to quash was based on an affidavit of the constable who made the levy, that the goods were in the possession of and claimed by the tenants of the houses, where the levy was made, as owners, of whom the plaintiff Steinwick was not one.

Wollaston, for the rule. The party replevying is a stranger, and has no claim to the goods.

THE COURT. This is too summary a method to dispose of a replevin suit. The very question in the suit is the ownership of the goods.

Rule discharged.

C. P. No. 4. **In Re Fortieth Street.** Sept. 30.

Road law—Leave given to amend proceedings after appointment of jury and prior to view.

Motion to amend proceedings.

An ordinance provided for the widening of Fortieth Street from Elm Avenue to Mantua Avenue. The street had been widened from Elm Avenue to the Pennsylvania Railroad Bridge, about one-third the distance. Upon a petition reciting the ordinance, a jury had been appointed to view the entire distance from Elm Avenue to Mantua Avenue, and notice had been given to owners of property fronting on Fortieth Street between the two avenues.

The jury had not yet viewed, when a property owner between the bridge and Mantua Avenue objected to the proceedings on the ground that the record would preclude the appointment of a second jury, while the city might afterwards take his land.

The present motion was to amend the proceedings so that the jury should view only the portion of the street actually widened.

Michener, for the motion.

Motion granted.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, NOV. 2, 1876.* [No. 5.

Supreme Court.

July, '74, 131. Feb. 24, 25.

De Coursey v. The Guarantee Trust and Safe Deposit Co.

Landlord and Tenant—Proceedings to recover possession at end of term under Act of March 21, 1772, §§ 12, 13—Enforceable by the assignee of a portion of the demised property—Dispute as to the length of the term no ground to arrest proceedings—Certiorari—When a supersedeas under Act of March 24, 1865, (P. L. 750).

The assignee of a portion of a property sold subject to an existing lease of the whole, is entitled, as well as the lessor or the assignee of the whole, to the remedy given by the Landlord and Tenant Act of 1772, for the recovery of possession at the end of the term.

A dispute as to the time when the term expires is one of the very questions of fact to decide which the proceedings under this Act were given, and is not such a dispute as to the title to the land as, under the thirteenth section thereof, entitles the tenant to an arrest of proceedings.

The Act of March 24, 1865, makes a *certiorari* a *supersedeas* in landlord and tenant proceedings, only where it is especially allowed in the Act creating the proceeding.

Error to the Common Pleas of Philadelphia County.

This was, in the Court below, a certiorari to Aldermen David Beitler and W. P. Hibberd to bring up the record of certain proceedings had before the said two aldermen and a jury of freeholders, under the Landlord and Tenant Act of 21 March, 1772 (Purd. Dig. 879, pl. 17), to recover possession of a property on the east side of Carpenters' Court.

On May 5, 1871, the Carpenters' Company of Philadelphia leased the entire property in question to S. G. De Coursey for two years from July 1, 1871, with the privilege to the lessee of renewal for three years more, and on February 20, 1873, the latter gave written notice to the Company that he availed himself of this privilege of renewal. At that time, however, negotiations were pending between the Carpenters' Company and the Guarantee Trust and Safe Deposit Company for a sale of a portion of the property, and on March 31, the Company gave De Coursey a general notice to quit at the end of the term. On May 31, of the same year, the Carpenters' Company conveyed by deed to the Guarantee Trust and Safe Deposit Company, subject to De Coursey's lease, the northernmost part of this property, containing in front on Carpenters' Court eleven feet, and extending in depth the whole depth of the lot. De Coursey refusing to give possession of the property, on July 1, the day when his original term under the lease expired, the Guarantee Company instituted proceedings to recover possession under the Act of 1772, the Carpenters' Company declining to join in the proceedings. De Coursey thereupon filed an affidavit, claiming an arrest of the proceedings on the grounds: (1) that proceedings under this Act could not be brought to recover a part only of a property leased; and (2) that the exercise of the power of renewal created such an adverse title as was contemplated by the thirteenth section of the same Act, which provides that if the tenant shall allege that the title to the lands in question is disputed by some other person, etc., by virtue of a title accruing since the commencement of the lease, the proceeding shall be arrested.

The aldermen refusing, however, to stay the proceedings, evidence was offered before them and the jury of freeholders to the effect: (1) that the clause of renewal was void under the charter of the Carpenters' Company, and (2) that certain correspondence and conversations took place between W. H. Rhawn, President of the Guarantee Company, and De Coursey, which, it was claimed, estopped the latter from claiming a renewal of the lease, even if the clause was held valid.

The jury and aldermen found in favor of the Guarantee Company on July 30, 1873, and on the same day a writ of possession was issued, which was duly executed by the sheriff. De Coursey thereupon took a writ of *certiorari* to the Common Pleas of Philadelphia County, and filed, *inter alia*, the following exceptions to the record: (1) The record shows a case in which a vendee or grantee of a small portion of demised premises, proceeds under the Act of March 21, 1772, against the tenant of the whole, as his landlord in respect to said portion, to recover possession of such portion, the original lessor, who is still the owner of the residue and landlord in respect of the same, declining to join in said proceedings, and not being made a party thereto; whereas said Act of Assembly was not intended and cannot be construed to be applicable to such a case, or to permit the tenant to be harassed by divers proceedings by divers owners in respect of divers parts of the demised premises, into which it may have been divided by conveyances subsequent to the lease. (2) The record shows a notice by the Carpenters' Company to the defendant, to quit the entire premises on the first day of July, 1873; but no notice by the Guarantee Company to quit its portion of said premises, is set forth or alleged, and the latter company, claiming under a deed subse-

Digitized by Google

quent to said notice, cannot avail itself in respect to a portion of the premises of the former company's notice to quit the whole; so that in fact the record does not show any allegation or proof of such a notice to quit as is required by the said Act of March 21, 1772. (4) The aldermen insisted on proceeding with the complaint of the plaintiff, notwithstanding the presenting of the affidavit of the defendant; whereas, on the coming in of the same, they should have foreborne any further proceedings.

A rule for a writ of restitution was likewise taken, on the ground that the certiorari was a *supersedeas* under the Act of March 24, 1865. (Purd. Dig. 609, pl. 31.) The Court refused this rule, dismissed the exceptions, and affirmed the judgment.

The defendant thereupon took this writ, assigning for error the above-mentioned actions of the Court.

E. Spencer Miller (with him *H. Wharton*), for plaintiff in error.

Proceedings under the Act of 1772 cannot be brought to recover a part only of a leased property, for as the contract of lease is a whole, so the possession under it is a unit.

Vaughan *v.* Blanchard, 1 Yeates, 176.

De Coursey's exercise of the power of renewal created such a dispute as to the title as, under the thirteenth section of the Act of 1772, is ground for an arrest of proceedings.

Steel *v.* Thompson, 3 Penna. 34.
Newell *v.* Gibbs, 1 W. & S. 499.
Cunningham *v.* Gardner, 4 Id. 120.
Blashford *v.* Duncan, 2 S. & R. 480.
Debozear *v.* Butler, 2 Grant, 421.

The Act of 1865 makes a certiorari a supersedeas in every proceeding in Philadelphia to recover the possession of leased property, in which it is allowed at all, whether by common law or by statute.

Harger *v.* Commissioners, 2 Jones, 252.
Trimbath *v.* Patterson, 26 Sm. 277.

C. Pancoast (with him *C. Gilpin*), contra.

The assignee of a part of property leased is entitled to the remedy given by the Act of 1772.

White *v.* Arthurs, 24 Penna. St. 96.
Watson *v.* Bioren, 1 S. & R. 229.
Co. Litt. 241, *r.*
Ards *v.* Watkin, Cro. Eliz. 637.
Harrison *v.* Barnby, 5 Tenn. 246.
Rivis *v.* Watson, 5 M. & W. 266.
Gilbert on Rents, 172.

No such dispute as to the title of this land was set forth in the affidavit as would be sufficient to arrest the proceedings.

Cunningham *v.* Gardner, *supra.*
Haffner *v.* Hoeckley, 3 Brew. 253.
Debozear *v.* Butler, *supra.*

The Act of 1865 makes the certiorari a supersedeas only in proceedings where the certiorari is specially allowed in the act creating the jurisdiction.

Warburton *v.* Loveland, 1 H. & Br. 648.
Hawkins on Bills, 3.
Duff *v.* Fitzwater, 4 Id. 226.
Haines *v.* Levin, 1 Id. 414.

March 13. THE COURT. The record in this case presents but three questions that need be discussed. The first is, whether the assignee of a portion of the demised premises is entitled to proceed under the Act of 1772 to recover the possession of such portion. It appears that the Carpenters' Company of the City of Philadelphia, by lease dated May 5, 1871, demised to Samuel G. De Coursey, the plaintiff in error, a property on the east side of Carpenters' Court, for the term of two years from the first day of July, 1871, reserving rent; that the said De Coursey entered into possession of the demised premises. That on the 31st day of May, 1873, the said company gave him notice to remove at the expiration of his said term. That subsequently, by deed dated the 31st day of March, 18 3, the said company granted and conveyed to the Guarantee Trust and Safe Deposit Company, defendants in error, a lot of ground which included eleven feet of the demised premises. Thereupon the last named company proceeded to recover the possession of the said eleven feet under the Act of 1772, upon the notice previously given by the Carpenters' Company. The latter did not join in the proceeding, nor did they take any steps to recover the possession of the residue of the said demised premises.

Our own cases do not furnish a distinct ruling upon the very point. Yet its solution is not difficult. The mischief which the Act of 1772 was intended to remedy is clearly expressed in the preamble to said act: "And whereas it frequently happens within this province, that lessees or tenants for years, or at will, often hold over the tenements to them demised, after the determination of such leases, and although such tenants have been required to deliver up the tenements to the landlord or lessor who had occasion to dwell in his own house, or give, grant, or demise the same to another, yet they have most unjustly refused to do so, and have obliged the lessors or landlords at great expense to bring ejectments against their tenants, and by the delays incident to law proceedings have kept the owner of the house at law and out of possession for several years. For preventing therefore such unjust practices, be it enacted," etc. etc. Prior to the passage of this act, the landlord had no remedy against his tenant holding over after the expiration of his term, but the action of ejectment, a tedious and expensive proceeding. The object of the Act of 1772 was to furnish a summary proceeding in such cases, in which the legal rights of the parties should be carefully protected, and yet avoid the intolerable delays incident to a suit of ejectment.

Digitized by Google

This case comes clearly within the mischief which the act sought to remedy.

We have a demise, a notice to quit, a sale by the landlord, and a refusal by the tenant to surrender the possession to the landlord's vendee at the end of the term. Does the fact that the proceedings were for a part of the demised premises only, oust the jurisdiction of the aldermen? It may be conceded that the landlord cannot proceed under this Act to recover the possession of a part of the demised premises, and hold the defendant as tenant for the residue. No such attempt was made in this case. The notice to quit was for the entire premises. At the end of the term the landlord had a right to proceed for the recovery of the whole. How is the tenant injured because the proceedings are only for the recovery of a part? The purchaser of the eleven feet would have been entitled to his writ of ejectment to recover it. His case is within the mischief of the Act, as well as its very words. "It shall be lawful for such lessor or lessors, his or their heirs and assigns, to complain," etc. The assigns may be assigns of separate parts. If originally held in common the parties may come to hold separate parts by partition. The owner of a part becomes the landlord *quoad* that part. By a grant of the reversion, the rent, which is an incident passes with it. Where there is an apportionment of the rent the tenant is subjected to separate actions and distresses. (Co. Litt. 241.) A tenant in common may distrain for his share of the rent; and it was held in Rivis *v.* Watson (5 Mees. & W. 266), that a rent charge may be divided, by will or deed, so as to make the tenant liable, without attornment, for several distresses. "If I make a lease of three acres reserving three shillings rent, as I may dispose of the whole reversion, so may I also of any part of it, since it is a thing in its nature severable, and the rent as incident to the reversion may be divided too because that, being made in retribution for the land, ought, from the nature of it, to be paid to those who are to have the land on the expiration of the lease." (Lord Ch. Baron GILBERT on Rents, 172.) If the reversion may be divided and the rent apportioned and each part of the apportioned rent recovered by distress or an action of debt, it is not easy to see the force of the argument urged in behalf of the plaintiff in error that it would be subjecting him to an undue burden to hold that he may be proceeded against under the Act of 1772 for a portion only of the demised premises. It is clear that an ejectment may be brought against him. But the very object of the Act was to avoid the expense and delay incident to this form of proceeding. We are clearly of opinion that this case comes within the spirit, if not within the very letter of the Act of 1772, and that the aldermen had jurisdiction.

This brings us to the second question. It is contended that the affidavit filed by the plaintiff in error deprived the aldermen and freeholders of jurisdiction, and that they should have proceeded no further in the cause. The thirteenth section of the Act of 1772 provides that if the tenant shall allege that the title to the lands and tenements in question is disputed and claimed by some other person or persons, whom he shall name, in virtue of a right or title accrued or happening since the commencement of the lease, so as aforesaid made to him, by descent, deed, or from or under the last will of the lessor, etc., the proceeding shall be arrested. The affidavit filed by the plaintiff in error does not bring the case within the provisions of the above section. It does not show what the proviso in the Act expressly requires, that there was a dispute as to the title to the lands: that the title was disputed and claimed by some other person or persons named in virtue of a right or title accrued, or which had happened since the commencement of the lease by descent, deed, or under the last will of the lessor. What it does show is a dispute as to when the term expired. This is one of the questions which the Act of 1772 by its express terms requires the jury of freeholders to determine. The cases cited by the plaintiff in error upon this point do not sustain him. In Blashford *v.* Duncan (2 S. & R. 480) no rent was reserved in the lease, which is necessary to give jurisdiction under the Act of 1772. Steel *v.* Thompson (2 Penna. Rep. 34) was clearly not within the Act. So far from being the mere case of a demise at a certain rent, it presented unusual complications. Says GIBSON, C. J., "Here the relation of the parties was contingent, if not doubtful from the beginning, and when application was made to the justices, it was not easy as it appeared at the trial to determine its nature or extent." Again, "the contract had more the aspect of one for the disposal of an interest in land on specified terms than of a lease by the actual proprietor to his tenant at a stipulated rent." In Newell *v.* Gibbs (1 W. & S. 496) the tenant offered to show that the title of Gibbs, the landlord, had expired by lapse of time, and that since the commencement of the lease the title had vested in a certain William Griffis, by virtue of a purchase at a sheriff's sale of the interest of Ezekiel Griffis, who was the lessor of Gibbs, the landlord. Cunningham *v.* Gardner (4 W. & S. 120) is against the plaintiff. The affidavit of the tenant alleged that he had a right to the lands under the lease during his natural life, in consideration of which he was to erect buildings and improve the premises, and that he had done so. Said HUSTON, J. "This case presents a simple question of fact. Did Mr. Kirkpatrick agree to give a lease for life or for years to the tenant? This is the question as stated by the landlord, and by the tenant, and by

Digitized by Google

the counsel before us. It would not be easy to show that twelve freeholders summoned for the purpose from the county would not be as competent to decide this fact as twelve jurors drawn from the wheel as jurors. The law is made for such uses. It is no more difficult than to decide whether a parol lease was for one year or for two years. It is a simple question of fact, and no legal knowledge is required to the decision of it." We may well apply the above language to the present case. The contention was whether under the stipulations of the lease the term of the plaintiff in error was fully ended. This was a mere question of fact, simple in its nature and entirely within the province of the jury to decide. It involved no question of title within the meaning of the Act of 1772.

The third question is whether the Court below erred in not awarding restitution to the plaintiff in error. The record shows that the aldermen gave judgment for the plaintiffs (defendants in error) for possession of the eleven feet, with damages and costs; that they then proceeded upon the same day to issue a writ of possession, which the sheriff executed and returned "possession given." A certiorari was taken to the proceedings, and a petition was presented to the Court below for a writ of restitution, on the ground that, under the Act of 1865, a writ of possession could not properly issue within ten days of the judgment. The Court below decided that the Act of 1865 does not apply to proceedings under the Act of 1772. Whether it does so apply is the precise point involved.

The Act of 24 March, 1865 (P. L. 750), provides that "In every proceeding or suit brought in the city of Philadelphia, under any of the several acts of this Commonwealth, by landlords to recover possession of property leased for a term of years or from year to year, in which a certiorari is now allowed, the said certiorari shall be a *supersedeas*," etc. It is necessary to a proper understanding of this Act to consider briefly the law as it stood at the time of its passage. The Act of 1772 makes no mention of a certiorari. Such writ is not allowed by its terms. Yet it has been repeatedly held that the common law writ of certiorari might issue under said Act. But it does not operate as a *supersedeas*. (Grubb *v.* Fox, 6 Bin. 460.) The reason for this is that proceedings under the Act of 1772 are *sui generis*, the Act of Assembly intending to give landlords a speedy remedy. While the common law right to a certiorari to remove proceedings under this Act has never been denied, this Court decided at a very early day that such writ did not operate as a *supersedeas*, for the reason above given. Next in order came the Act of 25th of March, 1825 (P. L. 114), providing for the case of tenants who shall remove from the demised premises without leaving sufficient property on the premises to secure at least three months rent, and who shall refuse to deliver up possession, etc. This Act contains no provision for a certiorari.

The Act of 3d of April, 1830 (P. L. 182), provides a mode in which a landlord may proceed to obtain possession of the demised premises for non-payment of rent. In said Act it is provided "that nothing herein contained shall prevent the issuing of a certiorari with the usual force and effect." To say that this proviso does not allow the certiorari in the sense of expressly giving it, is a refinement of criticism. While the phraseology is peculiar, giving it somewhat the form of a negative pregnant, it evidently provides for and allows a writ of certiorari with its usual force and effect.

The Act of 14 December, 1863 (P. L. 1125), allows an appeal and also a certiorari to remove the proceedings of the justices, as in other cases.

Thus stood the legislation when the Act of 1865 was passed. It is contended that the effect of the latter Act is to make the certiorari a *supersedeas* in every proceeding or suit brought in the city of Philadelphia by a landlord to recover the possession of property leased for a term of years. If this be the proper construction of the Act of 1865, then the Act of 1772 is rendered comparatively useless; and the serious mischiefs which for over one hundred years it has protected us against have returned to vex the present generation, as they must seriously have disturbed the framers of said Act. For its avowed object was to give some proceeding *sui generis*, and unknown to the common law, by means whereof a landlord who had occasion to use or occupy his own house, or to sell or demise the same, might recover possession thereof at the termination of the lease without the delay and expense of an ejectment. If a certiorari is interposed to stay proceedings under this Act, its value as a remedial statute is seriously impaired if not wholly gone. If the Legislature intended by the Act of 1865 to make a certiorari a *supersedeas* in all landlord and tenant cases, it was very easy to have said so in few and plain words. They have not done so. On the contrary, the intent is clear to restrain the operation of the Act to certain cases only, else why the words "in which a certiorari is now allowed"?

Evidently the Legislature had no reference to the common law writ of certiorari when they used this language. Such writ is of right and may issue of course, but it does not, as has already been said, suspend proceedings in a landlord and tenant case.

It was undoubtedly the writ of certiorari allowed by statute that was in the contemplation of the Legislature when the Act of 1865 was passed.

Digitized by Google

Such a writ was allowed in both the Acts of 1830 and 1863. Yet in neither of those Acts is it said in express terms that the certiorari shall be a *supersedeas*. There are reasons why the law should be explicit upon this point. Both of the last-named Acts are a wide departure from the course of procedure under the Act of 1772. It will be remembered that in the latter case the cause is heard before two aldermen and a jury of twelve freeholders, to be selected by the sheriff In no form of summary proceedings known to the law is so much care exercised to guard the rights of the parties, and secure a fair trial as under the Act of 1772. The provision for a freehold qualification for the jurors was intended at least to secure a jury of more than the average grade. If such jurors are not composed generally of as good material as they ought to be it was no fault of the law, but of its officers charged with its execution. In such proceedings the tenant has a fair trial before a jury of his peers, and it is no hardship to him to allow the judgment of such a tribunal upon so simple a question as whether his term is fully ended, to be enforced notwithstanding a writ of certiorari. So as to the Act of 1825. It gives the remedy where the tenant has removed from the premises leaving no goods thereon, refuses to give security for the rent, and yet declines to surrender the possession. A certiorari is clearly not needed in such cases. But in the Acts of 1830 and 1863 the proceedings are entirely without a jury; under that of 1830 before two aldermen; under that of 1863 before a single alderman. It is not singular, therefore, that inasmuch as both these Acts are in derogation of the common law right of trial by jury, the Legislature deemed it essential to place the question at rest whether the writ of certiorari which had been theretofore allowed by said Acts should operate as a *supersedeas*. This we regard as the proper construction of the Act of 1865. To extend it to the Act of 1772, in which a statutory certiorari had never been allowed, would be, in our judgment, to carry the Act of 1865 beyond its manifest intent as well as its express terms. An ingenious argument was made on behalf of both the plaintiff and defendant in error upon the grammatical construction of said last-named Act. We are unable to see that the view we have taken of it does any violence to its proper reading. When the Legislature intend so radical a change in existing legislation as to make a certiorari a *supersedeas* to proceedings under the Act of 1772, they will probably say so in express terms, and not leave it to rest upon implication or the yet more uncertain rule as to which of two antecedents shall govern a verb.

The question raised by the remaining assignments need not be discussed; most of them refer to matters *dèhors* the record.

The judgment is affirmed.

Opinion by PAXSON, J. WILLIAMS, J., absent.

[*Cf.* McLaughlin *v.* McGee, 2 WEEKLY NOTES, 375.]

Jan. '76. **Kemmerer v. Tool.** March 23.

Bankruptcy — Fraudulent preference — Debtor and creditor—Amicable revival of judgment.

An amicable revival of a judgment by an insolvent debtor is not a fraudulent preference within the purview of the Bankrupt Act.

Error to the Common Pleas of Lehigh County.

Assumpsit by Tool, assignee in bankruptcy of Knerr, against Kemmerer, to recover moneys produced by a sheriff's sale of the bankrupt's estate, and received by the defendant Kemmerer from the sheriff in payment of a judgment, which the assignee now endeavored to avoid as a fraudulent preference by the defendant over other creditors. Plea, non assumpsit.

Upon the trial it appeared that in April, 1868, Kemmerer loaned to Knerr $4000, taking a note therefor, with a warrant of attorney to confess judgment, which was immediately entered up. In May, 1870, Kemmerer, wishing to extend the lien of this judgment to certain property purchased by Knerr in 1869, obtained from Knerr an agreement for an amicable revival of the judgment. At this time Kemmerer was, according to his own testimony, ignorant of Knerr's insolvent condition.

The defendant presented the following points: (2) A creditor holding a judgment may issue an execution and levy on the property of the debtor, even though he doubts his solvency at the time of making the levy, and the lien thus created will be protected. *Answer.* This may be a good legal proposition, but it has no application to the cause trying. (5) Kemmerer might at once have sued out an execution, made a levy on the after acquired real estate of Knerr, and thus secured the lien which he was desirous of obtaining. Surely the mere circumstance that Knerr consented to do a thing, which in any aspect was for his (Knerr's) benefit, should not be allowed to affect the creditor with knowledge of insolvency. *Answer.* This first part (here repeated by the Court) as a proposition may be good law, but it has no application to the case trying. The remainder is a circumstance for the jury to give to it such weight, if any, as it may be entitled to. (7) Kemmerer in accepting the revival obtained no higher security than he might have obtained by issuing execution, and, therefore, it is no fraud on the Bankrupt Act. *Answer.* This point as a whole is answered in the negative.

The Court (LONGAKER, P. J.) charged, *inter alia*, as follows: I instruct you that the effect of

Digitized by Google

the revival was to give the defendant a preference over the other creditors, and as the law presumes that every man intends the consequences of his act, it follows, as a legal conclusion, that the revival was given with a view to prefer, and did, in fact, prefer the defendant over the other creditors.

Verdict and judgment for the plaintiff for $3389.25. The defendant took this writ, assigning for error the charge of the Court as above given, and the answers to his points.

C. J. Erdman and *J. D. Stiles*, for the plaintiff in error.

Kemmerer gained nothing by the agreement for an amicable revival, which could not have been equally as well effected by issuing a *scire facias* or an execution; the actual benefit was to the bankrupt's estate because it saved costs.

Clark *v.* Iselin, 21 Wallace, 360.
Cook *v.* Tullis, 18 Id. 332.
Tiffany *v.* Institution, 18 Id. 375.

Albright and *R. E. Wright & Son*, contra.

The judgment which was revived by the consent of Knerr was not a judgment whose lien was about to expire, but one of only two years' standing. A revival of such a judgment surely is out of the ordinary course of business.

May 8. THE COURT. The material facts in this case are not in dispute. They are succinctly stated by the learned Judge below in his charge to the jury. Upon these facts we think there was error in the answers to the second, third, fourth, fifth, and seventh points of the defendant, and also in the charge as set out in the first assignment of error. It is not a proper practice to divide the assignments of error into separate claims and number them accordingly.

When this case was here on the former writ of error [reported 1 WEEKLY NOTES, 447], we held that the Court below had erred in instructing the jury, that the amicable revival of Kemmerer's judgment was an act out of the usual course of business, and that it was Kemmerer's duty to make inquiry as to the insolvency of Knerr, and on failure so to make inquiry, the presumption followed that he would have found reasonable cause to induce the belief that Knerr was insolvent, or was contemplating insolvency. The principle there settled was conclusive against the plaintiff below, although the case was not so presented as to call for the expression of such an opinion. The second assignment of error then actually including five distinct points, was, according to the twenty-second rule of the Court, a waiver of the errors alleged.

Kemmerer could have issued an execution on his original judgment, and immediately secured a lien by a levy on the after acquired property of Knerr. Though he knew of Knerr's insolvency, there would have been no infraction of the Bankrupt Act in doing this. This being so, Knerr's confession of a judgment of revival did not alter the case. It was not a preference voluntarily given by the debtor within the purview of the law. The creditor was put in no better condition, and the debtor had more time given to him, and was saved the costs of adverse process. It was an act in the ordinary course of judicial proceedings. Perhaps nine-tenths of all judgments are revived by agreement. Where the act of the debtor does not hasten the remedy or give preference to one over other creditors pressing their claims, or any other advantage which the creditor could not at once have secured, it is not easy to understand how it can be regarded as a fraud on other creditors. According to the judgment of he Supreme Court of the United States in Wilson *v.* the City Bank (17 Wall. S. C. 473), something more than passive non-resistance of an insolvent debtor to regular judicial proceedings is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the Bankrupt Act, and that though the judgment creditor in such case may know the insolvent condition of the debtor. We hold that the debtor by consenting to an amicable action or revival, which gives the creditor no advantage which he could not at once have secured by adversary process, does nothing in effect beyond mere passive non-resistance. He agrees only to what he cannot help. The contrary doctrine would be of no practical benefit, except to prothonotaries and sheriffs. No man would rest upon an amicable revival if it was liable to be declared invalid in case the defendant became bankrupt within four months. The case below we think falls directly within the principle of Wilson *v.* City Bank, and, upon the undisputed facts, the defendant below was entitled to a verdict in his favor.

Judgment reversed.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

Jan. '76. **Polly Bittner's Appeal. Zimmerman's Estate.** March 21.

Will—Devise—Construction of—Distribution per capita or per stirpes.

A. bequeathed the residue of his estate to be divided among his brothers and sisters, and the brothers and sisters of his wife, "in equal shares, so that one has as much as the other:"

Held, that the distribution should be per capita and not per stirpes.

Appeal from the Orphans' Court of Lehigh County.

Charles Zimmerman died leaving a widow, but no children. By his will, written in German, he

Digitized by Google

provided, upon the death of his widow, *inter alia*, as follows:—

"Das uebrige von meinem und ihrem Vermœgen soll ausgetheilt werden unter meine geschwistern und unter meiner Ehe Frau Elizabeth, ein geborne Frey, ihre geschwistern in gleiche theile so das eins so viel hat als das andere; solte eins oder mehrere gestorben sein, so soll sein oder ihr theil an sein oder ihre erben bezahlt werden."

The auditor reported the following as a correct translation of this clause:—

"The residue of mine and her property shall be divided among my brothers and sisters, and among the brothers and sisters of my wife Elizabeth (a born Frey), in equal shares, so that one has as much as the other. Should one or more be deceased, then shall his or her share be paid to his or her heirs."

Zimmerman left five brothers and sisters, and his wife ten. The Zimmerman heirs claimed, before the auditor appointed to distribute the estate upon the death of the widow, that the residue should be divided into two equal portions, of which one should be divided among the Zimmerman heirs, and the other among the Frey heirs.

Upon the translation, as above given, the auditor reported his opinion as to the intention of the testator as follows: "That the property shall be divided among his brothers and sisters, and among the brothers and sisters of his wife Elizabeth, in equal shares, so that one has as much as the other, clearly evinces the fact that the devisor intended to give to each of the brothers and sisters of both sides an equal amount." And the auditor accordingly distributed the balance of the estate equally between the brothers and sisters of the devisor and the brothers and sisters of the widow of the devisor. In other words, he decided that the division should be *per capita* and not *per stirpes*. Distribution was decreed in conformity with this opinion. Polly Bittner, a sister of Zimmerman, excepted to this report, but the Court below dismissed her exception, whereupon she appealed, assigning for error the distribution *per capita* and not *per stirpes*.

Rupp (with him *Metzger*), for the appellant.

Just before the testator says "the one shall have as much as the other," he makes a distinction between the Zimmerman and Frey branches of the family, and the expression "the one" should be referred to these branches of the family, and not to the individuals composing them. The word used in the original will, which is translated "the one," is "eins," which can as readily be applied to a class of individuals as to a single individual. If the testator had had individuals in his mind, he ought to have said "jedes," or "jederer," meaning each one.

E. Harvey contra.

Th. auditor's construction of the word "eins" is sustained by the same use of the word in the clause "should one or more be deceased, then his or her share shall be paid to his or her heirs." Here "eins" undoubtedly refers to individuals, and it is well settled that the legal presumption is that if the same word be used twice in the same will, it is used both times in the same sense.

March 27. THE COURT. The interpretation given by the auditor and the Court below to the will of Charles Zimmerman, deceased, as to the proportion bequeathed to the brothers and sisters of himself and of his wife, appears to have been correct. We see no error in the decree, and it is therefore affirmed with costs, and the appeal is dismissed.

PER CURIAM. WILLIAMS, J., absent.

[See Dible's Appeal, 2 WEEKLY NOTES, 236.]

Fessler's Appeal. May 20.
Bomberger's Appeal.

Subrogation—Right to by one partner against another before settlement of the partnership accounts—Payment of firm judgment by subsequent mortgage creditor of one partner—Act of 22 April, 1856 (Purd. Dig. 827, pl. 40)

The payment of a firm debt by one partner does not entitle him to subrogation against his copartner until an account has been settled between them.

The Act of 22 April, 1856, was not intended to apply to any case in which the amount that the substituted creditor has a right to collect from the adverse party under the judgment, has not been ascertained.

The rule that "where a creditor has a lien on two funds and another creditor has a lien only upon one of the funds, the first may be compelled in equity to levy his debt out of the fund to which the other cannot resort," applies only to cases where both funds are in the hands of the common debtor of both creditors.

F., a judgment creditor of the firm of H. & B., levied upon the property of H. alone. L., a subsequent mortgage creditor of H., brought into Court the amount of the judgment debt, interest, and costs, and then joined with H. in a petition that F. be required to accept the amount of his judgment and mark the same to the use of L., who should be allowed to proceed against B. for the latter's proportion of the debt. The answer of B. set forth that the partnership accounts of the firm of H. & B. were still unsettled.

Held (reversing the judgment of the Court below), that neither H. nor L. was entitled to subrogation.

Appeals from Common Pleas of Lebanon County.

The petition of John Hickernell and Jacob Lauser, filed Dec. 6, 1875, set forth that on December 26, 1874, George Fessler entered a judgment against said John Hickernell and one Christian S. Bomberger on a bond and warrant of attorney for $600, dated April 1, 1874; that said Fessler, who was the father-in-law of Bomberger, did, on November 17, 1875, cause execution to be issued and levied upon the real and personal

Digitized by Google

estate of Hickernell alone; that with the knowledge and consent of said Fessler, Bomberger had, shortly before the issuing of the writ of execution, and, for the purpose of evading said writ, assigned, sold, and removed all his personal property, and sold his real estate; that Jacob Lauser, one of the petitioners, was a creditor of said Hickernell for $1030, secured by two mortgages, the lien of which would be divested by the sale of Hickernell's real estate under said judgment; that said Lauser would be obliged to bid more for said real estate than it was worth in order to protect his interest, and said Hickernell's property would be sacrificed and he entirely ruined; that Lauser had tendered to said Fessler the full amount of the judgment, interest, and costs, brought the amount thereof into Court, and was willing to pay the same to him if he would stay said writ of execution, and mark the judgment to the use of Lauser. The petition prayed for a rule on Fessler to show cause why he should not accept said money, stay the execution, and mark the judgment to Lauser's use.

To this petition the plaintiff in the judgment filed an answer, setting forth that he held another bond given by defendant for $600; that he was willing to look to Bomberger alone for the payment of the latter bond if Hickernell would pay the bond on which judgment was entered; that he was willing to assign said judgment to Lauser if he might first be allowed to release Bomberger from the payment thereof. Bomberger also filed an answer, setting forth, substantially, that, at the time the judgment note was given, a partnership existed between himself and Hickernell; that the partnership accounts were unsettled, and that on a settlement thereof it would be found that Hickernell was largely indebted to him. The replication of Hickernell to these answers denied that he would be indebted to Bomberger on a settlement of the partnership accounts, and alleged that the latter was indebted to him, and was acting in collusion with Fessler to make Hickernell pay more than his share of the judgment.

The Court below (HENDERSON, A. L. J.) delivered the following opinion and decree. "The judgment being joint and a lien upon the property of Christian S. Bomberger, the other defendant, the mortgage creditor of Hickernell would be entitled to be substituted, or by subrogation to be protected, in the event of the payment of the whole debt out of the property of Hickernell Can there be any doubt of this? The fact must be taken, as averred in the petition, that this is a joint judgment. There are no equities growing out of the alleged partnership transactions between these two defendants which we can consider. Whatever, if anything, is set up in the answer, drawing into the controversy the rights of the defendants, is more than denied by the replication of complainant. The real estate sought to be sold—the personal property is claimed under the exemption law—is the private and separate property (not partnership) of the defendant. Does not this case come within the general equity powers of the Court? Is it not within the spirit and letter of the 9th section of the Act of 22d April, 1856? We can see it in no other light? It would then be against equity and law to permit the plaintiff to harass and oppress needlessly one of these defendants, or to hinder, delay, or defeat a subsequent lien creditor in the very face of these remedial powers of the Court. The plaintiff is tendered the amount of his judgment debt, interest, and costs, and must accept it.

"And now, to wit, March 20th, 1876, it is ordered and decreed that the said George Fessler, plaintiff, upon the payment of the debt, interest, and costs of said judgment and *fi. fa.*, by the said Jacob Lauser, do assign the same to him without recourse, to the end that he may receive and collect from the other defendant, the said Christian S. Bomberger, the amount to which he would be entitled by subrogation or by way of contribution. And further, if the said plaintiff shall refuse to accept the same, the said *fi. fa.*, and all further proceedings thereon, shall be stayed."

George Fessler and Christian Bomberger severally appealed, assigning for error the decree of the Court.

Josiah Funk, for appellants.

Lauser, as the mortgagee of Hickernell, has no rights in the premises *per se*. He must work out his advantage through the equities of Hickernell, and if the latter has no equity, Lauser's claim to subrogation must fail.

Dorr *v.* Shaw, 4 Johns. Ch. 18.
Story's Eq. Jur. 642.
Ebenhardt's Appeal, 8 W. & S. 327.
Lloyd *v.* Galbraith, 8 C. 103.
Ex parte Kendal, 17 Ves. 520.

The copartnership accounts between Hickernell and Bomberger remaining unsettled, there could be no subrogation in this case, because it did not appear with certainty that the whole of the judgment should not be paid by Hickernell.

Sterling *v.* Brightbill, 5 W. 229.
McGinnis' Appeal, 4 H. 445.
Baily *v.* Brownfield, 8 H. 41.
Singizer's Appeal, 4 C. 524.

Nor could there be any subrogation in this case, so long as the second bond of $600 remained unpaid.

Kyner *v.* Kyner, 6 W. 221.
Bank *v.* Pontius, 10 W. 148.
Cottrell's Appeal, 11 H. 294.
Hoover *v.* Epler, 2 Sm. 522.

The decree of the Court not being in the alternative is not in accordance with the Act of 1856.

Arna's Appeal, 15 Sm. 73.

C. P. Miller, for appellees.

This case seems to be within the spirit and

Digitized by Google

letter of the Act of April 22, 1856 (Purd. Dig. 827, pl. 40). That Act extends to all cases where the estates of several persons shall be subject to the lien of any judgment to which they should in law or equity contribute. It confers upon the Courts power to control and direct executions, so as to subserve the rights and equities of defendants as well as plaintiffs.

Roddy's Appeal, 22 Sm. 99.

The judgment of Fessler being a lien on the real estate of both Hickernell and Bomberger, and the mortgage of Lauser being a lien on the real estate of Hickernell alone, Lauser was clearly entitled to subrogation under the Act.

Mosier's Appeal, 6 Sm. 76.

The real estate sought to be sold was the private and separate property of Hickernell. So also the real estate of Bomberger, which was bound by the lien of the judgment, was his private property. The partnership transactions between the defendants, therefore, cannot be considered in this controversy.

The Act of 1856 does not require an alternative decree. It provides for "a rule on the plaintiff to show cause why he should not levy his execution," etc., "or accept his debt and assign the same for such uses as the Court may direct," which has all been done in the present case; and then, "if the plaintiff shall refuse to accept his debt and make such assignment of his judgment, the executions shall be so controlled and directed by the Court as to subserve said rights and equities."

May 29. THE COURT. The radical erro of the decree made by the Court below consists in the fact that it attempts to work out the equities between Bomberger and his partner Hickernell in a summary manner. Where one partner has paid a partnership debt, he is not entitled to subrogation against his co-partner until an account has been settled between them. In what other way can it be ascertained which is the creditor and which the debtor partner? This difficulty confronts us instantly in any attempt to enforce the order made in this case. How can it be ascertained, upon the execution, how much of the debt Bomberger ought to pay? Clearly this cannot be done without a settlement of the partnership accounts. It may be that upon such settlement it will be found that Hickernell ought to pay the whole of the judgment. In such case, Lauser, the appellee, would be in no condition to claim subrogation for the purpose of having the judgment enforced against Bomberger. Lauser has no equity. His mortgage postdates the judgment. He had notice of the latter when he loaned his money. Nor can he successfully invoke the principle that where a creditor has a lien on two funds in the hands of the same debtor, and another creditor has a lien only upon one of the funds, the first may be compelled in equity to levy his debt out of the fund to which the other cannot resort. This equitable rule has never prevailed except in cases where both funds were in the hands of the common debtor of both creditors. The equity of the second creditor is precisely that of the debtor, and is worked out through the equity of the latter. (Lloyd *v.* Galbraith, 8 Casey, 108.) Here Lauser is the creditor of Hickernell alone; Fessler is a creditor of Hickernell and Bomberger. Hickernell is the common debtor, and he has but one fund. Lauser has no equity unless he can work it out through his debtor Hickernell. The latter can have no equity to throw the claim upon his partner until by a settlement of the partnership accounts he shows Bomberger to be in his debt.

The learned Judge of the Court below evidently based his decree upon the Act of 22d of April, 1856 (P. L. 534). We think it manifest, from an examination of said Act, that it was not intended to apply to any case in which the amount the substituted creditor has a right to collect from the adverse party under the judgment has not been ascertained. This is the first step in subrogation.

The decree is reversed and the petition dismissed with costs.

Opinion by PAXSON, J. WILLIAMS and GORDON, JJ., absent.

July, '75, 158. March 20.

Baldwin's Appeal. Nyce's Estate.

Administrator—Foreign assets—Change of investment.

A., domiciled at the time of his death in Pennsylvania, left a first mortgage in New Jersey. B. took out letters of administration in Pennsylvania and New York. B.'s attorney subsequently cancelled the mortgage in New Jersey, and took a third mortgage for the same debt upon a portion only of the property originally mortgaged.

Held, that the cancellation being regular, B. should be surcharged with the full amount of the original mortgage in his account filed in Pennsylvania.

Appeal from the Orphans' Court of Pike County.

George Nyce, domiciled in Pike County, Pennsylvania, died intestate, November 25, 1869. He left assets, both in the place of his domicil, and in Orange County, New York, together with a mortgage upon certain real property, owned by David K. Howell, and situated in Warren County, New Jersey. In 1871 letters of administration were granted to John Baldwin, both in the decedent's late domicil in Pike County, Pennsylvania, and in Orange County, New York. Separate

Digitized by Google

and distinct inventories were subsequently filed in both places. The "Howell mortgage," was included in the New York inventory, but excluded from that filed in Pennsylvania. In the following year the administrator filed his account in the Register's Office for Pike County, but omitted therefrom both the New York assets and the New Jersey mortgage. The guardian of the minor children of the decedent excepted to this account, and the same was thereupon referred to an auditor for adjustment and distribution. It appeared from searches exhibited before the auditor, and duly certified by the clerk of Warren County, that the original "Howell mortgage" was given to secure the sum of $4500, and was a first lien upon two separate tracts of land in said Warren County. It further appeared that this mortgage, which was due and payable February 1, 1872, had been cancelled July 20, 1872. That afterwards a third mortgage for $4500, preceded by two mortgages, amounting in the aggregate to $8500, had been given upon one of the above tracts, and on an additional tract of woodland, to "Baldwin, Adm'r of George Nyce, dec'd," and was duly recorded, July 17, 1872. It was admitted that the "Howell mortgage" had never been paid, but that the original mortgage upon both tracts had been cancelled, with the consent of the attorney representing the administrator in Warren County, and that the third mortgage upon one tract only had been taken in lieu thereof. The only evidence as to the value of the whole property was to the effect "that in war times it might bring $8000."

The auditor refused to surcharge the administrator with the amount of the Howell mortgage, "it being without the power of the administrator in this county to collect it by action of law, and the same not having been paid to him, and having been included in the inventory and appraisement made of the funds of said decedent in Orange County, New York."

Upon exception by the guardian the report was referred back to the auditor with instructions to surcharge the accountant with the amount of the Howell mortgage and the interest due thereon. The auditor returned an amended report in accordance therewith, and the same was duly confirmed. This appeal was thereupon taken, the surcharging of the "Howell mortgage" being assigned for error.

Burnett and *Storm*, for the appellant.

The mortgage in question was undoubtedly within the sole and exclusive jurisdiction of the Orphans' Court of Warren County, New Jersey; for although the right of *succession* to the personal estate of an intestate is governed by the law of his late domicil, yet the *administration* of the estate will be controlled by the forum within whose jurisdiction the assets are found.

2 Williams on Ex'rs. 1301, 1415; 1 Id. 357.
Story, Confl. Laws, ch. 13, § 513.
Dent's Appeal, 10 Harris, 514.
Parker's Appeal, 11 Sm. 478.
Freeman's Appeal, 18 Id. 151.
Aspden *v.* Nixon, 4 Howard, 467.

It can hardly be maintained that the alteration of the security would vary the above well-established principle, for the Orphans' Court of Pike County had no jurisdiction over the changed security; nor was there any evidence of loss to the estate by the change, whereby the jurisdiction of any court could be invoked.

S. Holmes, Jr. (with whom was *Van Auken*), for appellee.

It is well established that an administrator cannot alter a security, or release a debt, without receiving the amount, except at his own risk.

Tomkies *v.* Reynolds, 17 Ala. 109.
Gerald *v.* Bunkley, Id. 170.
State *v.* Johnson, 7 Blackf. (Ind.) 529.

It cannot be doubted that the cancellation of the original mortgage was valid and regular, and the reinvestment by Baldwin, therefore, amounted to an illegal conversion for which he is liable personally.

March 27. THE COURT. We see no error in this decree. The administrator clearly did acts to charge himself with the debt of the "Howell mortgage." The debt, for which the mortgage was the security only, came into the hands of the administrator as a part of the assets, so far as the facts of the case show. He chose voluntarily to cancel the mortgage and take a new security by mortgage in his own name. The first mortgage was well secured on two tracts of land, and was a first lien. The second was taken on one of them only and a small piece additional, but subject to two large mortgages equal to and probably greater than the whole value of the land. The fact that the land held in security lay in New Jersey, could make no difference in this case, for it seems the law of New Jersey permitted the cancellation of the mortgage, and the fact of cancellation is certified by the proper officer. In such a case, the claimants of the estate in Pennsylvania had a right to insist on his accounting for the debt here. The fact that the administrator chose to carry the "Howell mortgage" into the inventory of ancillary administration in New York cannot protect him, for the debt by no rule belonged to New York. The ancillary administrator in New York could grasp within it only the estate whose *situs* was there. Neither the debt, nor the mortgage of Howell had any *situs* there.

Decree affirmed with costs and appeal dismissed.

PER CURIAM. WILLIAMS, J., absent.

Digitized by Google

Jan. '76, 158 **Taylor's Appeal.** March 23.

Usury—Debtor and creditor—Marshalling of securities.

A creditor who has several securities for the same debt has a right to avail himself of any one of them until he has realized his whole claim.

T. loaned S. $12,343, upon the security of two mortgages, one of $10,000, and another of $3000; in the distribution of the proceeds of the sheriff's sale of the property subject to the $10,000 mortgage:

Held, that T. was entitled to have the whole of his $10,000 paid without abatement for alleged usury. If usury were proven, advantage would have to be taken of it upon the $3000 mortgage.

Appeal from the Common Pleas of Lehigh County.

Taylor loaned to Scheon $12,343.56, to secure the payment of which sum, Scheon executed a mortgage of $10,000, and assigned another of $3000. Subsequently the property subject to the $10,000 mortgage was sold by the sheriff, and the proceeds, amounting to $19,044.62, paid into Court, and a commissioner appointed to distribute the same, before whom Taylor claimed the payment of his $10,000 in full with interest. This claim was opposed by certain subsequent judgment creditors, who contended that $656.44, the difference between the money loaned by Taylor to Scheon and the face value of the mortgages, should be deducted from the face value of the mortgages as a usurious bonus. The commissioner reported that the $10,000 mortgage should be paid in full with interest. To this report, Roth, a judgment creditor excepted. The Court below sustained the exception, and ordered that the sum of $531 should be deducted from the award on Taylor's mortgage; being the proportionate part of the alleged usury, which attached to the $10,000 in comparison with $12,343.56, the whole amount advanced. From this decree Taylor appealed.

E. Harvey, for the appellant.

W. H. Sowden, contra.

May 8. THE COURT. Conceding all that can be asked, that the sum advanced by Taylor to Scheon constituted one debt for which two several mortgages were taken as securities, and that the sum of $656.44, the difference between the amount of these two mortgages and the sum actually advanced, was usurious, it is not easy to comprehend on what principle of law or equity the usury is to be apportioned between these two mortgages. The opinion of the learned Judge below does not enlighten us. A creditor who has several securities for the same debt, has a right to avail himself of any one of them until he na realized this whole legal claim, principal, and interest. If Taylor had sued out the $10,000 mortgage, he would have been entitled to a judgment for the whole amount, principal and interest, for after receiving it there would still have been a balance due him for which he must look to his other security. That other security he may never realize, or not in full. If both mortgages had been turned into money, and it was thus legally ascertained that there was more than enough to pay Taylor his debt in full with legal interest, there might then have arisen a question of marshalling the assets, there being two separate funds. Here there was but one fund in Court, upon which the $10,000 mortgage stood as an undoubted lien, and the Eagan mortgage not a lien. It seems to us that there was error in the decree of the Court below. Decree reversed, and now record remitted that distribution may be decreed according to the report of the commissioner.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

July, '75, 168. March 23.

Centreville Independent School District's Appeal.

Practice—Errors and appeals—Technical and clerical error, not ground for reversal—Entitling papers as of wrong court.

A petition filed and adjudicated upon in the Quarter Sessions was entitled as if in the Common Pleas:

Held, that, as the proper Court in fact had possession of the case and acted upon it, it would be unwise and too technical, upon appeal, to regard the error as more than clerical.

Appeal from the Common Pleas of Northampton County.

In 1857, by appropriate proceedings in the Quarter Sessions, the Centreville Independent School District was duly organized, and carved out of the school district of Upper Mount Bethel Township. In 1873 a petition of certain citizens of Upper Mount Bethel Township, praying for an abolishment of the Centreville Independent School District, was filed in the Quarter Sessions. The petition was entitled as if filed in the Common Pleas. The prayer of the petition, after hearing, was granted, whereupon certain inhabitants of the Centreville School District appealed, assigning for error, *inter alia*, the defect in the title of the petition.

H. Green, for the appellants.

W. W. Schuyler, contra.

March 30. THE COURT. The record of this case shows that the petition to abolish the district was entitled as in the Court of Common Pleas, but was in fact filed in and acted upon by the Court of Quarter Sessions. The Court might have amended the petition to bring it into harmony with other parts of the record. The pro-

Digitized by Google

per Court having had possession of the case and acted upon it, it would be unwise and too technical now to regard the error as more than clerical. We had a similar case of mixing the titles of proceedings in the Courts of Common Pleas and Quarter Sessions in an insane pauper case, heard at the last term in the Western District, wherein we applied the same rational principle of reaching substantial justice. If we were to act otherwise, in these matters of special procedure, but few cases would escape overturning in our system of mixed courts having the same judges and officers.

Proceedings affirmed, and the persons taking out the certiorari ordered to pay the costs.

PER CURIAM. WILLIAMS, J., absent.

Common Pleas—Law.

C. P. No. 2. **Brown v. Walton.** Oct. 21.

Promissory note—Affidavit of defence—Averment that defendant "is informed, believes, and expects to be able to prove"—Sufficiency—Allegation that plaintiff is holder for collection only—Practice.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on promissory note by holder against maker. The affidavit set forth a good defence as between defendant and the payee, and then averred that "four days before the note came due defendant was notified, by counsel for the payee, that the note was in his hands for collection, and defendant is informed, believes, and expects to be able to prove that the said note was passed to plaintiff after maturity solely for the purpose of this suit."

Jennison, for the rule.

The affidavit ought to say by whom defendant is informed, etc.

THE COURT. It might have been well to require such particulars from the defendant as to show the Court that it was not mere suspicion, but genuine information on his part as to the good faith of the plaintiff's title; but the practice has long been settled to treat a general averment of information, belief, and expectation of ability to prove, etc., as sufficient.

Rule discharged.

[See Reznor v. Supplee, 2 WEEKLY NOTES, 401.

As to allegation that plaintiff is holder for collection only, see Landis v. Metzger, Id. 80; Brenkeret v. King, Id. 321; Maule v. Zurn, Id. 380; Bank v. Bartholomew, Id. 445; Bank v. Bergen, Id. 439; Flood v. Park, Id. 569; Burdick v. Sterr, Id. 123.]

C. P. No. 2. **Weis v. Weis & Fowler.** Oct. 21.

Execution against personal property—Distribution—Payment of proceeds into Court only ordered in special cases.

Rule on the sheriff to pay money into Court, the proceeds of personal property.

Delany & Co. obtained judgment against the defendants before a magistrate. Execution issued August 23d, and the personal property was levied upon by the constable. On August 30th defendants took out a writ of certiorari by which the proceedings were removed to the Court of Common Pleas, No 4. The defendants failed to enter bail to make the certiorari a *supersedeas*, but the constable, supposing they had done or would do so, withdrew from the possession of the goods.

On September 30th the writ of certiorari was dismissed, and on the same day Delany & Co. issued a *fi. fa.* On September 18th the defendants confessed a judgment in favor of one Joseph Weis, and execution thereon immediately issued. Under this later execution the sheriff sold the same personal property which the constable had seized under the former execution, and on Oct. 7 Delany & Co. took this rule, claiming that the judgment and execution of Joseph Weis were fraudulent.

Peterman, for the rule. The writ of certiorari not being perfected was not a *supersedeas*, and the property seized by the constable remained constructively in his possession. Money arising from the sale of personal property will be ordered into Court on the application of a lien creditor who can show some reasonable ground.

Tr. and H. Pr. 921.

Stinson v. McEwen, D. C. Phila. (MS.)

THE COURT. The constable having relinquished his possession, there was no lien of plaintiffs on these goods. The Court never interferes with the distribution of the proceeds of personal property except under very special circumstances to protect a lien creditor.

Rule discharged.

[See Snow v. Hyman, 2 WEEKLY NOTES, 352.]

C. P. No. 2. **De Leon's Estate.** Oct. 14.

Insolvent—Creditors for wages of manual labor—Act of April 20, 1876, construed.

Citation to assignee to file his account.

The insolvent, De Leon, made an assignment for the benefit of his creditors in July, 1876, and on August 11, 1876, the assignee sold the goods

Digitized by Google

assigned for the sum of $1174. Certain creditors, claiming to be entitled to the benefits of the Act of April 20, 1876 (P. L. 43), now asked that the assignee be directed to file his account, notwithstanding that the time allowed by the general Insolvent Act had not yet elapsed.

The assignee filed an answer admitting the facts as above set forth, but claiming that he was entitled to a year to file his account.

Meany, for the creditors.

Scollay, for the assignee.

C. A. V.

Oct. 21. THE COURT. The Act of April 20, 1876, is very loosely drawn. The second section provides, that no voluntary assignment shall operate to hinder, delay or prevent, for longer than thirty days, the collection or enforcement of any claims for the wages of manual labor secured by the Act of April 9, 1872, and claimants may, after the expiration of thirty days, enforce their claims "in the same manner, and by means of the same remedies, that they might have done had no such assignment been made." This section, which is *prima facie* complete in itself, certainly affords no sanction to the present contention. Had no assignment been made, the creditors might have proceeded to judgment and execution by levy on the goods of the insolvent. If the goods were still in the hands of the assignee, a levy might nevertheless be made on them under the section quoted; but it appears in this case that the goods have been sold, and only money—the proceeds of the sale—remains in the hands of the assignee.

Now, the third section provides that in all cases of assignments made before the passage of the Act, and then remaining unsettled, in which the assignee has more than five months within which to settle his account, the claimants may immediately proceed to collect their claims as if no assignment had been made, and *in case such assigned property has been already sold*, and the assignee refuses to pay, the claimants shall have the right to compel him to file his account, and have such claims paid by distribution through an auditor.

This section does not in terms apply to any cases but those pending at the time of the passage of the Act of 1876, but the provision for claims where the assigned property has been sold by the assignee, appears not only to meet exactly the facts of the present case, but also to furnish the only regular and adequate remedy to the present petitioners. The assigned property having been sold, cannot now be levied upon in the hands of the purchasers, and though a levy or attachment of the proceeds in the assignee's hands would be within the power of the Legislature to authorize, yet it would be so much out of the regular course and form of legal proceedings, that we are not to sanction it unless required by explicit words in the statute. By treating the second part of the third section as a general enactment, applicable to all appropriate cases under the act, whether pending at its passage, or subsequently commenced, we give the petitioners a convenient and adequate remedy in conformity with established modes of legal procedure, and clearly within the general scope and equity of the statute. To accomplish this purpose, we think we may fairly do some little violence to the strict grammatical construction of the language of the Act.

The assignee is therefore directed to file an account without further delay.

Opinion by MITCHELL, J., in full.

C. P. No. 3. **Bacharach v. Schaller.** Oct. 7.

Promissory note—Affidavit of defence—Set-off—Compromise with creditors—Excessive payment to plaintiff in fraud of other creditors no defence to suit on composition note.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on two promissory notes. The affidavit set forth, as a defence to one of the notes, for $299, that the defendant had made a compromise settlement with his creditors, including the plaintiff, by which they agreed to take 25 per cent. of their respective claims in promissory notes; that the plaintiff was in fact paid in cash a sum equal to ten per cent. more on his claim than he had agreed to take or than the other creditors received, and that the ten per cent. excess was about equal to the amount of said note for $299.

Tim, for the rule, did not deny the receipt of the excess, but argued that it could not be set off against the composition notes in suit. If the defendant preferred plaintiff, to the detriment of the other creditors, he cannot take advantage of his own wrong.

Young, contra. The fraud, if any, was on the part of the plaintiff, and the defendant should be allowed credit for the ten per cent. paid in excess.

Rule absolute.

C. P. No. 3. **Taylor v. North.** October 21.

Warranty—Representation—Insufficient averment of warranty—Statements should be specific.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit upon two promissory notes. The affidavit alleged that the notes were given for, and on account of an agreement by the plaintiff

Digitized by Google

to furnish the defendant with doors, sashes, etc., towards the erection of certain houses; that under the said agreement the plaintiff contracted to furnish the defendant with articles of good and merchantable quality and of well-seasoned stuff; that the articles furnished were inferior in quality to that agreed upon; that the defect arising from unseasoned wood was not and could not by reasonable diligence have been discovered until after the erection of the buildings; and that consequently the houses were depreciated in value to an amount greatly exceeding the amount of the plaintiff's claim.

C. C. Lister, for the rule.

If a warranty is claimed, the circumstances should be more clearly set forth. The deponent neither says when he ascertained the damage, nor what the damage was.

R. P. White, contra, contended that the warranty was sufficient under—

Nagle *v.* Potter, 3 WEEKLY NOTES, 26.

THE COURT. (LUDLOW, P. J.). A more specific supplemental affidavit must be filed before next Saturday.

C. P. No. 4. Oct. 14.

Gilbough et al. v. Keller et al.

Practice—Service of process on agent where defendant resides out of county—Act of May 4, 1852, § 1—Sheriff's return must show an exact compliance with provisions of Act—Stock gambling by engaging in a pool operation, quære, whether a "business" within the Act.

Rule to show cause why the return of service on defendants, David G. Schwartz, Peter S Reist, Hugh S. Gara, Henry Baumgardner, and Frederick Shroder (as below), should not be set aside.

To the summons issued in this case the following return was made:—

"Served David G. Schwartz, Peter S. Reist, Hugh S. Gara, Henry Baumgardner, and Frederick Shroder, residents of this Commonwealth, and non-residents of the City and County of Philadelphia, by giving, upon September 1st, 1876, a true and attested copy of the annexed writ, and making known the contents thereof to Francis S Bond, named as agent in an agreement signed by said parties; said agreement being in the following words, viz.:—

'In consideration of being a shareholder in pool No. 3, in the office of Bond, Moxey & Co., said pool being for the purpose of buying and selling Hestonville, Mantua, and Fairmount Passenger Railway stock, as may seem best to the manager of same, we and each of us agree to the following conditions, viz.: *First.* We and each of us agree not to have any interest, either directly or indirectly, in Hestonville, Mantua, and Fairmount Passenger Railway stock, outside of the pool. except such stock as we may now have on hand; but when we have sold this stock, we agree not to repurchase or resell it again. *Second.* We and each of us do make, constitute, and appoint our true and lawful attorney for us and in our name, Francis S. Bond, of the firm of Bond, Moxey & Co., as manager of the pool, for the purpose of buying and selling Hestonville, Mantua, and Fairmount Passenger Railway stock, as may seem best in his judgment, and to do all lawful acts requisite for effecting the premises, hereby ratifying and confirming all that the said Francis S. Bond shall do therein by virtue of these presents. *Third.* We and each of us agree to keep the most perfect silence in regard to all the movements made by said pool, as given to us by the manager or any member of the pool party. We agree not to talk or write in regard to the same to any one (except parties interested in the pool), or in any manner whatsoever to divulge the secrets of the pool. *Fourth.* We and each of us agree that the profits shall be divided in proportion to the amount of stock held by each of us, and the losses in the same way; but we are not to be held responsible to a greater extent than the money we have invested in the pool. *Fifth.* We, each of us, hold ourselves individually responsible to the manager of the pool to the amount of twenty-five thousand (25,000) dollars, should we in any way violate the above agreement and conditions, or by acting outside of the pool in any manner to cause injury to it.

'In witness whereof, we have hereunto set our hands and seals, the first day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[Seal.]	JOHN KELLER . . .	$10,000
[Seal.]	D. G. SCHWARTZ . . .	5,000
[Seal.]	PETER S. REIST . . .	5,000
[Seal.]	H. S. GARA	1,000
[Seal.]	H. BAUMGARDNER . . .	2,500
[Seal.]	F. SHRODER	2,500
		4,000
[Seal.]	ELUGIA CLARK (D. A. D., Att'y)	10,000
[Seal.]	CHAS. J. DANGLER . . .	10,000
[Seal.]	H. H. LANDIS . . .	10,000
[Seal.]	WM. K. HEMPHILL . .	10,000
[Seal.]	J. H. SCHAEFER . . .	10,000'

Said service being made at the usual place of business of said Bond, in the City of Philadelphia."

G. T. Bispham and *Wayne MacVeagh*, for the rule.

The service in this case was attempted to be made under the Act of May 4, 1852 (Purd. Dig. 43, pl. 7), authorizing service of mesne process on the agent where any residents of this State "shall engage in business" in another county than the one in which they reside. The return is defective, because it does not set out that the defendants are engaged in business in this county, but by reciting the agreement in full would leave the Court to infer that fact. The language of the Act, in the ordinary meaning of the words, applies only to merchandising, manufacturing, or the pursuits of the mechanic arts.

Vankirk *v.* Wetherill, 1 Leg. Gazette, 131.

The term "business" denotes repeated practice or commencement with the intention of continuing. Persistence is its distinguishing characteristic. "Trading," which is an analogous expression, in the Bankrupt Acts has received this interpretation.

Archbold on Bankruptcy, 38.

Marston's Case, 5 Benedict, 313.

Digitized by Google

Here the transactions are confined to one pool in one stock, and the Act does not apply. Such a construction would be contrary to common sense, as well as public policy.

Samuel Dickson and *E. Spencer Miller*, contra.

The Act is remedial and should be liberally construed, particularly with reference to the plaintiffs, for they found their action on transactions arising under the agreement. The acts of the principals through their agent, Bond, were not isolated or single, but repeated, and covered the purchase and sale of a large amount of stock. Besides, by the appointment of a manager, the defendants have given evidence of an engagement in business sufficient to come within the provisions of the Act.

C. A. V.

Oct. 12. THE COURT. The Sheriff's return here does not show that the defendants engaged in business in this county, or that they were not in the county at the time of issuing of the writ or process.

The sheriff must show an exact compliance with the terms of the Act authorizing him to make the service before defendants can be considered in default in not appearing. The sheriff under this return would be answerable to no one, because he certifies or returns no fact which the law requires him to determine before he can make his service. He cannot shield himself from responsibility behind such a questionable return. The return must be certain and positive, not argumentative or doubtful.

It cannot with any degree of certainty be argued that the simple fact of making a single contract to share in a stock pool is engaging in or carrying on business. The contract may never have been carried out or enforced, the money not contributed, the stock not bought or sold. It may be a fraud, and, as the sheriff presents it, is wanting in the necessary proof as to execution to make it evidence in any tribunal. It may be subject to numerous defences any one of which might destroy the fact that a business in pursuance of it actually existed.

The Act of Assembly never contemplated that the signing of a contract was entering into business. It means the actual carrying on of a business, occupation, or employment, not any in contemplation. It is very doubtful if the scheme contemplated in the agreement if in actual operation would amount to a business within the meaning of the Act; but whether it would or not we are not called upon to determine until the sheriff returns the actual existence of such a business and the engagement of the defendants therein, for the defendants are not now in Court.

To permit such a return to stand would lead to great abuse of legal process, and a want of responsibility on the part of the officer executing the same.

The rule is therefore made absolute.

Opinion by ELCOCK, J.

[See Lehigh Val. Ins. Co. *v.* Fuller, *ante*, p. 7. As to service on clerk of non-resident, under Act of 2 April, 1856 (Purd. Dig. 43, pl. 8), see Culligan *v.* Russell, 2 WEEKLY NOTES, 440. *Cf.* Koecker *v.* Thompson, Id. 487.]

C. P. No. 4. **Gormley v. Stovell.** Oct. 14.

Affidavit of defence—Conditional acceptance of an order for the delivery of goods.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on an acceptance as follows:—

"Phila., Nov. 5th, 1875.

"Messrs. J. A. STOVELL & Co.—Please deliver to Messrs. Gormley & Geisenberger 69 Moore's whiskey to the amount of five hundred dollars, and oblige, etc.

"F. RAHTER."

"Accepted and will be delivered at $4.50 per gallon.

"Nov. 23, '75. JAMES A. STOVELL."

The affidavit alleged that Rahter was a salesman in defendant's employ; that the order was without consideration; and that the meaning of the paper was expressly understood to be that the whiskey was not to be delivered until the price named should be paid either by Rahter or Gormley.

John A. Bickel, for the rule. This is an unconditional acceptance of an order in kind. The price and quantity are named merely for the purpose of computation, and settlement in account.

[ELCOCK, J. It is a conditional acceptance to be delivered upon payment of a certain price.]

Goodwin, contra.

Rule discharged.

Orphans' Court.

Hopple's Estate. Oct. 18.

Competency of witnesses—Act of 15 *April*, 1869 *—The widow of decedent is a competent witness before examiner.*

Sur certificate of Examiner.

Joseph Hopple died in September, 1874, leaving a will. A *caveat* was lodged against the Register's granting its probate, on the ground of unsoundness of mind and undue influence. The Register of Wills having refused an issue *devisavit vel non*, an appeal was taken to this Court, and an examiner appointed to take testimony.

Counsel for the contestants called before the examiner the widow of the testator, who was also the executrix of his will, to testify as to the men-

Digitized by Google

tal condition of the decedent. Counsel for the executrix objected, and the witness, under advice of counsel, declining to answer, the examiner certified the matter to the Court.

Hopple, for the contestants.

The wife is a competent witness under the Act of 1869.

Rowley *v.* McHugh, 16 Sm. 269.

C. M. Husbands (with whom was *Junkin*), for the executrix.

This is not the issue *devisavit vel non;* it is only a preliminary proceeding.

She was incompetent before the Act of April 15, 1869, and she remains so under the first section, viz.: "This act shall not alter the law as now declared. . . . so as to allow a husband and wife to testify for or against each other."

[HANNA, J.: She is not a witness here for or against her husband. He is dead.]

[DWIGHT, J., called the attention of counsel to the decision of the Court in Hyneman's Estate, 2 WEEKLY NOTES, 571.]

Junkin, on the same side: In that case the question was as to her competency to prove a claim against the estate. The wife is incompetent no matter whether she has been living with her husband or not. It makes no difference when the relation began or when it ceased.

Hitner's Appeal, 4 Sm. 110.

THE COURT. The widow is a competent witness, and must answer any question put to her; if it is irrelevant or impertinent we can determine so when the examiner reports to the Court.

[See Watson's Estate, 2 WEEKLY NOTES, 113.]

Soley's Estate. Oct. 18.

Practice—Costs—Examiner's fees—Prolix and irrelevant cross-examination.

Sur petition for an order on respondents to pay costs and fees for taking testimony.

The petition, filed by William H. Burnett, set forth that on the 16th day of October, 1875, he was duly appointed by the Court, examiner to take testimony, and report the same to the Court, in the proceedings arising under the petition of James Soley, a devisee under the will of John Soley, deceased, for an order on the executors of the above estate, to pay over the balance of the sum awarded him by the report of the auditor, filed September, 1875. The petition further set forth, that "for taking testimony on behalf of respondents in the proceedings under George B. Soley's petition, the petitioner charged at the rate fixed by the equity fee bill adopted by the Supreme Court of Pennsylvania, thus making the charge in these proceedings one hundred and four dollars and eighty-one cents, which sum the said respondents, the executors of the above estate, have wholly neglected and refused to pay."

Lewis Shallcross and Robert Soley, executors of the above estate, alleged in their answer, "that they had no funds in their hands as executors out of which said costs may be paid, and that the cross-examination of the respondent's witnesses was vexatiously extended beyond all reasonable length, and that said depositions were inordinately drawn out by the misconduct of counsel for petitioners, in asking long, impertinent questions, and causing long remarks to be entered at length, against the protest of counsel for executors.

H. Budd, Jr., for the petitioner.

The only question is, whether, when an officer is appointed by the Court, and performs his duty, his remuneration must depend on the solvency of one of the parties, and one for whose special benefit the service was not rendered.

Lewis Stover, for respondents.

The testimony was drawn out beyond all reason.

[HANNA, J. It was your client's duty to pay the examiner if he availed himself of his services; an examiner cannot refuse to take testimony or put questions.]

If he does not follow our directions, we should not be obliged to pay him.

[DWIGHT, J. You do not mean to say, that, if a master takes irrelevant testimony, he does so at his own expense? You cannot control an examiner; a great mass of unnecessary matter generally finds its way into such proceedings.

O'BRIEN, J. You might have come in here before, and if you had satisfied us that the testimony inserted was impertinent, and given us instances, we would have made him give security for costs.]

Eo die. THE COURT granted the prayer of petitioner, ordering him to file his bill of costs subject to review.

[See Collins' Estate, 2 WEEKLY NOTES, 430.]

Moore's Estate. Oct. 21.

Practice—Dismissal of executor not decreed pro confesso where executor, though served with citation, has not appeared.

Motion for decree *pro confesso.*

A citation was issued at the instance of a legatee to the executor of decedent, to show cause why he should not be dismissed, on the ground that he was wasting and mismanaging the estate. No answer having been filed, and proof of service of the citation having been made—

M. Arnold, for petitioner, moved for the dismissal of the executor.

THE COURT. We must refuse this application. We never will dismiss an executor or administrator where the petition is taken *pro confesso.* You must take depositions in support of your petition.

Digitized by Google

Weekly Notes of Cases.

Vol. III.] *THURSDAY, NOV. 9, 1876.* [No. 6.

Supreme Court.

Bair and Shenk's Appeal.

Assignment for the benefit of creditors—Distribution of fund—Creditor of two assigned estates for same debt—Right to claim dividend from both on the whole amount of the debt.

Where more than one person is liable for the same debt, and each debtor makes an assignment for the benefit of his creditors, the creditor may claim a dividend from each estate on the full amount of the debt until the debt is fully satisfied.

The maker and the endorser of a note made separate assignments for the benefit of their respective creditors. The holder of the note received a dividend on it from the assigned estate of the maker. On a subsequent distribution of the assigned estate of the endorser:

Held (reversing the judgment of the Court below), that the holder was entitled to a dividend from the estate of the endorser on the full amount of the note, without deducting the amount received from the estate of the maker.

Bank of Pennsylvania *v.* McCalmont (4 Rawle, 307), and Perit *v.* Pittfield (5 Rawle, 166), overruled.

Appeal from the Common Pleas of Cumberland County.

This case came before the Court below on exceptions to the report of an auditor appointed to distribute the balance in the hands of Abraham Witmer, assignee for the benefit of creditors of Amos Miller. The facts as found by the auditor were as follows:—

Bair & Shenk were the holders of a promissory note for $3000, drawn by John Miller to the order of Amos Miller, and by him endorsed. John Miller received the proceeds of this note, and afterwards, on October 24, 1873, made an assignment for the benefit of his creditors. Before his estate was distributed Amos Miller also made an assignment for the benefit of creditors. Afterwards Bair & Shenk received from John Miller's assigned estate a *pro rata* dividend of $399.60 on the note. They then appeared before the auditor in Amos Miller's estate and claimed a dividend from that estate on the full amount of the note with interest. The auditor, on the authority of Bank *v.* McCalmont (4 Rawle, 307), and Perit *v.* Pittfield (5 Rawle, 166), deducted from their claim the amount already received by them from John Miller's estate, and awarded them a dividend (amounting to $1145.62) on the balance. To this award Bair & Shenk filed an exception. The Court below (McLean, special P. J., delivering the opinion) dismissed the exception and confirmed the report. Bair & Shenk appealed, assigning for error the confirmation of the auditor's report and the refusal of the Court to decree that a dividend be awarded them, from said assigned estate of Amos Miller, on the full amount of their claim, without deducting the amount received from John Miller's estate.

John Hays, for appellants.

By the deed of assignment the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors, and each creditor *owned* such a proportional part of the whole as the debt due to him was of the aggregate of the debts. The extent of interest was fixed by the deed of trust.

Miller's Appeal, 11 Cas. 481.
Morris *v.* Olwine, 10 Har. 441.
Patten's Appeal, 9 Wr. 151.
Graeff's Appeal, 2 Weekly Notes, 104.

In the last case cited the Court, in speaking of the creditors, say: "So far as regards the assigned estate, they were *no longer creditors* but equitable *owners*." If owners of the estate in proportion to their claims, are they so at some future day, or as of the date of the deed? The Court below rules in effect that they take not as of the date of the assignment, but as of the date of distribution. If this principle is correct, the cases above cited cannot stand. And if it be asserted that the principle is applicable only where there are two insolvent estates, that position is met by the case of Bair & Shenk's Appeal (19 Sm. 272), where there were two estates in process of settlement and a *pro rata* on the full amount was allowed from each estate. To adopt any other rule would be to work injustice. An endorser's liability for the amount of an endorsed note would depend upon the point of time when the maker's estate was distributed. If distributed first, the endorser would stand as if he had endorsed a note for a less amount, and his estate would only be liable for a *pro rata* on the diminished sum.

[No counsel appeared contra, and no paper-book was submitted.]

October 9. The Court. Amos Miller made a voluntary assignment for the benefit of creditors on the 24th of October, 1873. On distribution by an auditor of the balance in the hands of the assignee, Bair and Shenk, the appellants, presented a claim founded on a note for $3000, drawn by John Miller and endorsed by Amos Miller, which had become due and been protested for non-payment on the 1st of April, 1873. It appeared that after making the note, and before the assignment of Amos Miller was executed, an assignment for the benefit of his creditors had been made by John Miller. It appeared also that in a

Digitized by Google

distribution of John Miller's estate, the appellants had received a dividend on their claim of $399.60. The question presented was whether the appellants were entitled to a dividend out of Amos Miller's estate on the entire claim, embracing the principal and interest of the note, or on the balance remaining after deducting the dividend received from the assigned estate of John Miller? The auditor allowed a dividend only on the balance, and his report was confirmed by the Common Pleas.

In deciding the question, the auditor and the Court below rested on the authority of The Bank of Pennsylvania *v.* McCalmont (4 Rawle, 307), and Perit *v.* Pittfield (5 Rawle, 166). In the first of these cases, it was held that the rule for making a dividend, where more than one of the persons liable to the payment of a note or bill have failed and made voluntary assignments of their property for the purpose of paying their respective debts and liabilities, is to take the amount actually due upon the note or bill at the times respectively at which the first dividend is declared of each fund so assigned. The rule thus established was confessedly outside of any precedent, and was founded on what was assumed to be local practice. Judge KENNEDY said: "The rule possibly has been derived from that which seems to have been adopted in England in cases of bankruptcy, which is to take the amount of the debt actually due at the time of the creditor's first *proving* it against the fund. The only difference between the two cases seems to be that in the case of bankruptcy the amount of the debt due at the time of the creditor's first proving it is taken as the sum for which a dividend shall be allowed; but in the cases of voluntary assignments here, the amount due at the time of declaring the first dividend of each fund respectively is taken as the sum on which the dividend is to be allowed. I do not see any sufficient reason why this rule, which has already been adopted in practice here, should not also be adopted by the courts." In Perit *v.* Pittfield, the principle of The Bank of Pennsylvania *v.* McCalmont was followed without discussion.

In later cases doctrines have been settled entirely inconsistent with the principle of these two precedents. Morris *v.* Olwine (10 Harris, 441), decided that a creditor by bond and notes secured by mortgage may have recourse, in the first instance, to the personal property of the debtors which had been assigned for the benefit of creditors without preference; and that, though after an award by an auditor in his favor to a *pro rata* share of the personal estate, such a creditor, by direction of the Court, proceeded upon the mortgage and recovered the greater proportion of his claims, he was still entitled to the *pro rata* dividend on his whole claim, and was not limited to a *pro rata* share on his claim as reduced. A creditor who has a lien upon a particular portion of an assigned estate, and out of a sale of part of which he realizes a portion of this claim, is entitled to his *pro rata* dividend on the whole claim out of the general assets in the hands of the assignee to an amount sufficient to pay the balance of his demand in full, although a portion of the estate on which he holds the lien remains unsold. (Keim's Appeal, 3 Casey, 42.) A debtor executed a general assignment of all his estate in trust for the benefit of his creditors; subsequently, the assignor became entitled to a legacy, which was attached and recovered by one of the creditors for whose benefit the assignment was made. It was held that such creditor was nevertheless entitled to a dividend out of the assigned estate on the whole amount of his claim at the time of the execution of the assignment. (Miller's Appeal, 11 Casey, 481.) It was said in that case that "a creditor is entitled to a dividend under an assignment, not merely as a creditor, but as an equitable owner of the assigned estate; and the extent of his ownership is fixed by the amount of the claim when the assignment is made." Patten's Appeal (9 Wright, 151), was perhaps a still stronger case. In the argument, the authority of The Bank of Pennsylvania *v.* McCalmont, and Perit *v.* Pittfield was there pressed upon the Court in opposition to the doctrine announced in Miller's Appeal. It was ruled that the detention by vendors of goods sold, on the insolvency and assignment for the benefit of creditors by the vendees, did not rescind the contract of sale; that the vendors were entitled to *pro rata* distribution out of the assigned estate; and that where part of the goods had been delivered, and the balance which had been retained had been sold by the vendors, who applied the proceeds to the payment of the notes given upon the sale, leaving a balance still due, they were entitled to a dividend on the whole amount of their claims at the date of the assignment. In delivering the opinion, Judge STRONG said: "If the beneficial ownership of property assigned in trust for creditors is not in the creditors for whose benefit the trust was made, it can be nowhere, for clearly it is not in the assignor, nor is it in the trustee. Surely it cannot be maintained that when an assignment has been made in trust for creditors, it does not operate as much for the benefit of a creditor who holds a collateral security for the debt due him as for the benefit of the creditor who holds no collateral." These cases have been emphatically endorsed by this Court in Hess's Estate (19 P. F. Smith, 272); Brough's Estate (21 P. F. Smith, 460); and Graeff's Appeal (2 WEEKLY NOTES, page 104; 32 Legal Intelligencer, 448). Brough's Estate, indeed, may be regarded as decisive. Brough, being indebted to Hinchman, gave him his own

Digitized by Google

note with endorsers, and the note of Gabley as collateral security. Brough afterwards assigned for the benefit of creditors. The notes were not paid at maturity, but afterwards payments on account were made by the endorser. In the distribution of Brough's estate, it was held that Hinchman was entitled to a dividend on the amount due at the date of the assignment, irrespective of the intervening payments.

Upon authority the rights of the appellants would seem clear. They would seem clear also in view of a principle so simple and palpable as to be obvious to the plainest comprehension. If the estates of the two debtors had been adequate to the purpose, the appellants had the right to demand payment of their debt in full. That is, if each estate had been large enough to pay a dividend of fifty per cent., the dividends from both, if apportioned to it, would have satisfied the claim. By the rule which was adopted by the Court below, if John Miller's estate had paid fifty per cent., and a dividend of fifty per cent. had been subsequently declared in Amos Miller's estate, the appellants would have been confined to a *pro rata* distribution on the balance remaining due, and one full quarter of their claim would have been left unpaid. Surely a rule that would so divert funds admittedly adequate as to make the satisfaction of an uncontested debt impossible, would neither be sound nor safe.

The decree of the Common Pleas is reversed at the costs of the appellees; and it is now ordered that the scheme of distribution reported by the auditor and confirmed by the Court be so modified and corrected as to allow to Bair and Shenk, the appellants, a dividend upon the whole amount of their original claim, with interest and cost of protest.

Opinion by WOODWARD, J. WILLIAMS, J., absent.

May, '76. **Crouse v. Staley.** May 24.

Evidence—Competency of witnesses—Act of 15 *April*, 1869, *proviso—Husband and wife—Action against administrators.*

Where, by the death of one of two defendants, the plaintiff is rendered incompetent to testify, the surviving defendant is also incompetent.

In an action against husband and wife on a mortgage of the wife's property, she died before trial, and her administrator was substituted of record. On the trial, the Judge excluded the plaintiff as a witness, but permitted the husband to testify:

***Held*, that the husband also should have been excluded.**

Error to the Common Pleas of Adams County.

Scire facias sur mortgage by Crouse against James J. Staley, and Mary Ann, his wife. Mary Ann Staley and her husband executed a mortgage of her real estate, dated December 26, 1867, to Crouse, to secure her note for $400, payable to the plaintiff on April 1, 1869. Pleas: payment, and set-off. Before trial, Mary Ann Staley died, and her administrator was substituted as party to the record.

Upon the trial the plaintiff offered the note and mortgage in evidence and rested. The defendants offered in evidence a mortgage of the same tract, dated March 9, 1869, between the same parties, conditioned for the payment of an obligation of Mrs. Staley for $500, payable April 1, 1870, to be followed by evidence that the mortgage in suit was included in the later mortgage, and was to have been satisfied by the mortgagee in consideration of the new mortgage. For this purpose James J. Staley was called to testify. The plaintiff objected to his competency. Objection overruled. Exception.

In rebuttal, the plaintiff offered himself as a witness to prove the consideration of the second mortgage. The defendant objected. Objection sustained. Exception. The same party was then offered as a witness to contradict Staley. The defendant objected. Objection sustained. Exception.

Verdict and judgment for the defendants. The plaintiff took this writ, assigning for error the admission of Staley as a witness, and the rejection of the plaintiff.

D. Wills, for the plaintiff in error.

In the exceptions provided for in the Act of 15 April, 1869, the Legislature guarded against any advantage being given to either party by the death of the other, and if the plaintiff was rendered incompetent to testify by the death of Mrs. Staley, an unfair advantage was given to James Staley, in allowing him to testify in support of his own interest. Whilst one of the parties to a contract in litigation is denied the privilege of testifying, the policy of the law is to close the mouth of the other.

Groves *v.* Griffin, 7 Harris, 176.

This doctrine was recognized prior to 1869, and is the true principle to apply to the construction of this Act.

Karns *v.* Tanner, 16 Sm. 297.

Pattison *v.* Armstrong, 24 Sm. 476.

H. B. Woods and *R. G. McCreary, contra.*

The proviso of the Act of 1869 excepts the case of husband and wife testifying *against* each other. They may be witnesses *for* each other.

Yeager *v.* Weaver, 14 Sm. 427.

Rowley *v.* McHugh, 16 Id. 270.

The witness was not called to testify against the deceased party, or against the substituted administrator, but in favor of them. Hence this case is wholly unlike Karns *v.* Tanner, where the interests were opposing. The proviso was only intended to close the mouth of the adversary of a

Digitized by Google

deceased party; in this case there was no dispute between the witness and the administrator, and he was competent.

Craig *v.* Brendle, 19 Sm. 154.
McFeren *v.* Mt. Alto Iron Co., 26 Sm. 188.

June 6. THE COURT. The subject of this action was the mortgage of the wife, with whom her husband was necessarily joined in the action. When she died and her administrator was substituted, it fell within the exception of the Act of 15 April, 1869, viz., an action against an administrator.

The equality of parties was gone in respect to their ability to testify. Crouse was no longer competent to testify against the administrator of Mrs. Staley, and his mouth could not be opened by calling her husband, while to call the husband who had acquired a personal interest by curtesy in the mortgaged estate would have been unjust.

We think he was incompetent under our recent decisions.

PER CURIAM. Judgment reversed, and a *venire de novo* awarded.

WILLIAMS, J., absent.

Jan. '76, 49. March 9 & 10.

Breisch et al. v. Coxe et al.

Unseated lands—Tax sales of—Acts of April 3, 1804, *and March* 13, 1815.

An offer to the County treasurer by the owner of unseated lands, of payment of all the taxes due thereon, and a payment by the owner of all sums made known to him by the treasurer, are equivalent to an actual payment of the whole, and will prevent a valid sale of the land for an unpaid balance not made known by the treasurer.

The provision in the Act of 1804, § 3 (Pur. Dig. 1448, pl. 31), that all actions for the recovery of such lands must be brought within five years from the date of sale, does not apply when the sale was absolutely void for want of jurisdiction.

Error to the Common Pleas of Schuylkill County.

Ejectment, brought in June, 1870, by Charles S. Coxe, F. Coxe, T. C. Coxe, and Charlemagne Tower against Jacob Breisch, W. Michael, S. Michael, B. Bitler, H. Lebo, and C. Wagner, for a tract of 400 acres of unseated land in North Union Township. Plea, Not guilty.

The plaintiffs' claim was founded on a warrant for the land in controversy from the Commonwealth to Matthew Smith, dated June 13, 1793. Smith's title became vested by various conveyances in Charles S. Coxe, in trust for the heirs of Tench Coxe. The defendants claimed title under a sale made June 14, 1852, by the treasurer of Schuylkill County, to Joseph S. Patterson, for alleged non-payment of the following taxes:—

1850.	County tax . . .	$ 80
"	State tax . .	60
"	Road tax . .	1 20
1851.	County tax .	80
"	State tax . . .	60
	Total . . .	$4 00

The plaintiffs claimed that they had paid in full all the taxes assessed on the Tench Coxe estate, and that the sale was therefore void. They put in evidence assessments establishing payment of taxes from 1821 to 1870, and a tabulated statement, headed thus:—

"An account of all taxes assessed and unpaid on the land mentioned below, situate in Union and Rush townships, in Schuylkill County, the property of Charles S. Coxe, trustee of the estate of Tench Coxe, Esq., deceased."

In the body of this statement was embraced the Matthew Smith tract, assessed as Matthias Smith, and opposite to the tract were the County and State taxes respectively, 80 and 60 cents for each of the years 1850 and 1851, and appended to it was the following receipt:—

"Received April 20th, 1852, of Charles S. Coxe, Esq., trustee of the estate of Tench Coxe, Esq., deceased, two hundred and thirty dollars and seventeen cents, in full for all the taxes, interest and costs upon the several tracts, parts of tracts, and parcels of unseated land above mentioned, the property of the said Charles S. Coxe, Esq., trustee of the estate of Tench Coxe, Esq., deceased, and that sum being all the taxes assessed and now due on the said unseated land with the interest and costs thereon.

G. D. BOYER,
Treasurer of Schuylkill County."

They likewise produced the following receipt annexed to a tabular statement of lands, including the Matthew Smith tract:—

"Received 3d June, 1854, of Charles S. Coxe, Esq., trustee of the estate of Tench Coxe, Esq., deceased, the sum of six hundred and fifty-nine dollars and twenty-five cents, in full for all the taxes upon the several tracts, parts of tracts and parcels of unseated land above mentioned, the property of the said Charles S. Coxe, trustee as aforesaid, that sum being all the taxes assessed and now due on the said land with the interest and costs thereon.

ISAAC WARD,
Treasurer."

The return of the road tax for 1850 was not certified to by the supervisors until December 30, 1851, and was not filed in the treasurer's office until January 20, 1852, only five months before the sale. In the above mentioned tabulated statement, this road tax was not set out opposite the Matthew Smith tract. The plaintiffs contended that this was an omission on the Treasurer's part, which relieved them from all responsibility therefor; that they performed their whole duty in the matter by offering payment of all taxes due, and actually paying the full amount claimed by the Treasurer.

The defendants submitted the following points:

Digitized by Google

(1) The tax sale of 1852 to Joseph S. Patterson is based on a regular assessment and sale of the land in suit. It appears by the evidence that the road taxes for 1850 were unpaid, and Charles S. Coxe, having applied to the treasurer on the 30th of April, 1852, and having paid the County and State taxes for 1850 and 1851, on land assessed to Charles S. Coxe, but not the road taxes for the year 1850, cannot take advantage of any allegation that he was misled by the County Treasurer in this suit, the same having been brought more than five years after the delivery of the Treasurer's deed to Patterson.

(2) Under all the evidence in this cause, the verdict of the jury must be for the defendant.

(3) Coxe paid but the State and County taxes, when in fact there were County, State, and road taxes due. The records in the treasurer's office were notice to Coxe, and he was not only presumed to know, but did, in fact, have notice from the records that the road taxes were due; and from his own receipt that they were unpaid. Hence, if the jury believe that Coxe was not misled by the County Treasurer, of which there is no positive evidence in this case, and neglected to pay the road tax, the defendant is entitled to a verdict. And this is so from the fact that the County Treasurer has no right to take less than the taxes due, and in such case it would be a fraud upon the county, and the receipt would not avail Coxe who was a party to it, for on its face it showed that he had not paid the road taxes.

THE COURT (PERSHING, P. J.) made no direct answer to these points, but charged, *inter alia*, as follows:—

"We are firmly impressed with the belief (and if we are wrong we can be corrected by a higher Court) that these receipts are sufficient to sustain the position taken by the plaintiffs here; that the limitation of five years, found in the Act of 1804, would not apply to the facts in this case. . . . We, therefore, instruct you that, under the evidence, in this case, your verdict should be for the plaintiffs"

The defendants took this writ of error, assigning the portions of the charge quoted, and the omission of the Court to affirm or to answer specifically the points which they submitted.

F. P. Dewees (with him *J. J. Clark*, *O. P. Bechtel*, and *Hughes & Farquhar*), for plaintiffs in error.

A tax sale is valid if the land was unseated at the time of sale, and the taxes properly assessed, and due and unpaid for one whole year.

Laird v Hiester, 12 Harris, 453.
McReynolds v Longenberger, 7 Sm. 24.

The date of delivery of the tax return to the treasurer is immaterial, provided the assessment was made a year before the sale.

Creigh v Wilson, 1 S. & R. 41.
Birch v Fisher, 13 Id. 208.
Strauch v Shoemaker, 1 W. & S. 176.
Laird v. Heister, *supra*.
Miller v. Hale, 2 Cas. 432.
McReynolds v. Longenberger, *supra*.
McDermott v. Hoffman, 20 Sm. 54.

An offer by the owner of unseated lands to the county treasurer to pay all the taxes due thereon, and an actual payment of all sums made known to him by the treasurer, will not invalidate a sale of the land for an unpaid balance not made known by the treasurer.

Steiner v. Coxe, 4 Barr, 13.
Philadelphia v. Miller, 13 Wr. 440.
Brown v. Com'th, 2 Rawle, 44.
Burd's Exrs. v. Patterson, 10 Har. 223.
Baird v. Cahoon, 5 W. & S. 540.

The limitation in the Act of 1804 prevents the bringing of actions for the recovery of lands sold for unpaid taxes more than five years after the date of sale.

Ash v. Ashton, 3 W. & S. 510.
McCall v. Himebaugh, 4 Id. 164.
Bradford v. Dornseif, 2 P. & W. 503.
Shiek v. McElroy, 8 Har. 25.
Robb v. Bowen, 9 Barr, 71.
Burd's Exrs. v. Patterson, *supra*.
Iddings v. Cairns, 2 Grant, 88.
Rogers v. Johnson, 17 Sm. 43.
Johnston v. Jackson, 20 Id. 168.

F. B. Gowen (with him *G. R. Kaercher*), contra, was not heard by the Court. Their printed argument contained the following points and authorities.

A valid tax sale cannot take place in less than a year after the filing of the tax return in the treasurer's office.

Act of March 30, 1811, Pur. Dig. 1279, § 55.

If the owner of unseated lands offers to pay to the county treasurer all taxes due thereon, and actually pays all sums made known to him by the treasurer, a sale for an unpaid balance not made known by the treasurer will be invalid.

Dougherty v. Dickey, 4 W. & S. 146.
Baird v. Cahoon, *supra*.
Laird v. Hiester, *supra*.
Halsey v. Blood, 5 Casey, 319.
Bubb v. Tompkins, 11 Wr. 359.
Price v. Mott, 2 Sm. 316.
Lyman v. City, 6 Id. 504.
Dietrick v. Mason, 7 Sm. 40.

The limitation of five years in the Act of 1804 does not apply when the sale was absolutely void for want of jurisdiction.

Laird v. Hiester, *supra*.
Hunter v. Cochran, 3 Barr, 107.
McReynolds v. Longenberger, *supra*.
Ankeny v. Albright, 8 Har. 157.
Levick v. Brotherline, 24 Sm. 149.
Wilmoth v. Canfield, 26 Sm. 153.

May 8. THE COURT. The first and important question in this case is, whether an offer to the county treasurer, of payment of all the taxes due on unseated lands, and a payment by the owner of all sums made known to him by the treasurer, is equivalent to an actual payment of the whole, and will prevent a valid sale of the land for an

Digitized by Google

unpaid balance not made known by the treasurer. It is undisputed that the sale will be void if there be actual prepayment of the tax. The 4th section of the Act of 13 April, 1815 (6 Smith's Laws, 301), is express on this point, and the right is recognized in many cases. (Dougherty *v.* Dickey, 4 W. & S. 146; Hubley *v.* Keyser, 2 Penna. 496; Baird *v.* Cahoon, 5 W. & S. 540; Kennedy *v.* Daily, 6 Watts, 269; Ankeny *v.* Albright, 8 Harris, 157; Laird *v.* Hiester, 12 Harris, 452.)

But it is contended a tender of payment is not within the express words of the 4th section of the Act, which forbids recovery, except in the case of redemption within two years or payment of the tax before the sale. It is said that being not paid in fact, the owner is bound to know it, the jurisdiction of the treasurer remains, and the purchaser will not be affected by an act or neglect of the treasurer not appearing in the proper books. The Act of 1815, is indeed very express that the owner shall recover after a sale for taxes, "in no other case and on no other plea," than the two mentioned. Yet it has been held that these words were not intended to exclude recovery where the tax title is obviously defective for other good causes. Thus in the cases of Sutton *v.* Nelson (10 S. & R. 238), and Connelly *v.* Nedrow (6 Watts, 451), it was held that the omission of a purchaser to give a bond for the surplus of the bid over taxes and costs is fatal, and that even payment of the whole bid to the treasurer is insufficient. So in Bartholemew *v.* Leech (7 Watts, 472), it was determined that if the surplus bond contains no description of the land sold, it is fatal to the sale. In Coney *v.* Owen (6 Watts, 435), it was held that a sale for taxes actually assessed upon donation land during the life of the soldier is void; the soldier being entitled to exemption from taxes on such land during his lifetime. There was jurisdiction to sell in all these cases; in the soldier's, general jurisdiction, and in the others, specific jurisdiction, yet the sale was held void for what might be termed fatal irregularities. The case before us, therefore, must be determined upon other considerations than the mere words of the Act. It must be conceded that the payment of taxes is a duty, and a failure to perform it is a fault of the owner. But payment is one thing, and the steps leading to it are another. For the latter, the owner is not responsible. He cannot assess himself or know what is charged against him. He must wait the actions of the officers of the law. He cannot pay until he is informed what he is to pay. To perform the duty of payment he must apply to the treasurer for the taxes charged against his land. If this officer fails to give him the information on demand, on what just principle shall it be said he has not performed his duty? It is said there are tax books open to inspection, let him search them; but this is neither his business nor his duty. As was said in Dietrick *v.* Mason (7 P. F. Smith, 40), the treasurer is the legal custodian of the books and entries of the taxes necessary to show the sum to be tendered. This information it is his duty to give, and he cannot lay the books before the owner and compel him to search for himself. The knowledge of the latter may be inadequate to find what he needs. If then the owner pays all the taxes stated by the treasurer, he has done his whole duty; he can do no more. (Baird *v.* Cahoon, 5 W. & S. 540; Laird *v.* Hiester, 12 Harris, 464.) His claim to be protected against a sale of his land for taxes he stood ready to pay, but which the proper officer has failed to present to him on demand, is quite as great as that of the purchaser to be protected against the act of the same officer in making a sale for taxes actually paid. Indeed his equity is greater, for he has a prior title to the land, which has wrongfully been exposed to sale for an unknown trifle of tax. He would lose a valuable property, sold for no real equivalent, while the purchaser pays but a trifle of tax and costs, which, in most circumstances, he can have returned to him. If the sale be void in point of want of knowledge, they stand upon a par, the owner's ignorance of the tax being the equivalent of the purchaser's ignorance of the attempt to pay it. As a matter of fact, too, purchases at tax sales are known to be full of risks; and rarely more than a tithe of the value of the land is bid. It is but just then that a *bona fide* attempt to pay all the taxes, frustrated by the fault of the treasurer, should stand as the equivalent of an actual payment. This is an almost universal rule, which substitutes a tender for performance, when the tender is frustrated by the act of the party entitled to performance. It is conceded that a similar offer to redeem land already sold for taxes, frustrated by a similar neglect of the treasurer, will stand good as a redemption. This has been too often decided to be denied. (Bubb *v.* Thompkins, 11 Wright, 359; Price *v.* Mott, 2 P. F. Smith, 315; Dietrick *v.* Mason, 7 P. F. Smith, 40; Lamb *v.* Irvin, 19 P. F. Smith, 436; Halsey *v.* Blood, 5 Casey, 319.) But it is said that in the case of redemption, a duty lies on the treasurer to furnish the means of ascertaining how much shall be paid. Yet, wherein lies the difference? We have shown that the duty is precisely the same. A man cannot pay his taxes without a knowledge of what they are, better than he can pay the redemption money without a knowledge of what it is. If there be a difference, it is in favor of the owner who goes to pay before sale, for his is no fault whatever, while he who suffers his land to be sold is in fault, and redemption becomes his necessity.

Digitized by Google

Here the whole fault was with the treasurer. The road tax for 1850 on the Matthew Smith tract, was certified into the treasurer's office on the 20th of January, 1852. It was within the treasurer's official knowledge, on the third of April, 1852, the day when he gave his receipt for all the taxes assessed and due on the Smith tract.

The only inquiry remaining on this branch of the case, is whether the Court was justified in considering the treasurer's statement of accounts of the taxes, and his receipts of April 30, 1852, sufficient evidence on their face that Charles S. Coxe, the trustee, called on the treasurer, and offered to pay all the taxes of the Matthew Smith tract. The paper is headed "An account of all taxes assessed and unpaid on the land mentioned below, situate in Union and Rush Townships, in Schuylkill County, the property of Chas. P. Coxe, trustee of the estate of Tench Coxe, Esq., dec'd." In this paper the Matthew Smith tract is distinctly and particularly set forth, and opposite it, in the tax columns for 1850 and 1851, are placed the County and State taxes, but no road taxes, a blank being left in the column of road taxes. The receipt at the bottom is in these words: "Received April 30, 1852, of Charles B. Coxe, Esq, trustee of the estate of Tench Coxe, Esq., dec'd, two hundred and thirty dollars and seventeen cents, in full for the taxes, interest, and costs upon the several tracts, parts of tracts, and parcels of unseated land above mentioned, the property of the said Chas. S. Coxe, Esq., trustee of the estate of Tench Coxe, Esq., dec'd, and that sum being all the taxes assessed and now due on the said unseated land, with the interest and costs thereon." This receipt was signed by the treasurer, G. D. Boyer, and on the same day acknowledged by him before an Associate Judge of Schuylkill Co. This paper is very formal, and in the absence of evidence to impugn its correctness, is certainly very clear evidence to any reasonable mind that Mr. Coxe called on the treasurer for an account of all the taxes assessed and due on his lands, and paid all that was demanded of him by the treasurer. No one in view of the paper can doubt that the omission of the road tax was the fault of the treasurer, and that the failure to pay it was no fault of Mr. Coxe.

The next question is whether the limitation of five years, contained in the third section of the Act of 3d April 1804 (4 Smith's L. 202), is a bar to the plaintiffs' recovery. That the limitation is a bar in all cases of sale void for irregularity is well settled. And it applies to sales made since the Act of 1815. (Bradford *v.* Dornseiff, 2 Penna. 503; Ash *v.* Ashton, 3 W. & S. 510; McCall *v.* Himebaugh, 4 W. & S. 164; Robb *v.* Bowen, 9 Barr, 71; Burd's Ex'r *v.* Patterson, 10 Har. 219; Iddings *v.* Cairns, 2 Grant, 88; Rogers *v.* Johnston, 17 P. F. Smith, 43; Johnston *v.* Jackson, 20 P. F. Smith, 164.) But a distinction is stated in Rogers *v.* Johnston, *supra*, between a sale absolutely void from a want of jurisdiction to sell, and one merely void because of a fatal defect in the proceeding. In one case the treasurer has no authority whatever to make a sale, in the other he has, and he only errs in the proceeding in which he exercises his authority. The owner is not bound to take notice of the former, for it is not to be presumed that an officer will do an act he has no authority to do, and he cannot be implicated in the consequence of the act where there is no power to bind him. But where there is authority to do the act, the owner must take notice, for then he becomes implicated in the consequences. Hence, if he would take advantage of an error of procedure, or an irregularity in the execution of the power, he must do it in due course of law, and time is part of the course prescribed. It was said in Laird *v.* Hiester (12 Harris, 463), as a result of the cases, that, "the authority of a treasurer to sell unseated lands for taxes depends upon the facts that the land was unseated at the time of the assessment, that a tax appeared to have been and was in fact assessed upon it by the proper officers, and that the tax has been due for one whole year, and remains unpaid." The absence of either of these facts involves exemption from the penalties of the acts of 1804 and 1815. If then a *bona fide* offer to pay all the taxes on an unseated tract, frustrated by the negligence of the treasurer to give information of all the taxes charged against the land, is the legal equivalent of actual payment of the taxes, in taking away jurisdiction to sell, as we have seen it is, the conclusion follows, that the limitation of five years in the Act of 1804 does not apply to such a case. The want of authority to sell is as clear as when the taxes have been actually paid, and the owner is not bound to presume a sale, and follow up its consequences within five years. It is not a mere irregularity which leaves the limitation in the act of 1804 in full force. All the hardship attributed to the purchaser's want of knowledge is as fairly imputable to a case of actual payment as it is of one of tendered payment. In neither does the fact appear to us to challenge his notice. In either case it is just as difficult for counsel to know the undiscovered defect. It is simply a want of knowledge of a fact, not of the law. If the land turn out to have been seated, the effect is the same, and counsel cannot be expected to know it. It is, therefore, not a just ground of complaint that counsel cannot know how to advise as to such a title. No counsel is responsible for advice in respect to unknown facts, but he can tell his client of these risks he must run.

Digitized by Google

Upon a consideration of the whole case we discover no error, and the judgment is therefore affirmed.

Opinion by AGNEW, C. J. WILLIAMS, J., absent.

May 24.

McCulloch v. Logan & Berkey to use of Hertzler.

Practice—Discontinuance—Abandonment of action—Suit before justice of peace for same subject matter as in a prior undetermined suit—Pleading—Former action pending.

The payment of costs by plaintiff, withdrawal of papers, and failure to proceed for four years, is an abandonment of an action instituted before a justice of the peace.

In a subsequent proceeding before the justice between the same parties and for the same subject matter, such former proceeding cannot be pleaded either in bar or in abatement.

Error to the Common Pleas of Juniata County.

This was, in the Court below, an appeal from the judgment of a justice of the peace. The justice's transcript showed that on Nov. 9, 1870, a suit was commenced by Logan & Berkey to use of N. Hertzler against McCulloch, and the case was heard, both parties appearing and offering evidence; but no judgment was entered. The following entry appeared on the transcript, without date: "Costs paid by N. Hertzler, note given Hertzler." The justice's record further showed that four years afterwards, in November, 1874, an *alias* summons issued between the same parties, for the same subject matter, upon the hearing of which judgment was entered for plaintiff, and the defendant appealed to the Common Pleas.

On the trial (before JUNKIN, P. J), the defendant, McCulloch, requested the Court to instruct the jury, (1) that the first suit, begun in 1870, having been between the same parties and for the same subject matter, was a bar to the present action. (2) That the justice had no authority to issue an *alias* summons in the original action after the defendants had appeared and the case had been heard, but no judgment entered. The Court refused the first point, and in answer to the second, said: "It is settled in Blair *v.* McLane (1 Cas. 77) that after hearing on both sides, the plaintiff may enter a non-suit, or may discontinue, and in either case he may sue again. Although in this case there was no final judgment, we instruct you that the legal effect was the equivalent of a non-suit, or discontinuance, and that plaintiff is not barred thereby, as by a former recovery or former action pending; and that plaintiff could, as he did, sue again on the 16th of November, 1874. We are of opinion that the suit brought in 1870 was wholly abandoned when the plaintiff paid costs, withdrew his papers, and commenced a new action by issuing an *alias* summons."

Verdict and judgment for plaintiff. The defendant took this writ, assigning for error, *inter alia*, the answer of the Court to his points.

Ezra D. Parker, for plaintiffs in error.

The entry on the justice's record "Costs paid by Hertzler, note given Hertzler," signifies neither discontinuance nor non-suit. A discontinuance is not effectual until costs are paid; but payment of costs is not a discontinuance. A non-suit or discontinuance ought not to be matter of doubt, dependent on construction of words which have no reference to the plain act of discontinuing. Set-off had been claimed, thus involving a cross action, and if the second action had been reversed as to parties, it would have been a strange ruling, but equally defensible, to have forced on the present plaintiff the effect of a non-suit when he only paid costs.

Louis E. Atkinson, for defendant in error.

As there was no judgment in the former action a plea of former recovery could not be maintained, and this action began *de novo*, as though there had been no former suit. The payment of costs and withdrawal of papers by the plaintiff and the lapse of years was in effect, if not in fact, a discontinuance.

3 Shars. Black. Com. 296.

Magaw *v.* Clark, 6 Watts, 528.

May 29. THE COURT. These assignments of error cannot be supported. The first action before the justice was abandoned, there being no judgment in it, the costs being paid by the plaintiff, and the so-called alias summons not having been issued for four years.

There having been no judgment, the transcript could not be pleaded in bar, and the abandonment prevented its use by plea in abatement.

PER CURIAM. Judgment affirmed. WILLIAMS, J, absent.

Jan. '75, 184. March 28.

Kimble, Adm'r of McBride, v. Carothers, Adm'r of Lusk.

Evidence—Competency of witnesses—Act of 15 April, 1869—Sufficiency and relevancy of evidence—Decedent's estate, claims against—Jurisdiction of Orphans' Court—In what case Common Pleas has concurrent jurisdiction.

In an action by the administrator of A. against the administrator of B., to recover funds alleged to belong to A.'s estate, the next of kin of A. are not competent witnesses under the Act of 15 April, 1869.

Such action, being to establish a debt against B.'s estate, and not involving any question as to the amount of B.'s estate, may be brought in the Common

Digitized by Google

Pleas. Evidence that the same claim had been presented before an auditor appointed by the Orphans' Court to audit defendant's administration account, is irrelevant to the issue, and should not be admitted.

Although a narr. and a bill of particulars, which had been withdrawn and supplied by an amended narr., ought not to be taken out by the jury, yet the judgment will not be reversed therefor, if the withdrawn narr. is in substance the same as that on which the cause was tried, and the bill of particulars is but a statement of the claims on which evidence was given at the trial.

Error to the Common Pleas of Lycoming Co.

Assumpsit by Carothers, administrator of Sarah Lusk, against Kimble, administrator of John McBride, to recover several sums of money and the value of various household articles, belonging, as alleged, to Sarah Lusk in her lifetime, and wrongfully in the possession of McBride at the time of his decease. The narr. consisted of the common counts, and a special count containing a bill of particulars. Plea, the general issue.

The substance of the evidence produced by the plaintiff was this: John McBride and his reputed wife, Isabella, formerly Isabella Lusk, were murdered by one Nelson E. Wade at their residence, known as the "Homestead Farm," in Woodward Township, Lycoming County, on July 22, 1873. A large amount of money in coin and bank notes was collected by the Coroner from every part of the house, and was taken by him to Williamsport and placed on deposit; and the defendant, when appointed administrator of John McBride, duly received credit therefor. The furniture and other goods found on the premises were sold at auction by the defendant as the property of McBride, and the proceeds carried into his administration account. The plaintiff claimed a large portion of the goods and money as having belonged to Sarah Lusk, a sister of said Isabella, who had lived with and pre-deceased John McBride, and in support of his claim proved the following facts:—

Patrick Lusk died in 1816, leaving his "Homestead Farm" of two hundred and twenty acres, and some personal property to six of his children, two sons and four daughters; among the latter, Sarah and Isabella, afterwards Isabella McBride. These brothers and sisters lived on their farm, cultivating it, and regularly dividing the proceeds when received. Several of them engaged in other occupations also. They were a parsimonious family, and cautious in their dealings even with each other. The money received was invariably kept at the house, concealed in bags, stockings, old chests, and various other places, each, however, retaining the custody of his or her own share.

Fifty years before his death John McBride, being, as alleged by the plaintiff, of intemperate habits, and entirely without property or occupation, came to the Lusks, and was employed by them as a laborer on the farm. In 1825 he married Isabella Lusk, as it was reputed, and he continued to live on the place until he and his wife were murdered in 1873. In the year 1859 Sarah Lusk and Isabella McBride were the only survivors of the six children of Patrick Lusk, to whom he had left his farm; the others having died, most of them unmarried and intestate, and all without issue. As each died, his or her share fell to the others, and the family made no change in their mode of life. Therefore, in 1859, the whole of the Homestead Farm had become vested by conveyance and inheritance in the two survivors, Isabella and Sarah. The same habits were still kept up. McBride farmed the place, and divided the proceeds into three shares, giving one each to Sarah and Isabella, and retaining one for himself, thus doing until June 28, 1871, when Sarah Lusk conveyed her real estate to McBride and wife for the recited consideration of three thousand dollars. Eight months after the conveyance Sarah Lusk died intestate, not having been away from home for two years before her death. No letters of administration on her estate were taken out by McBride, who remained in possession of whatever estate she left, until his death. Letters to the plaintiff were granted on November 11, 1874. Twenty-seven hundred dollars of the money found in the house after McBride's death were found in Sarah Lusk's bedroom.

Much of this evidence to support the plaintiff's claim rested on the testimony of Samuel Lusk and Martha Scudder nephew and niece of Sarah Lusk, and entitled to distributive shares in her estate. The defendant objected to the competency of these witnesses on the ground that they were interested in the result of the suit, but their evidence was admitted, and an exception sealed for defendant. (First and second assignments of error.)

Henry Apker, being on the stand, the plaintiff offered to prove "that the Lusk family, with whom he was living, gave notice to the tavern-keeper in their neighborhood that no liquor should be furnished McBride, and that when the tavern-keeper informed McBride of this notice, and that it was given by Isabella Lusk or Isabella McBride, McBride denied that Isabella was his wife; to be followed by proof that McBride did not afterwards acquire any property—this for the purpose of showing that McBride had no property, and was of intemperate habits, and that he denied that Isabella McBride was his wife" The defendants objected (1) that the time referred to was more than thirty years ago, and, therefore, too remote; (2) that the offer was irrelevant and contained no evidence which would charge the defendant. Evidence admitted and exception to the defendant. (Third assignment of error.)

The plaintiff then offered "petition of defend

Digitized by Google

ant read in the Orphans' Court November 16, 1874, representing that claim had been made before an auditor in estate of John McBride for the claim in this suit; that the suit in this case had been commenced, and asking the Court to place the case at the head of the trial list for trial at this term; also order of Court endorsed on petition, and the certificate from the Clerk of the Orphans' Court of said order, filed in this case January 13, 1875—these offered as part of the proceedings in this case, and as the acts of the defendant, and to explain why the case on trial was placed at the head of the trial list for this term, and also to explain the nature of the issue." Objected to by the defendant as irrelevant. Evidence admitted. Exception to the defendant. (Fourth assignment.)

The plaintiff next offered, under objection as irrelevant, and exception, "the record of an amicable partition of the Homestead Farm in 1854, to be followed by proof that Sarah Lusk and the other parties took possession of their respective purparts, and enjoyed the proceeds of the same during life, and also on whose lands John McBride lived during his life. This offered as evidence on the question of the ownership of the personal property found on the premises after the death of McBride." (Fifth assignment.)

Lastly, the plaintiff proposed to prove by himself that he could find no notes or securities of the estate of his decedent, and that the only personalty was that taken by the administrator of McBride; also that from the time that Sarah Lusk conveyed her real estate to McBride and wife for the sum of three thousand dollars in June, 1871, until March, 1872, the time of her death, she was sick, and remained constantly in the house occupied by McBride and by her, being the same house in which the moneys and property taken by defendant were found by the coroner's jury. This for the purpose of showing what personal property and money Sarah had at the time of her death." The defendant objected to the offer as irrelevant. Evidence admitted, and exception noted for the defendant. (Sixth assignment.)

The defendant first proved his appointment as administrator of John McBride on July 28, 1873; the filing of his partial account on July 25, 1874, and its absolute confirmation by the Court. Also that an auditor was appointed to distribute the balance in his hands, before whom the Lusk heirs first made claim on November 11, 1874. He then offered himself to prove "that after he was appointed administrator of John McBride he had several interviews with Nelson E. Wade, who had robbed and murdered John McBride and Isabella, his wife; that in said interviews Wade informed him that he had taken a large amount of gold and silver from the house of McBride, and had hid it so effectually that no one could find it; that he intended to give information of the place of hiding to some poor man, so that he could obtain it, and not the relatives of McBride; this for the purpose of proving that money had been taken from the house by Wade prior to the death of McBride, and that the said money so taken did not come into the hands of the administrator." Objected by the plaintiff that the offer was of hearsay and irrelevant evidence. Offer rejected, and exception to the defendant. (Seventh assignment.)

The defendant presented five points, four of which, in substance, requested the Court to charge that the plaintiff had failed to show any right to recover. This the Court declined to do. (Ninth, tenth, eleventh, and twelfth assignments.)

The defendant's fourth point, which the Court reserved, was as follows:—

"The Orphans' Court of Lycoming County has exclusive authority to ascertain the amount of the property of John McBride, and to make distribution thereof not only amongst the next of kin, but also amongst creditors. The plaintiff therefore cannot maintain this action, but must seek his remedy in the Orphans' Court."

The Court below (GAMBLE, P. J.) charged the jury, *inter alia:* "It may not always be practicable for parties to produce proof positively and precisely defining amounts, quantities, or values; yet if, from an impartial consideration of all the evidence in the cause, a right of recovery is established to the satisfaction of a jury, and there is evidence from which they can substantially ascertain amounts, quantities, or values, there is sufficient proof to warrant a verdict." (Eighth assignmennt.)

The plaintiff having amended the form of his *narr.*, the withdrawn declaration, containing the bill of particulars, was sent out with the jury, under exception to the defendant. (Fourteenth assignment.)

Verdict for the plaintiff ($4900.54), on which the Court afterwards entered judgment on the reserved point, saying:—

"The issue in this case is not formed for the *purpose* of ascertaining the amount of the estate of John McBride, nor for the *purpose* of its distribution, but is the common issue in an action of indebitatus assumpsit to determine the liabilities of the decedent to this plaintiff. And although the *result* may have the effect to lessen the amount for future distribution, or to increase the claimants or distributees, that *result* is only incidental and consequential, and cannot oust the jurisdiction of the Common Pleas." (Thirteenth assignment.)

The defendant took this writ of error, assigning for error the admission and rejection of evidence as excepted to, the answers to his points,

Digitized by Google

the charge of the Court, and the sending of the withdrawn bill of particulars to the jury, as above particularly set forth.

W. H. Armstrong and *Henry C. Parsons*, for the plaintiff in error.

The first question which arises is, were the nephews and nieces of Sarah Lusk competent witnesses in this case? Their father having died in her lifetime, they were among her next of kin, and were directly interested in the result of this suit. They testified exclusively to occurrences in the lifetime of John McBride. The law will not permit the estate of a decedent to be swept away by adverse claimants, when the plaintiffs' case rests on their own testimony. That the admission of the evidence of these witnesses was directly contrary to the Act of 1869, is shown by—

Eshleman's Appeal, 24 Sm. 42.
Allum's Ex'rs *v.* Carroll's Adm'r, 17 Id. 68.
Craig *v.* Brendel, 19 Id. 155.

But, granting that these witnesses were competent, the plaintiff's testimony did not make out his case. The basis of this action was tort, an alleged wrongful conversion by McBride. The plaintiff chose to waive the tort and to proceed in assumpsit. But there was no conversion proved, for there must be proof of a disposal of the property by the decedent himself; it being settled that an executor or administrator is answerable for no cause of action that was not created by the act of the decedent.

Siep *v.* Drach, 2 Harris, 356.

In cases where the tort is waived and an action of assumpsit brought, it is incumbent on the plaintiff to show a clear and indisputable title to the property.

3 Phillips's Evidence, 404.

Moreover, if any of the property found belonged to Sarah Lusk, there was no evidence from which the jury could determine the amount. A plaintiff is bound to give proof as well of the amount of his claim, as that it exists at all.

Bogle's Ex'rs *v.* Kreitzer, 10 Wright, 480.

The jurisdiction of the Orphans' Court in cases of this kind, is at least concurrent with that of the Common Pleas, and perhaps is exclusive. Certainly the Orphans' Court alone has power to ascertain the amount of a decedent's property, and to order distribution.

Whiteside *v.* Whiteside, 8 Harris, 473.
Dundas's Appeal, 23 Smith, 474.
Van Dyke's Appeal, 10 Id. 481.

G. W. & S. L. Youngman and *Allen & Gamble*, contra, argued that it was not shown that the nephews and nieces of Sarah Lusk testifying were interested in this suit, but only that they *might* become interested. The money recovered would go to the administrator, and after payment of debts, nothing might be left for the next of kin. These parties testifying had not power even to begin this suit. Furthermore, the Act of 1869 does not apply where, as in this case, both plaintiff and defendant are administrators. The evidence given by these witnesses was unobjectionable. They did not testify to declarations of McBride, but only to certain facts which occurred while he was living. The evidence certainly tended to show property of Sarah Lusk in the hands of McBride, and was therefore properly submitted to the jury. The jurisdiction of the Orphans' Court does not exclude common law remedies.

McLean's Ex'rs *v.* Wade, 3 Smith, 149.
Swain *v.* Ettling, 8 Casey, 486.

May 8. THE COURT. This was an action of assumpsit brought in the Court below by the administrator of Sarah Lusk, deceased, against the administrator of John McBride, deceased, to recover a sum of money of which it was alleged that McBride had taken possession before his death, and which belonged to Sarah Lusk. It is clear, that, though McBride's possession might have been tortious originally, yet the plaintiff below had a perfect right to waive the tort and recover on the count for money by McBride had and received to the use of Sarah Lusk. It was an action to establish a debt against the estate of McBride, properly brought in a common law court, and not involving the necessity of determining any question as to the amount of McBride's estate within the exclusive jurisdiction of the Orphans' Court. (Sergeant's Ex'rs *v.* Ewing, 6 Casey, 76; Swain *v.* Ettling, 8 Casey, 486; McLean's Ex'r *v.* Wade, 3 P. F. Smith, 146.) There was no error then in the decision of the Court below which forms the ground of the thirteenth assignment of error.

It appeared that two brothers and four sisters, children of Patrick Lusk, lived together, upon a farm which they had derived from their father, who died, in 1816, leaving other children as well as other property. The brothers and sisters all died intestate and without issue. Sarah and Isabella survived the others. John McBride lived with them, reputed to have married Isabella. Sarah died in March, 1872. John McBride and Isabella continued to live together on the farm until July 22, 1873, when they were robbed and both murdered by one Nelson E. Wade, who was afterwards tried and convicted for the crime. A considerable amount of money was found in different parts of the house, which was taken possession of by the administrator of John McBride. The endeavor of the plaintiff below was to show that this money was the money of the Lusk brothers and sisters, which they had acquired by a long course of labor and saving; that at least a moiety of it was the property of Sarah Lusk at the time of her death. Sarah Lusk had purchased of her brother John Lusk, in 1859, a farm which, on the twenty-eighth day of June, 1871,

Digitized by Google

she had conveyed to John McBride and Isabella McBride (formerly Isabella Lusk) for the consideration of $3000. *Prima facie* this consideration was paid, and it was urged that to that extent there was some evidence to sustain a claim by the estate of Sarah Lusk upon the estate of John McBride.

In view of these facts, without referring to other details, it seemed very clear that there was evidence proper to be left to the jury. It is evident then that the eighth, ninth, tenth, eleventh, and twelfth assignments of error, which are all of them predicated of the assumption that there was no sufficient evidence for the jury, must be dismissed.

We think, however, that the first and second assignments of error must be sustained. Samuel Lusk and Martha Scudder, children of James Lusk, a deceased brother of Sarah Lusk, were offered as witnesses by the plaintiff below, objected to as interested in the event of the cause, and therefore incompetent; but the objection overruled and the witnesses admitted. They would be entitled as distributees to a share of the estate of Sarah Lusk. They were directly interested, therefore, that the plaintiff should recover, and prior to the Act of April 15, 1869 (Pamph. L. 30), "An Act allowing parties in interest to be witnesses," were undoubtedly incompetent. (1 Greenleaf on Ev. s. 392, and cases there cited; Mishler *v.* Merkle, 10 Barr, 509.) It must have been supposed by the learned Court below, that the Act referred to rendered them competent. But this was an error. That Act declares expressly, that it "shall not apply to actions by or against executors, administrators, or guardians." It can make no difference that both plaintiff and defendant are administrators. Even looking beyond the letter to the spirit of the Act, that a living party shall not be heard to prove a claim against the estate of a decedent, who was also a party to the contract or transaction, whose lips are now sealed, the admission of these witnesses cannot be sustained. If Sarah Lusk, when living, would not have been competent against the administrator of John McBride, neither can those who stand in her shoes, and will be entitled to a part of the money when recovered. This was not a controversy between parties claiming by devolution under a deceased owner respecting the right of such owner. They claimed not from one but two parties, whose rights were adverse to each other. Neither was their evidence proposed to be confined to facts occurring subsequently to the decease of John McBride, so as to be within the provision of the supplement of April 9, 1870 (Pamph. L. 44).

We think, too, that the third assignment of error must be sustained. It was certainly no objection to the competency of the evidence offered, that the facts occurred more than thirty years ago, and were too remote. That might be an available ground of attacking the credibility of the witness, but that was for the jury. It was relevant to prove the intemperate habits of John McBride, but not in the way proposed, that the Lusk family had given notice to a tavern keeper not to trust him. That, after all, was mere hearsay. Nor was it at all relevant that McBride denied that Isabella was his wife. The plaintiff below was suing as the administrator of Sarah Lusk, who died before Isabella, and was suing to recover her property, not derived from Isabella. Whether Isabella was or was not the lawful wife of John McBride was not a question relevant to the issue before the jury.

We think there was error in admitting the evidence complained of in the fourth assignment. It was irrelevant that the claim had been made before an auditor in the Orphans' Court, and nothing to the issue why the case had been ordered to be placed at the head of the list.

We think that the Court was right in admitting the evidence of the partition of the farm in Woodward Township between the six brothers and sisters, and that they took possession of their respective purparts, and on whose lands John McBride lived during his life. It had an evident bearing upon the main point whether the money in the house belonged to the Lusks or to McBride. So, also, as to the sixth assignment—the evidence therein complained of being of the same character.

We think the Court was right in rejecting evidence offered by the defendant of the declaration by Nelson E. Wade, the robber and murderer, of what he had taken from the house. It was of course mere hearsay.

As to the fourteenth and last assignment it is disposed of by Hall *v.* Rupley (10 Barr, 231), where it was held, that, although a withdrawn declaration and a bill of particulars delivered under it ought not to be taken out by the jury, yet the judgment will not be reversed if the declaration is in substance the same as the one on which the cause was tried, and the bill is but a statement of the claim, of which evidence was given on the trial.

Judgment reversed and a *venire facias de novo* awarded.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

Digitized by Google

Common Pleas—Law.

C. P. No. 1. **Kelley v. Hart et al.** Oct. 21.

Partnership—What constitutes—Agreement to loan money for share of profits—Act of 6 April, 1870.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a book account. The affidavit of Clarence A. Hart, one of the defendants, set forth that "neither he nor anyone for him, either individually or in partnership, obtained from the plaintiff the work and materials charged for in this suit, nor is he indebted to the plaintiff on any account." A supplemental affidavit, being ordered, set forth that E. Pincus and H. W. Faucett were copartners, trading as the International Restaurant and Hotel Co., and engaged plaintiff to perform certain plumbing; that the only connection which deponent ever had with this copartnership was to make an agreement in writing with said Pincus, Faucett, and the other defendants, which agreement was erroneously dated December 13, 1875, but was in fact made on or about January 7, 1876, at a time when most of the work contracted for by plaintiff had been finished, whereby deponent and certain parties joining with him agreed to furnish to Faucett and Pincus, as a loan, such amounts of money as might be necessary to carry on the business for one year; in consideration of which loan deponent and the parties joining with him were to receive, in lieu of interest, three-fourths of all net profits; that immediately after signing this agreement, deponent, before furnishing any money or receiving any profit or advantage from the business, rescinded his agreement with them by mutual consent, and subsequently, on March 23, 1876, upon their request, put this rescission in writing, whereby he acknowledged that all the interest he had in the International Restaurant had been theretofore disposed of to the said Pincus, Sautter, and Abraham Hart; that plaintiff had taken the promissory note of A. Hart for the debt sued for in this case and had already obtained judgment upon it, against said Abraham Hart.

Ernst, for the rule. Defendant by his agreement became a partner in this firm.

Sulzberger, contra. Under the Act of April 6, 1870 (Purd. Dig. 1121, pl. 15), this deponent cannot be considered a partner, but only as one who had made a loan to the firm and agreed to take a share of the profits in return for the use of the money. C. A. V.

Oct. 28. THE COURT. The defendant, having acknowledged that he had "transferred and disposed of all *his interest* in the International Restaurant," clearly shows that he regarded himself as possessed of some share or part in the same, and it will not do for him, after the enterprise had proven a failure, to come into Court and say he merely loaned the money to the firm, with respect to which he before acted as a partner.

Rule absolute.

Oral opinion by BIDDLE, J.

C. P. No. 1. **Banking Co. v. Wolf.** Oct. 21.

Promissory note—Protest—What mistake in notice of protest will release endorser—Notice dated before note due, though mailed and received at proper time, insufficient to hold endorser.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit, by holder against endorser, on a promissory note dated May 15, 1875, payable two months after date. The affidavit of defence averred that the note never was *duly* and *legally* protested; that defendant had, however, received by mail on July 19, 1875, a notice of protest *dated July* 15, 1875 (postmarked July 19) stating that payment of the note "being this day due, demanded and refused. . . . I have this day protested it accordingly."

Ingram showed cause.

The note was not due until the third day of grace. A notice of protest dated prior to that time was calculated to mislead the endorser, and is of no legal effect to bind him.

Dallas (with whom was *W. W. Carr*), for the rule.

The notice was mailed, and was received by defendant, at the proper time; the date was evidently a clerical error of the notary. The defendant, as endorser, is presumed to know the day on which the note fell due; and on receipt of notice of protest, the next day, could not have been misled by so plain an error in the date, especially as it was sufficiently corrected by the postmark. A notice is not invalidated by an erroneous date, or other mistake, which is apparent on its face, or which does not or should not mislead.

Etting *v.* Bank, 2 Barr, 355, explained in
Lennig *v.* Tobey, Brightly Rep. 482; S. C. affirmed, 2 Harris, 485.
Stephenson *v.* Dickson, 12 Har. 152.
Mills *v.* Bank, 11 Wheat. 431.
U. S. *v.* Carneal, 2 Pet. 543.

C. A. V.

Oct. 28. THE COURT. It is a well-established principle that an error in a notice cannot prejudice the rights of the party giving it, unless through such error the party to whom the notice is given might be misled; but a notice to an endorser that a note was not paid on some certain

Digitized by Google

day previous to its becoming due, would be to his mind no proof that it would not be paid when it should become due.

Rule discharged.

Oral opinion by BIDDLE, J.

C. P. No. 1. Oct. 14.

Tischner v. Bambrick et al.

Landlord and tenant—Misrepresentation by lessor at the time of execution of lease—Concealment and fraud—Indefinite and insufficient averments thereof.

Rule for judgment for want of a sufficient affidavit of defence.

Debt for rent in arrear. The affidavit set forth that on the 9th of March, 1876, plaintiff executed to defendants a lease for one year from date, of a lot of ground, being the rear end of the yard of lessor's hotel on Belmont Avenue, containing in front on Viola Street twenty feet, and in depth seventy-five feet, for the purpose of erecting thereon a restaurant; that both before and at the time of signing said lease, defendant was led to believe by representations made to him that no other buildings would be erected by plaintiff, or permitted to be erected on the said yard between defendants' restaurant and the said hotel; that, relying on these representations, defendants executed the lease on which suit is brought; that it was important to defendants' business for the said yard to be kept open, in order to allow a view of the restaurant from Belmont Avenue and other points; that otherwise defendant would not have signed the lease, or erected said restaurant; that, disregarding the above-mentioned representations, plaintiff leased portions of said yard to other persons, and permitted them to build thereon a bowling alley and shooting gallery; that, at the time of erecting said buildings, defendant complained to plaintiff without avail; and that the erection of these buildings has greatly reduced the value of defendants' lease, to an amount greater than the plaintiff's whole claim.

Ransford, for the rule, stated that he, acting as counsel for the lessor, drew up the contract, and nothing was said before him about other buildings. The lease contains the whole agreement; defendants were to have a frontage of twenty feet on Viola Street.

Sypher, contra.

The representations of plaintiff were a part of the inducement and consideration of the contract. The plaintiff's breach of representation is equivalent to concealment and fraud, which relieves the defendant from his part of the contract.

[BIDDLE, J. The affidavit is not definite enough as to the alleged representations by plaintiff. There is no sufficient evidence of concealment or fraud.]

Rule absolute.

C. P. No. 1. Oct. 14

McCausland v. Hickman.

Promissory note—Collaterals—Plaintiff holding collateral securities, unsold, entitled to judgment on note.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note The affidavit set forth that defendant gave plaintiff the note in suit for $400, at the same time delivering to him as collateral security four shares of stock of the First National Bank of Camden, N. J, with the right to sell the same upon non-payment of the note at maturity, and apply the proceeds to its liquidation; that plaintiff is still the holder of said stock, which is worth at least $300. The affidavit averred that plaintiff has no right of action until said shares of stock shall have been sold, and the proceeds applied to its payment.

Peace, for the rule, cited—

Story's Equity, vol. i. § 640.
Taylor's Appeal, 3 WEEKLY NOTES, 75.
Phila. & B. C. R. R. Co. v. Johnson, 4 Sm. 127
Ayres v. Wattson *et al.*, 7 Sm. 360.
McCurdy's Appeal, 15 Sm. 291.

Cheyney, contra.

Rule absolute.

C. P. No. 2. Oct. 28.

Whitman v. Lippincott.

Affidavit of defence—Contradicting the written instrument by parol.

Rule for judgment for want of a sufficient affidavit of defence.

Scire facias sur mortgage payable in one year after date. The affidavit set up that the mortgage was made by defendant with the express understanding and agreement that it should be drawn payable in three years; that when it was presented to her for signature she discovered it was drawn for one year; that she consented to sign it upon the understanding and agreement that it should be considered payable in three years, and that the foreclosure is therefore premature.

A. Thompson, for defendant, cited—

Maute v. Gross, 6 Sm. 250.
Schuylkill v. Copley, 17 Sm. 386.
Heist v. Hart, 23 Sm. 286.

Dallas Sanders, for the rule, was not called on.

THE COURT. The affidavit is a flat contradiction of the terms of the instrument; we are aware of no case in Pennsylvania that has gone as far as that. The cases cited for defendant were cases of fraud.

Rule absolute.

[*Cf.* Caley v. R. R. Co., 2 WEEKLY NOTES, 313; Kostenbader v. Peters, Id. 531; Haines v. Rapp, Id. 595; Fries v. Fox, Id. 263; Ross v. Hanna, Id. 222; Elliott v. Adams, 3 Id. 44.]

Digitized by Google

C. P. No 2. **Meyer v. Loeb.** Oct. 28.

Pleading—Set-off in action of tort.

Rule to strik off plea

Declaration in tort· 1st count. That defendants negligently caused loss of plaintiff's goods, of which defendants were bailees to keep for reward 2d count Similar to first. 3d count. Trover of same goods. Pleas. Not guilty; "And for a further plea in this behalf, the said defendants say that, before and at the time of the commencement of this suit, plaintiff was and still is indebted to th said defendant in a large sum of money, to wit," etc.

R P. White, for the rule. Set-off cannot be pleaded in an action of tort.

J. Russell, contra.

THE COURT. The plea does not allege that the set-off arises from the transactions sued on, and, the action being in tort, is therefore not within the most liberal of the Pennsylvania cases.

Rule absolute.

[*Cf.* Halfpenny *v.* Bell, *ante*, 9.]

C. P. No. 2. **Schlecht v. Restein.** Oct. 7.

Appeal from Alderman—Identity of cause of action.

Rule for judgment for want of a sufficient affidavit of defence, on appeal from judgment of alderman.

The affidavit set forth that before the alderman the cause of action upon which judgment was obtained was a promissory note for $88, whereas the copy filed in this present proceeding was of book entries amounting to $90.16.

Harrity, for the rule.

The proceedings on appeal are *de novo*.

THE COURT, referring to Owen *v.* Shelhamer (3 Binn. 46), said the cause of action must be the same.

Rule discharged.

C. P. No. 4. Oct. 28.

Com. ex rel. Lowenthal v. Robert R. Smith, Magistrate of Magistrate's Court No. 8.

Mandamus—The Court will compel a Magistrate to issue a summons against a constable who has been guilty of illegal delay in the return of a writ.

Sur rule to show cause why a mandamus should not issue to Robert R. Smith, magistrate, commanding him to issue a summons commanding James K. Jamison, constable, to appear before him on a certain day, and then and there to show cause why an execution should not issue against him for the amount of an execution against one Williams which was placed in his hands for collection, and which he failed to return according to law.

The petition of the relator set forth that on July 31, 1876, the petitioner recovered a judgment in Magistrate's Court No. 8, for $97.97 and costs, against one Williams, the petitioner having paid preliminary costs; and that, under said judgment, an execution was issued on Aug. 8, returnable Aug. 28, directed to James K. Jamison, constable, and which was placed in the latter's hands for collection; that on September 19 the petitioner's attorney examined the docket of Court No. 8, and found that the execution had not been returned; and, on September 20, the said attorney called at the magistrate's Court, in court hours, and requested said magistrate to issue a summons to said constable (as stated in above rule), which he refused to do, although the law on the subject was pointed out to him, and the summons demanded as a right; that the said sum of money had never been paid or any part of it, etc.

E. E. Petit showed cause by reading affidavits to the effect that the constable's pocket-book, containing the execution in question, had been lost or stolen from him some time between the issue of the execution and its return day; that the judgment was obtained on a bad debt, and was uncollectible; and argued that the constable, a poor man, should not be held personally responsible for such a debt.

L. W. Barringer, in support of the rule.

The magistrate was wrong in not issuing the summons, and should be compelled so to do.

Act 20 March, 1810. Purd. p. 267, § 19.

THE COURT. The magistrate had no option in this matter. The Act of Assembly gives suitors, under such circumstances as these, the right to issue summons against constables, without any excuse or delay, and we will give a peremptory writ.

Rule absolute.

C. P. No. 4. Oct. 28.

McCosker v. J. Pollock and Mary Pollock, his wife.

Married woman—Void judgment—A judgment entered on a bond given by a married woman will be stricken off—Judgment originally void not cured by acquiescence.

Rule to strike off judgment as to Mary Pollock.

The judgment was entered on a bond and warrant in 1874, under which, in January, 1876, some shares in a Building and Loan Association, belonging to Mary Pollock, were attached. In October, 1876, judgment was obtained against

Digitized by Google

the Association as garnishee, and against whom a *fi. fa.* was taken out.

Greenbank, for rule.

Judgment against a married woman is invalid, of course. Moreover, Mary Pollock is dead, and all her assets should go to her administrator for equal division among creditors.

Wilbur, contra.

This judgment was entered and has stood for two years by agreement of all the parties in interest, and should not now be defeated.

THE COURT. This is a plain case. The record shows a judgment against a married woman, which is void of course.

Rule absolute.

[See Harstraw *v.* Carey, 2 WEEKLY NOTES, 522.]

Orphans' Court.

Russell Thomas's Estate. Oct. 28.

Orphans' Court practice—Sale of real estate for payment of debts—Petition by administrator, requisites of—Inventory of personal estate—Schedule of debts—What particularity required—First mortgage should not be included in schedule of debts—Act of 29 March, 1832.

Sur petition to sell real estate for payment of debts.

The petition of the administrator set forth that decedent died intestate, seized, *inter alia*, of the real estate therein described; that the personal estate was insufficient to pay his debts, and that it was requisite to sell the real estate for the payment thereof; that petitioner has annexed a true and perfect inventory and conscionable appraisement of the personal estate, a full and correct statement of all the real estate, and a just and true account of all the debts of the decedent which have come to his knowledge; and prayed an order of sale of certain real estate of the decedent.

The inventory of personal property, annexed to the petition, was as follows:—

Stock as per inventory filed May 6, 1876,	$524 49
Cash	50 08
Household furniture	45 50
Book accounts	1382 74
	$2002 81

And the schedule of the debts of deceased was as follows:—

Bond and mortgage to the Paschalville Building Association	$1000 00
Bond and mortgage to Miss F. J. Sewell	1000 00
Bond and mortgage to William L. Boswell	1500 00
Bond and mortgage to Joseph Miller	1000 00
Bond and mortgage to Ezekiel Dunwoody	1000 00
Judgment in favor of Ezekiel Dunwoody, being to secure the same debt as the above mortgage	1000 00
Judgment in favor of Wm. L. Boswell,	500 00
Sundry bills	1600 00
	$8600 00

R. N. Simpers, for petitioner.

Oct. 31. THE COURT. The petition presented in this matter is radically defective. The Act of March 29, 1832 (Purdon, 428, pl. 113), requires that the petitioner shall exhibit to the Court "a true and perfect inventory and conscionable appraisement of all the personal estate," and while it has been held that the schedule need not be filed with the petition, and it is sufficient that it be exhibited to the Court (Stiver's Appeal, 6 Sm. 1), yet we believe the practice has always been, in this county, to attach the schedule to the petition and thus make it a part of the record. And careful practitioners always have the copy of the inventory certified as correct by the Register of Wills (Scott on Intestate System, 352). The schedule annexed to this petition is not such an "inventory and conscionable appraisement" as is contemplated by the Act of Assembly, but simply a statement of the gross amount of the personal estate.

The account of the debts of decedent is also improperly stated. It does not appear that the mortgages mentioned, or either of them, are due, nor upon which parcel of the real estate they exist as a lien, nor the order in which they stand, nor the nature and character of the debts denominated "Sundry bills, $1600." All these facts should be stated for the information of the Court and of purchasers. It also does not appear which of the mortgages is the first encumbrance upon the real estate proposed to be sold. Such first mortgage should not be included in the list of debts, as it will not be discharged by the sale (Bloomers' Estate, 2 WEEKLY NOTES, 68; Grice's Est., idem. 211). For these reasons this petition cannot be granted, but it may be withdrawn for amendment.

Opinion by HANNA, J.

Digitized by Google

Weekly Notes of Cases.

Vol. III.] THURSDAY, NOV. 16, 1876. [No. 7.

Supreme Court.

Coxe et al. v. Deringer et al. June 2.

Ejectment—Commissioners' sale for taxes—Act of March 29, 1824, compliance with its requirements—Evidence—Tax titles generally.

A party claiming under a commissioner's deed is not required, under all circumstances, to prove the prerequisites of the sale positively. Natural presumption arising from clearly proved facts, which lead to a belief that the directions of the law have been fulfilled, must be submitted to a jury in this as in other cases.

Plaintiffs in ejectment claimed under a commissioner's deed by virtue of a sale for taxes. The deed recited the performance of all the requirements of the Act of 29 March, 1824. There was no evidence tending to impeach the correctness of this recital, and it was proved that plaintiffs had paid the taxes for forty years subsequent to the sale:

Held, that it was properly left to the jury to determine upon these facts whether the requirements of the act had been complied with.

The defendants having put in evidence a treasurer's deed to the commissioners dated Nov. 25, 1828, in their possession, and a subsequent deed from the commissioners to defendant's ancestor:

Held, that the omission of an entry of the sale on the treasurer's sale book for 1828, a letter from the treasurer to the plaintiff's ancestor written in relation to the payment of taxes on the tract in controversy in 1829 after the sale, but not mentioning the sale, and his subsequent receipt for the taxes for those years, were not evidence to invalidate the treasurer's deed.

The owner of land having regularly paid taxes promptly in biennial periods for a long time, and the tax receipts having been destroyed:

Held, on the question of the validity of the tax sale, that it was for the jury to determine from such evidence, whether the taxes for a particular year had been paid in time.

McReynolds v. Longenberger (7 Sm. 13), distinguished.

Error to the Common Pleas of Luzerne County.

Ejectment, brought in 1872, by T. T. Deringer and others, heirs and legal representatives of Henry Deringer, deceased, against Charles S. Coxe and others, for a tract of land in Sugar-loaf Township, Luzerne County, surveyed under a warrant of 1793, granted to Samuel Rope. (The case is reported upon a former writ of error, 1 Weekly Notes, 397, May, 1875, when a *venire de novo* was awarded.)

On the second trial (before Harding, P. J.) the plaintiffs offered in evidence a tax title consisting of (1) Assessments on Samuel Rope tract for 1818 and 1819. (2) Treasurer's sale, Nov. 8, 1820, to commissioners. (3) Treasurer's deed, Dec 2, 1820, to commissioners. (4) Commissioners' sale, July 8, 1826, to Henry Deringer and T. Archtemacht. (5) Commissioners' deed, June 5, 1827, to Henry Deringer. The defendants objected to this deed, for the reason that no compliance had been shown with the provisions of the Act of 29 March, 1824 (Purd. Dig. 1452), requiring advertisement and public notice. The deed reciting that the directions of the Act had been complied with, the Court overruled the objection and admitted it, and, the plaintiffs having rested their case, the defendants moved for a nonsuit on the ground, *inter alia*, that no compliance with the requirements of the said act had been shown in the case of the commissioners' sale in 1826. The Court ruled that "unless further testimony be produced by plaintiffs tending to raise a presumption of law or of fact that the preliminary requirements of the Act of 1824 were complied with, the motion for a nonsuit would be granted," and permitted the plaintiffs to reopen their case. Plaintiffs then made an offer in writing as follows:—

"Plaintiffs offer to show from the records of the Treasurer's and Commissioners' office, that at the time the Samuel Rope tract was sold by the treasurer to the commissioners in November, 1820, four other tracts were sold on the same day in the names of John Brady, Joseph Brown, John McGowan, and Job Rope, and at the sale of the commissioners, July 8, 1826, they sold these four tracts with the Samuel Rope tract to Henry Deringer. That Henry Deringer, after his purchase from the commissioners in 1826, paid the taxes on these several tracts, which belong to the same body and lie contiguous and near to each other, year by year to the treasurer, until his death in 1868, with the exception of four years, from 1844 to 1848; that Henry Deringer resided in Philadelphia, that he kept receipts for the payment of taxes on these several tracts of land all together in a place where he was accustomed to keep his valuable papers in his dwelling-house. That after his death, by inadvertence, these receipts with other papers were destroyed; to be followed by proof of witnesses who saw the receipts for these lands, that they were the receipts for the payment of taxes on these five tracts of land from 1826 to 1844."

The defendants objected to any evidence of payment of taxes, if offered for the purpose of raising any presumption, either of law or fact, that the preliminary requirements of the Act of 1824 (Purdon's Dig. 1452), were complied with by the commissioner who sold to Henry Deringer in 1826. The Court overruled the objection, and admitted the evidence; and under the ruling, a number of witnesses testified to having examined the papers of Henry Deringer, and to the existence of biennial tax receipts covering the years from 1826 to 1844; it was also in evidence that the taxes had been paid to the time of his death. Plaintiffs produced the tax receipt for the years

Digitized by Google

1828 and 1829, dated Jan. 5, 1830, and proved that the other receipts had been accidentally lost or destroyed. Plaintiffs gave no evidence of the dates of any of the missing receipts, except that for the years 1827 and 1828, which Mr. C. M. Deringer testified was dated Nov. 10, 1828. The plaintiffs also offered in evidence the following letter of Zurah Smith, Treasurer, to Henry Deringer, as follows:—

Wilkesbarre, February 4, 1829.

DEAR SIR:—Your letter of 30th January last came to hand. I have seen Mr. Myers; he says the due bill you mention was given as part payment on the purchase of the five tracts of land, to wit:—

Joseph Brown	$36.23
John or Robert Brady . .	36.23
John McGowan	36.23
Job Rope	36.23
Samuel Rope	34.04½
	$178.96½

The amount here stated Mr. Myers says is all the moneys received by him, which appears by the books of the county was all he accounted for at settlement. If he is correct, there is still a deficit of the taxes of 1826, inasmuch as the taxes of twenty-six are not charged in the transcript of sale. The sale as appears of record charges the county taxes up to 1825, and the road taxes up to '24. The sale was made to you on the 8th day of July, 1826, at which time the tax for 1826 could not have been due, and the taxes of '27 were not assessed. After the lands go out of the hands of the commissioners, they can no longer levy a tax for the road, wherefore you will save the road taxes from '24 to '27, when the same was again levied by the road masters. The receipt I gave to Mr. Bittenbender includes the county tax of 1827, and road taxes of 1827 and '28, though Mr. Myers is positive, I say he may be in an error, and if you have any vouchers to show the payment of the same for 1827, county or road 1827–28, otherwise than by the hands of Mr. Bittenbender, your money ought and shall be refunded. You say that you have Mr. Myers' receipt for the taxes of 1827; if so, please forward me a duplicate of the same, which will set the matter at rest. It ought to be in the following form:—

Acres.	Warrantee names.	Town-sh.p.	Co. 1826.	Co. 1827.	Rd. 1827.	Rd. 1828.	Amt.
400	Brown, Joseph,	Sugar-loaf,	2.00	2.00	2.00		$6.00
400	Brady, Robert, or John,		2.00	2.00	2.00		6.00
400	McGowan, John,		2 00	2.00	2.00		6.00
400	Rope, Job,		2.00	2.00	2.00		6.00
372	Rope, Samuel,		1.86	1.86	1.86		5.58
			Advertising,				2.50
							$32.08

The foregoing is a transcript copy which I gave Mr. Bittebender which shows the years and what taxes were paid by him.

Signed, Z. SMITH, *Treasurer*.

TO MR. HENRY DERINGER.

During the argument of the counsel first speaking for the plaintiffs, counsel for defendants asked the Court to withdraw from the jury the above letter as evidence that the taxes of 1827 were paid to Treasurer Myers by Henry Deringer. The Court denied the motion, "for the reason that no evidence had been given of their payment to Myers," to which defendants excepted.

There was only slight evidence of the actual occupation of the Samuel Rope tract by either party to the suit.

The plaintiffs having closed their case, the defendants offered in evidence two tax titles, the first as follows:—

(1) Assessment Samuel Rope tract, 1826 and 1827. (2) Deed from Treasurer to Commissioners, in defendants' possession, reciting Treasurer's sale to Commissioners for taxes, November 25, 1828. The second was (1) Assessments Samuel Rope tract, 1832 and 1833. (2) Commissioners' list to Treasurer, showing taxes of 1832 and 1833 unpaid. (3) Deed from Treasurer to Charles S. Coxe, dated June 9, 1834, reciting sale made same day. They then proved payment of taxes by C. S. Coxe upon the land in controversy, continuously from the year 1838, inclusive, to the date of suit brought, and gave in evidence the following entry in the Commissioners' transcript book, showing the taxes for non-payment of which the land was sold by the Treasurer to the Commissioners on November 25, 1828, and that they were paid on January 10, 1829, which was *after* the sale.

Commissioners' Transcript Book, p. 100.

HENRY DERINGER to LUZERNE COUNTY, *Dr.*

Acres.	War. names.	Township.	Yrs.	Co.	Rd.	Am't.
400	Brown. Joseph,	Sugarloaf,	1827	2	2	
			1828		2	6 00
400	Brady, Robert,	"	1827	2	2	
			1828		2	6 00
400	McGowan, John,	"	1827	2	2	
			1828		2	6 00
400	Rope, Job,	"	1827	2	2	
			1828		2	6 00
372	Rope, Samuel,	"	1827	1.86	1.86	
			1828		1.86	5 58
						$29 58

Cr.

10 Jan. 1829, by cash per J. Bittenbender, Esq., 29 58

In rebuttal the plaintiffs made the following offer:—

"Plaintiff's counsel offer in evidence Treasurer's Sale Book from 1828 to 1830 of Zurah Smith and S. D. Lewis, the witness on the stand, Treasurers. This in connection with other entries of the same book of the same character, and like entries of the same character in other books in the Treasurer's office, in connection with the evidence of S. T. Lewis, Esq., who was Treasurer of the county in 1830, and who succeeded Zurah Smith as Treasurer and made entries in this book of similar character. This for the purpose of showing that the taxes of 1827 were paid before the sale, and that no sale of the Samuel Rope tract was made in 1828; and that the entry 'Paid before sale" in said book opposite said tract was in pursuance of the custom of marking the payment of taxes which were made after the entry of said tracts in the sale book and before the day of sale; and that the tract

Digitized by Google

so marked was not debtor to the county for taxes, and could not be sold for the taxes so appearing on the sale book. Also for the purpose of showing that a record of Treasurer's sales was kept in 1828, and that no sale of the Samuel Rope tract appears thereon."

The defendant objected to this offer, and the Court, while rejecting it for some of the purposes, admitted it "for the purpose of showing whether the Treasurer made an entry of the sale in the book or not."

The plaintiffs then made the following offer :—

"The Court having admitted in evidence the entry made in the Treasurer's sale book of 1828 relating to the Samuel Rope tract for the purpose of proving that it shows no sale of this tract in that year, plaintiffs now offer the entire record of the Treasurer's sales of 1828, for the purpose of showing how the record was kept by the Treasurer in reference to other tracts, which plainly appear to have been sold; for the purpose of showing to the Court and Jury, when taken in connection with other evidence already in the case, that no sale was made of the Samuel Rope tract in 1828; and further for the purpose of showing that in every instance where the entry 'paid before sale' appears, the record shows no sale of the tract to which such entry relates."

This offer was admitted, with the exception of the words "paid before sale," which, whether in connection with the Samuel Rope tracts or other tracts, were excluded.

Defendants presented, *inter alia*, the following points :—

(1) That if, while the lands were in the hands of the Commissioners under the sale of 1828, and after the five years allowed for redemption had expired, a subsequent sale was made by the Treasurer in 1834, such sale would be valid as against the plaintiffs, notwithstanding the fact that the lands were in the hands of the Commissioner at the date of the second assessment and sale; provided that the jury find that the taxes for 1827 were not paid before the sale of 1828. *Answer.* That point, as I understand it, is affirmed in the general charge.

(3) That if the taxes of 1827, for which the Samuel Rope tract was sold in 1828, were not paid until the tenth of January, 1829, the sale of 1834 would vest a good title in the defendant, Charles S. Coxe, irrespective of the fact whether the taxes for 1832 and 1833 were or were not paid by the plaintiffs prior to the sale of 1834. *Answer.* That point is susceptible of some explanation, but we affirm it.

(5) That the parol evidence of the contents of lost instruments of writing must be of the most positive and unequivocal kind; and, as in this case, none of the witnesses testifying to the contents of the alleged lost receipts for the taxes of 1832 and 1833, have proved the material fact of the date of such alleged receipts, or attempted to give the contents thereof, such parol evidence is inadmissible to destroy the Treasurer's deed of 1834, and the verdict of the jury must be for the defendants. *Answer.* You must be satisfied, gentlemen of the jury, that the taxes for those particular years mentioned in the point, were paid before sale. We repeat, if you are satisfied from all the evidence in the case, not only that the taxes were paid, but paid before sale, then, to that extent the point is negatived. The evidence must stand for what it is worth. The jury are to say whether it is satisfactory testimony, not only of the payment of the taxes, but of their payment within the required time.

The Court further submitted to the jury the question whether Henry Deringer or his agent paid the taxes for 1827 and 1828 before the Treasurer's sale on Nov. 25, 1828, and instructed them that if they found that the taxes were not paid until after the sale, their verdict must be for defendants. As to the question whether such a sale took place, the Court charged: "It was well said by counsel for plaintiffs that ordinarily when a treasurer makes a sale of land for taxes, he notes it upon his sale book. That book has been put in evidence, but notwithstanding the common practice referred to, it does not show that any sale of the Samuel Rope tract took place in 1828. . . . . Plaintiffs adduce the omission as one of the circumstances to corroborate their theory that no sale of the tract was made at that time. You are to consider carefully, gentlemen, the evidence presented by the defendants in this connection. They have produced a deed which recites a sale, and which, unless you are satisfied that the tax was paid before that sale, would be good. . . . In the discussion of this branch of the case, reference has been made to a letter written by Zurah Smith . . . When he wrote that letter, if the theory advanced by plaintiff's counsel be true, there had been dealt a staggering if not a fatal blow at this very title, and yet, it is argued, the probity of Zurah Smith is conceded on all sides. . . . Again, it is also argued that Zurah Smith continued to be the county treasurer until 1830; that his receipt is here for the taxes of 1828 and 1829; and yet when he executed and delivered that receipt to Mr. Deringer or his agent, if the views of the counsel for the defendants are correct, a destructive and fatal dagger had been sticking for two whole years in the very heart of Mr. Deringer's title. . . . It is for you to consider these circumstances; this most extraordinary state of things. You may also consider in this connection the condition of the records in relation to this alleged sale." As to the treasurer's sale in 1834, the Court said: "If you find, then, gentlemen, that the receipts spoken of by the Deringer family and by Mr. Stewart did exist, covering the payment of taxes for 1832 and 1833, and that these taxes were paid before the sale in

Digitized by Google

1834, then that sale conveyed no title whatever; it was utterly valueless."

Verdict and judgment for plaintiffs. Defendants took this writ, assigning for error, *inter alia*, the admission of plaintiffs' testimony excepted to as above, the answer of the Court to defendants' fifth point, and those portions of the charge above quoted.

Franklin B. Gowen, for plaintiffs in error.

The assignments of error may be grouped under the following propositions:—

(1) That a plaintiff in ejectment, claiming under a commissioner's sale, must show a compliance with the preliminary requisites of the Act of 29th March, 1824, and that where no possession of the land has been held by the plaintiff, and the defendant has not been direlict, no presumption in favor of the plaintiff's title arises, either from lapse of time or from payment of taxes.

(2) That neither any entry, nor the absence of any entry, in the treasurer's sale book of 1828, nor the letter of the treasurer dated February 4, 1829, was competent evidence to prove that no sale took place on November 25, 1828, or to contradict or invalidate the treasurer's deed, made in pursuance of such sale.

(3) That parol evidence of the contents of lost tax receipts is inadmissible to invalidate a treasurer's deed, unless such parol evidence establishes the material fact that the taxes were paid prior to the sale.

(4) That if the taxes of 1827 were not paid until after the sale of November 25, 1828, a perfect and valid title passed to Charles S. Coxe by the treasurer's sale of 1834, whether the taxes of 1832 and 1833 were or were not paid prior to that sale.

As to the first proposition, the curative provisions of the Act of 1815 do not apply to a sale by the commissioners under the Act of 29th March, 1824. (Jenks *v.* Wright, 11 Sm. 410.) Hence the maxim *omnia præsumuntur*, etc. cannot be invoked to cure the defect. In Hoffman *v.* Bell (11 Sm. 444) it was held that where taxes had been paid for forty years under a tax title, the deed of which had been executed by the treasurer after his term of office expired, the payment of taxes raised no presumption in favor of the holder of the tax title. Mere lapse of time proves nothing: all presumptions from lapse of time are in favor of the party in possession.

Alexander *v.* Bush, 10 Wright, 62.
Hillary *v.* Waller, 12 Vesey, Jr., 239, and cases therein cited.

As to the second proposition, the result of the reception of the treasurer's sale book and the letter of the treasurer of Feb. 4, 1829, is practically to maintain these propositions: first, that a purchaser at a tax sale, who pays the purchase-money and receives his deed, takes nothing by his purchase if the treasurer omits to note the sale upon his sale book, or records the sales of other tracts in a manner different from that of the tract in question; and secondly, that a purchaser of a good title at a treasurer's sale will lose his land and have his deed taken for naught, if at any time subsequent to his purchase the treasurer holds any communication with the prior owner without informing him of the sale.

As to the third proposition, no case can arise more clearly showing the danger of the extension of the ruling in McReynolds *v.* Longenberger (7 Sm. 13). If there is any presumption that the owner of land has discharged his duty by paying his taxes, it is overthrown by the counter one that the officers did not violate theirs by selling it without warrant.

Ankeny *v.* Albright, 8 H. 157.

The opinion of this Court, when this case was here before, certainly did not mean that any carefully guarded and measured instructions to the jury would justify the Court in submitting to them evidence of payment of taxes which did not afford any method of obtaining the date of such payment.

As to the fourth proposition, the treasurer sold the Samuel Rope tract in 1828 to the commissioners; while yet in their hands it was again assessed, and, after five years had expired without redemption, it was sold by the treasurer to Chas. S. Coxe. Now if the taxes of 1827 were not paid before the sale of 1828 (no redemption of that sale having been made), it follows under the ruling of Diamond Coal Co. *v.* Fisher (7 H. 267), that a perfect title passed to Chas. S. Coxe by the sale of 1834, whether the taxes of 1832 and 1833 were paid or not.

Armstrong and *Linn* (with whom were *Clarence Deringer* and *Stanley Woodward*), contra.

In the case of Jenks *v.* Wright, cited by plaintiffs in error, it appeared affirmatively that there had been an attempt to acquire title by a purchase from the commissioners at private sale. The case does not decide what amount or what kind of proof is sufficient to establish the requisites. From the recitals in the deed a presumption of regularity arises.

McCoy *v.* Michew, 7 W. & S. 386.
McHenry *v.* McCall, 10 W. 456.

The payment of taxes and exercise of acts of ownership afford a presumption of title.

Taylor *v.* Dougherty, 1 W. & S. 324.

The maxim *omnia præsumuntur* applies with peculiar force to tax titles.

Cuttle *v.* Brockway, 12 Harris, 147.
Alexander *v.* Bush, 10 Wr. 62.

The case of Hoffman *v.* Bell, cited by plaintiffs in error only, decides that the payment of taxes by *a stranger* for twenty-one years, will not raise a presumption that the owner has conveyed to him.

Digitized by Google

The records kept by the treasurer are evidence.
1 Greenl. on Evidence, §§ 483-4-5.
Cuttle v. Brockway, 8 Casey, 49.
Dikeman v. Parrish, 6 Barr. 210.
Kennedy v. Dailey, 6 W. 271.

Tax books and receipts for taxes are evidence.
Vastbinder v. Wager, 6 Barr, 339.

The error of the officer will not deprive the owner of his land.
Baird v. Cahoon, 5 W. & S. 540.

A recital in a treasurer's deed for unseated land is not conclusive, but may be shown to be erroneous by the sale book and parol evidence, and entries upon the books in the treasurer's office are notice to parties interested.
Turner v. Waterson, 4 W. & S. 171.
Cuttle v. Brockway, 8 Casey, 45.

The letter of Zurah Smith was received without objection, and there was no intimation of its not being legitimate evidence until the argument. It was then too late to withdraw it.

In Coxe v. Deringer (1 WEEKLY NOTES, 397) the Court say: "The admission of the evidence was warranted by the authority of McReynolds v. Longenberger (7 Sm. 13)," and as to the sufficiency of the evidence, it was much stronger than that in McReynolds v. Longenberger. The case of Diamond Coal Co. v. Fisher, cited by plaintiffs in error, differs from this, inasmuch as in the former it appeared that taxes were assessed and remained due and unpaid, whereas, in this case, the argument assumes that no taxes were due in 1834 to warrant a sale. Whatever effect the sale of 1834 may have upon the title acquired by the county, that sale was void as against the title of Henry Deringer, the former owner, because it does not appear that an account was kept with the tract for five years, as required by law, and if the taxes were paid before sale, then there were no taxes remaining due or unpaid, and consequently there was no authority to make any sale whatever which could effect the title either of Deringer or the county. Upon the propriety of submitting the evidence in the case to the jury, we refer, in addition to the cases already cited, to
Tanner v. Hughes, 3 Sm. 289.
Lackawanna Iron Co. v. Fales, 5 Sm. 90.
First Nat. Bank v. McMaingle, 19 Sm. 156.

McClintock, in reply.

Oct. 10. THE COURT. It will be sufficient to consider the four propositions presented by the plaintiffs in error, instead of discussing the specifications of error in detail. The first proposition cannot be sustained. There were facts to be submitted to the jury on the question whether the requirements of the Act of 29th March, 1824, had been complied with by the commissioners in making the sale to Henry Deringer, of June 5, 1827. There had been no *actual* possession of the Samuel Rope tract until very recently. Henry Deringer had paid the taxes regularly on this tract, with a slight exception, for nearly forty years. It is not the case of one setting up payment of taxes against another in actual possession, exercising rights of ownership under a claim of title. The payment of taxes will not stand for actual possession to support a title under the Statute of Limitations, but it is an assertion of title of a decided character; so much so, it will extend even a tortious possession beyond the *pedis possessio* of a trespasser. (McCall v. Neely, 3 Watts, 73; Hester v. Riehle, 7 Watts, 37; Criswell v. Altemus, Ibid. 580.) It was said, in our former opinion, the county being the owner of the land the commissioners conveyed, the deed of June 5, 1827, recited the performance of the directions of the act, and this sale has never been impeached by the county. The conclusion then stated was, that the facts were for the jury, upon the question whether the directions of Act of Assembly had been complied with (Opinion of WOODWARD, J., 32 Legal Intelligencer, 283.)* In Jenks v. Wright (11 P. F. Smith, 610) there was direct and positive proof that the sale was private, and the act not pursued. So in Hoffman v. Bell (11 P. F. Smith, 444), the deed was made after the treasurer had gone out of office, and, therefore, without authority. In no case has it been decided that the party claiming under a commissioner's deed must prove the prerequisites of the sale positively, under *all* circumstances. Natural presumption arising from clearly proved facts, which lead to a belief that the directions of the law have been fulfilled, must be submitted to a jury in this as in other cases.

The second proposition is sustained on the ground of the insufficiency of the evidence to overturn the fact of the sale, set forth in the treasurer's deed of 1828 to the commissioners. This fact lies at the foundation of the title of the county, of which the primary evidence is the deed itself. There are some recitals in a treasurer's deed which are only secondary evidence, and where, to support a sale, the recitals may be corrected by the original documents, from which the recitals were derived. (Turner v. Waterson, 4 W. & S. 171.) But a sale is an independent fact in itself, not necessarily the subject of an entry in an original document, unless it happens to be made voluntarily by the treasurer. The law requires no entry of it. The sale is itself an original act, done *in pais*, or, as it were, out of doors, and, in point of time, follows all the documentary entries relating to the tax for which the sale is made. It has nothing original to be referred to, by way of correction. Hence, the treasurer's deed is the primary and best, and, it may be, the only evidence of the fact of a sale.

* [1 WEEKLY NOTES, 397–401.]

Digitized by Google

The sale is a necessary act, without which no deed can be made. The deed, when delivered, is, therefore, the proper evidence of the sale set forth in it, and cannot be avoided by loose and inconclusive evidence that no sale was made. Nothing less than clear and strong evidence of no sale having been made, should be permitted to overturn the solemn deed of the officer of the law. Any other rule would render tax titles very insecure.

This deed is found in the possession of the defendants over forty years after its date, and is given in evidence by them at the trial. No objection is made to the deed itself for any defect on its face, and no evidence was given to prove non-delivery to the commissioners, or that they came to its possession surreptitiously. On the contrary, it came before the jury with the ordinary *indicia* of delivery, which, in the absence of countervailing proof, are legally sufficient, according to the following cases: (Blight *v.* Schenck, 10 Barr, 285; Rigler *v.* Cloud, 2 Harris, 361; Stinger *v.* Com'th, 2 Casey, 428.) Justice SHARSWOOD, remarking upon the case of Blight *v.* Schenck, said that "it recognized the doctrine that where an instrument is found sealed and delivered, and there is nothing to qualify the delivery but the keeping of the deed in the hands of the executing party—nothing to show that he did not intend it to operate immediately—that it is a valid and effectual deed, and that delivery to the party who is to take by it, or any other person, for his use, is not imperative." (Penna. Co. for Ins. etc. *v.* Dovey, 16 P. F. Smith, 267.)

This case does not need the doctrine of that case. Here we have not only the signing, sealing, and acknowledgment, but possession by a subsequent purchaser under a tax sale of 1834, to whom it would be probably delivered by the commissioners, who suffered the land to be sold for the taxes of 1832, 1833, assessed in his name. But it is not necessary to strengthen the presumption of delivery, for both the plaintiffs and the defendants in error have argued the case, as one of a *delivered* deed, and that the purpose of the evidence was to show that there was *no sale* to support the deed.

This brings us to the sufficiency of the evidence relied on. The first two facts, on which most reliance is placed, are that the treasurer made entries of the sales of other tracts at the same time, and made none of the sale of this tract. What, then, is the fact itself as to the Samuel Rope tract, the only one we are concerned in, and what is the value of the fact? The fact is simply an omission—a failure merely to make an entry; and its value uncertain. Was it a failure of inadvertence, or of intention? Was it a slip of memory, or because no sale was made? Who can say with certainty? The treasurer has made no entry of a sale, but will this fact overturn a sale he alleges he made, and which he has communicated in the most precise form, by a deed solemnly executed and delivered, under the responsibility of his office, and the sanction of his oath? Surely a solemn affidavit cannot be blown away by such a breath as this. Still worse and weaker are the next two facts relied on, viz., that the treasurer on the 4th of February, 1829, wrote a letter to Henry Deringer, and did not mention that the land had been sold to the commissioners in 1828, and that afterwards he received the taxes of 1828 and 1829, of Deringer, and said nothing of a sale in 1828, for the taxes of 1827. If Zurah Smith, the treasurer, were a party to be affected by his own acts or omissions, there would be room for argument. But, after the sale of 1828, he had no power whatever by acts or declarations, much less by mere omissions, to impair the deed he had before solemnly and officially executed and delivered. The title under that deed was not to be withered by his breath, or his omission to speak of that which did not concern him. Frail, indeed, would be the tenure of any purchaser under such a deed, could such evidence be used half a century afterwards to stifle its voice.

Of the same character are the omissions of the commissioners to perform the subsequent duties devolved on them by the Act of Assembly. Such irregularities are unfortunately too frequent. And what makes the error of the Court more hurtful, was the language and tone of the charge, upon these weak and inconclusive facts. Referring to the letter of February 4, 1826, the Judge said: "When Zurah Smith wrote that letter, if the theory advanced by the plaintiffs' counsel be true, there had been dealt a staggering, if not fatal blow, at this very title." And referring to Smith's receipt for the taxes of 1828–9, he said: "And yet, when he executed and delivered that receipt to Mr. Deringer, or his agent, if the views of the counsel for the defendants are correct, a destructive and fatal dagger had been sticking, for two whole years, in the very heart of Mr. Deringer's title." The language of hyperbole is suited to the purpose of the advocate, who would enforce his thought by striking and intense expressions, in order to deepen its effect, and by the exaggeration lead the minds of his hearers into the fever of his own heated fancy. But weak and inconclusive facts, when thus presented by a judge, can only mislead. Jurors, catching the tone and temper of their conclusions, from the strong and figurative style of the judge, fail to give to the facts their true weight, which a cool and fair statement is calculated to produce. There is clear error in the 10th specification.

The third proposition of the plaintiffs in error cannot be sustained. There was such evidence of the time of the payment of the taxes of 1832

Digitized by Google

and 1833, as was properly submitted to the jury. It came from several witnesses, not being confined to C. M. Deringer. It appeared that the receipts were continuous and complete, in biennial periods, from the year 1826 until the year 1844; a lapse intervening then for four years; and beginning again in 1849 they continued in the same manner until 1868. They were regular in their form, character, and time of payment early in the year. An illustration of their form, etc., was given in the receipt of January 5th, 1830, viz., a statement in transcript form of the five tracts belonging to Mr. Deringer, giving the names, quantities, localities, and taxes for each tract for the two preceding years, summed up together, and a receipt at the bottom for the entire amount, with date. This precise, methodical, and regular payment of the taxes on all the five tracts, early in the year, was strong evidence of Mr. Deringer's punctuality. It proved his deep interest in the subject, which was not likely to fail in performance of his duty to protect himself.

It was a very natural conclusion that a man who always paid his taxes promptly in biennial period, previous to the time of sale, would have paid them in time in 1832 and 1833. This, therefore, was a question for the jury, and not the court. Yet we are not unmindful of the necessity of holding a party to strict proof of the *time* of payment, when its purpose is to defeat a tax sale. The doctrine of McReynolds *v.* Longenberger (7 P. F. Smith, 13), ought not to be carried beyond its fair import. No question arose in that case upon the sufficiency of the evidence, as to the *time* of payment, as shown in the receipts, which had been destroyed, and, indeed, no objection was taken to the deposition on the score of time. The questions in this court arose upon the exclusion of parts of the deposition of the person who was the administrator of the owner, who had testified to the finding of the tax receipts in their proper places, among the muniments of the owner's title; and the points decided were, that no proof of their destruction by fire, and of their apparent official character, and the lapse of time since their dates, being over thirty years, the evidence of their existence, character, and possession was competent, in order to receive proof of their contents. The chief question was, whether such instruments, when accompanying the possession and title of the land, proved themselves after a lapse of thirty years? What would have been their effect had the deposition been read, and no other evidence of the time of the payment of the taxes than the mere years for which the taxes were assessed, had been offered, was not determined. We make these remarks to guard against any inference that we now mean to give that case a wider range than its true character imports.

As this judgment must be reversed for error under the second proposition, it is unnecessary to consider the alleged contradiction, stated in the fourth proposition, between the answers of the Court to the defendant's first and third points, and that part of the charge asserting that the sale of 1834 was valueless, if the taxes for 1832 and 1833 had been paid by Mr. Deringer. No such contradiction need take place in a future trial.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by AGNEW, C. J. WILLIAMS, J., absent.

May, '75, 117. May 16.

Blair Iron & Coal Co. v. Lloyd.

Land—Trespass quare clausum fregit—Damages, measure of—Errors and appeals—Tendency of charge of the Court.

In actions of trespass *quare clausum fregit*, unless the alleged trespass is wilful, or proceeds from recklessness or gross carelessness, only compensatory damages can be recovered.

Although a single sentence culled out of a charge, while standing alone, might be so interpreted as to contain an erroneous exposition of the law, yet if the connection and whole current of the charge show that such was not the meaning of the Court, and that it was scarcely possible the jury could have so understood it, the judgment will not be reversed.

Error to the Common Pleas of Blair County.

Trespass *quare clausum fregit* by Lloyd against the Blair Iron & Coal Company, to recover damages resulting from an alleged wrongful entry by the defendants' servants on the plaintiff's lands.

Upon the trial it appeared that the defendants, who were the owners of lands adjacent to those of the plaintiff, had passed the boundary line, and removed a considerable quantity of ore. The Court below (DEAN, P. J.) charged, *inter alia*, as follows:—

"Where a trespass has been inadvertently committed, where the conduct of the trespasser measured by the ordinary standard of morality and care, the standard exemplified in the rule, 'Do unto others as you would have others do unto you,' and where the trespasser is not chargeable with fraud, violence, or gross negligence, the value of the property taken, if it is a mineral, after deducting all just expenses for mining, is the proper measure of damages. This compensates the wronged party, and, in such a case, is all that should be allowed.

"If the defendants, acting in the mistaken belief that the ore was upon their own land, mined and used it, they should only pay the value of it

Digitized by Google

at the mouth of the mine, after deducting the expense of putting it there—all just expenses of putting it there. While the law permits you to fix, and entrusts to you the duty of fixing the measure of damages, to punish the wilful wrongdoer, as well as to compensate the injured party, it would be an outrage and a wrong to impose upon a party guilty only of unintentional trespass a penalty in damages greater than the value of the ore. Not unfrequently, as we have no doubt it has come within your observation, it happens that the rights of others are infringed upon by ordinarily prudent men in the prosecution of a lawful business without intentional wrong, or selfish purposes. All prudent and cautious men may be led into mistakes. For a trespass resulting from such want of intention, or in the absence of wilfulness, the law imposes no penalty beyond compensation to the injured party.

["If the weight of the evidence satisfies you that defendants wilfully took ore from the plaintiff's lands, or if the evidence satisfies you they were guilty of recklessness and gross negligence, did not take such care as ordinarily prudent men should take under such circumstances, you can give a larger sum than would merely compensate the plaintiff—you can give what is called vindictive or exemplary damages; the measure of damage in such case is for you; you are not restricted to the value of the property taken, you can punish the defendants by compelling them to pay more than an amount which would make whole the plaintiff—such amount as would deter other wilful and wanton or reckless trespassers from the commission of like offences."]

Verdict for the plaintiff for $14,100, and judgment thereon.

The defendants took this writ, assigning for error that portion of the charge within brackets.

Banks, Landis, Hewit, and *Elder*, for the plaintiffs in error.

Except in cases of oppression, outrage, and vindictiveness on the part of the trespasser, damages for a trespass must only be compensatory.

Rose *v.* Story, 1 Barr. 190.
Good *v.* Mylin, 8 Barr. 51.
Amer *v.* Longstreth, 10 Barr. 145.

In the charge the Court placed a trespass proceeding from negligence in the same category with a wilful trespass. It is of no consequence whether the negligence be gross or ordinary; in neither case ought punitive damages be allowed.

S. S. Blair and *D. J. Neff*, contra.

When negligence amounts to recklessness, in the eye of the law it is malicious, although no actual hostile purpose existed, and will render the party guilty of it liable to punitive damages.

Seely *v.* Alden, 11 Sm. 305.

In those cases of gross fault, it is difficult to distinguish between a mere neglect and a malicious design that, besides the reparation for injury done, demands some punishment of the person offending.

May 22. THE COURT. It is assigned for error that the Court below charged the jury that the defendant was liable for vindicatory or exemplary damages, for the want of such care as ordinarily prudent men would take under the circumstances. This single sentence culled out of the charge, standing alone, might be so interpreted; but its connection, and the whole current of the charge show that the Court did not mean so to charge, and that it is scarcely possible the jury could have understood the Judge to mean this. It is very clear that the instruction as to vindicatory damages was applied by the Court only to a wilful trespass, or to one proceeding from recklessness and gross negligence; and so the counsel of the defendant below understood him, for his exception to the charge was that the Court instructed that vindictive damages might be allowed, if the trespass was the result of culpable or gross negligence.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

[See Little Schuylkill Nav Co. *v.* French, 2 WEEKLY NOTES, 718; Carman *v.* Clarion Riv. Nav. Co Id. 720. *Cf.* Wash. Ins. Co. *v.* Rosenberger, *ante*, 16, and cases cited in note.]

Mar. '76, 6. Mar. 20.

The Burgess and Council of the Borough of Bethlehem v. The Perseverance Fire Co., No. 1.

Corporation—Fire Company—Charitable use—Ownership of property—Assumpsit—When not maintainable—Remedy for conversion of property.

Assumpsit does not lie for the value of chattels seized under a claim of right and without fraud, where there has been no conversion of the chattels into money, and no circumstances from which the law would imply such a conversion, or would imply a contract to pay the value.

A fire company incorporated for the declared purpose of protecting the property of its fellow-citizens from fire, holds all property acquired by it in trust for that purpose, but the rights of the *cestuis que trustent* therein can only be protected and enforced by and through the Courts.

Error to the Common Pleas of Northampton County.

Assumpsit by the Perseverance Fire Company, No. 1, against the Burgess and Council of the Borough of Bethlehem. Plaintiffs relied on the common counts, and furnished thereunder a bill of particulars which, in addition to items of $1000 for money loaned, and $150 for money paid, contained the following item:—

"Also to recover the value, with interest, of the articles and property specified in the schedule hereto annexed, which said articles and property were un-

Digitized by Google

lawfully, forcibly, and tortiously taken from the possession of the plaintiffs, whose property they were, by the defendants, and converted by the defendants to defendants' own use."

The schedule included a hand engine, a hose carriage, a pair of horses, and various articles composing the apparatus and equipments of a fire company, the whole being valued at $3907.20. Defendants pleaded non-assumpsit, payment with leave, etc. At the trial (before MEYERS, P. J.) the following facts appeared in evidence: For more than forty years prior to their incorporation in 1853, plaintiffs had existed as a fire company. Their fire apparatus had originally been furnished by the Moravian Society, and included an old hand engine, supposed to have been built in London in 1692. Between 1851 and 1853 the fire company, with the aid of money derived from a concert, and from subscriptions from the citizens of Bethlehem, purchased another hand engine. In 1853 plaintiffs were incorporated by the Court of Common Pleas of Northampton County, under the Acts of April 6, 1791, and April 8, 1833, their object, as set forth in their constitution, being "the protection of the property of our fellow-citizens from fire." About this time the company erected an engine house on land belonging to the Bethlehem Water Company, and incurred, in so doing, an indebtedness of $500. This land was afterwards conveyed to the Borough of Bethlehem, who also paid a balance of $400 remaining of the indebtedness of the fire company on the engine house. At various times after their incorporation, plaintiffs purchased with money derived from balls, fairs, concerts, and voluntary subscriptions, principally from the citizens of Bethlehem, a hose carriage, a pair of horses, and other property set forth in the schedule annexed to their bill of particulars. They also, by means of a gift enterprise in 1869, raised $1000, which, with $3000 raised by the Borough of Bethlehem, was applied to the purchase of a steam fire engine. After the purchase of this latter engine the borough, without objection from the fire company, sold the hand engine which had been purchased by the company, and received the proceeds. In July, 1872, the town council passed an ordinance creating a fire department composed of the volunteer companies, and providing for the election of a chief engineer. By another ordinance they provided for the wearing of a uniform badge by every member of the fire department. Plaintiffs participated in the election of a chief engineer, and its members wore the badge of the fire department. In July, 1873, the Bethlehem Water Board passed a resolution that the old hand engine of the Moravian Society, which had remained in possession of plaintiffs, should be removed to the museum of the Young Men's Missionary Society. Plaintiffs, who valued this engine as a relic, refused to obey this resolution. On July 3, 1873, these facts were reported to the town council of Bethlehem, who were also informed that threats had been made to destroy the old engine. Thereupon the council passed a similar resolution to that passed by the water board, and also resolved to proceed in a body, together with the police force of the borough, to the engine house of plaintiffs, and forcibly remove the old engine to the museum, which they accordingly did. On the evening of the same day, a large number of the members of the fire company being present at the engine house, an informal and irregular meeting was held at which a motion was made to disband. Plaintiffs' witnesses testified that no vote was taken on this motion, while defendants' witnesses testified that the motion was carried unanimously. It was undisputed, however, that an inventory was made of the company's property; that some of the members tore their photographs from a large frame in the engine house, and took away their hats, belts, shirts, etc.; and that a list of the remaining property claimed by the company was handed to a police officer of the borough who was present. After the meeting the high constable of the borough, by the orders of the town council, locked one of the doors of the engine house and took away the key. The next morning the chief engineer of the fire department, who had been present at the meeting of the previous night, made an official report to the town council that the company had disbanded. Council immediately appointed a committee who, together with the chief engineer, took charge of the apparatus of the fire company. Afterwards, under the authority of the council, a new company was organized, to whom, on July 12, 1873, was delivered plaintiffs' apparatus. In the meanwhile, on July 7, 1873, plaintiffs brought this suit; first, to recover the $1000 paid by them in the purchase of the steam engine, and the further sum of $150 which had been paid by them for the repair of the same, and secondly to recover the *value* of the apparatus which had been purchased by the company including the hand engine sold by the borough, and the hose carriage, horses, etc, taken possession of by the borough as aforesaid.

On the trial defendants presented the following points, all of which were answered in the negative:—

"That the engines, hose carriage, and other apparatus for the extinguishment of fires, held by a fire company, which has been paid for by money subscribed directly or indirectly by the citizens of a town, or raised by taxation, is held by such fire company in trust for the citizens

Digitized by Google

of such town, subject to the control of the constituted authorities of such municipality, and such fire company has no title to sell the same."

"That there was neither an express nor an implied contract on the part of the borough to pay the plaintiffs the value of the fire apparatus and other property, and the plaintiffs therefore cannot recover.'}

The Court charged *inter alia* as follows: ["While there might have been a concurrent remedy in a Court of Equity, or by mandamus, yet these plaintiffs, if they had the legal title to the property, which they allege the defendants took and retained possession of forcibly and without their consent, and under circumstances which would entitle them to recover against a stranger, had a right to have and maintain a common law action against these defendants.] . . . It is contended on the part of the plaintiffs that if the jury find from the evidence that they were the lawful owners of the property mentioned in the bill of particulars, and that the defendants forcibly and without plaintiffs' consent took out of their possession this property and retained it; that they have the right to waive the tort, and recover the value of the same with interest in this form of action under the count for money had and received. We say to you that such is the law, and it is immaterial whether you find that they held such property absolutely or in trust for the uses and purposes provided for by their charter. . . . If there was property on the 3d of July up to the 8th, that belonged exclusively to the plaintiffs, and which was taken by force and against the consent of the plaintiffs out of their possession, and retained, then the plaintiffs can recover the value of the property, in this case, with interest from that date, without having made a demand. If defendants, being the owners of the engine house and believing that plaintiffs had disbanded and abandoned their property, only went there to secure the property and were willing to deliver it up again on demand, there can be no recovery unless plaintiffs prove an express demand before suit.

Verdict and judgment for plaintiffs for $2975.14. Defendants took this writ of error, assigning for error the refusal of their points and that part of the charge inclosed in brackets.

W. E. Doster and *Edward J. Fox*, for plaintiffs in error.

The engines, hose carriage, and other apparatus for the extinguishment of fires, which were purchased by money which was either subscribed by the people of Bethlehem, or which was the proceeds of fairs, concerts, or similar enterprises for raising money among the people of Bethlehem, were not the property of the plaintiffs, but were simply held in trust by them for the use, benefit, and advantage of the people of Bethlehem in protecting their property from fire, and this trust was a charity over which a court of equity had jurisdiction.

Magill *v.* Brown, Brightly's Rep. 405.
Thomas *v.* Ellmaker, 1 Pars. Eq. Ca. 107.
Pepper's Estate, 1 Pars. Eq. Ca. 436.
Wright *v.* Linn, 9 Barr, 435.

That the fire company were not the absolute owners of the fire apparatus, appears from the fact that when the volunteer fire system in Philadelphia was abolished, it required an Act of Assembly to enable the companies to sell their property.

Act of May 28, 1872, P. L. 1171.

The borough of Bethlehem, being a municipal corporation, was the only legal representative of the people of Bethlehem, and had in charge everything that concerned the general good and related to the public welfare.

Dillon on Mun. Cor., vol. i. p. 92–93.

If these propositions are true, it would be strange, indeed, if a recovery could be permitted in this action. Because it would permit an association of men, to whose care and keeping had been committed trust property to be used in protecting its owners from the ravages of fire, to recover the value of that property from the *cestuis que trustent*, who had resumed the possession of that property, because the association had both refused and neglected to use that property in the extinguishment of fires.

If this was trust property held for a charitable use, a court of equity has exclusive jurisdiction over it.

Thomas *v.* Ellmaker, *supra*, citing King *v.* Marquis of Stafford, 3 T. R. 646.
Act of June 16, 1836, Purd. Dig. 589, pl. 1.
Foley *v.* Tovey, 4 Sm. 192.
Kisor's Appeal, 1 ? Sm. 428.
Roshi's Appeal, 19 Sm. 467.

There was no evidence that the borough converted any of this property to their own use before suit brought. They did not deliver the property to the new company until July 12, and suit had been brought July 7, up to which time the defendant had merely taken possession of property which had been abandoned by plaintiffs. In such a case trover cannot be supported without proof of a demand and refusal.

1 Chitty Pleading, 155.

H. Green and *W. W. Schuyler*, contra.

It is not necessary for us to dispute the proposition that the property held by plaintiff was subject to the supervision of the courts, as property held upon a charitable use. But in this case it was sought to make plaintiffs subject not to the courts, but to the town council of Bethlehem, an irresponsible body of laymen, having no judicial power whatever, and who seized plaintiffs' property without notice, and without any hearing, or any opportunity to plaintiffs to be heard in their own defence. Even if plaintiffs were but

Digitized by Google

trustees of their property, they held the legal title to it, and could bring this common law action for its value, and since the borough of Bethlehem did not furnish the money for the purchase of plaintiffs' property, they were not the *cestuis que trustent.* At the most, the cases cited by the defendants only hold that such property is held for a charitable use, and is subject to the control, *not* of the borough, but of the courts. If defendants unlawfully took possession of plaintiffs' property, the latter had the right to waive the tort, and recover the value of the property in assumpsit. The questions of ownership and of the unlawful taking were properly left to the jury, and were decided by them in favor of the plaintiffs.

May 8. THE COURT. Two controlling questions arise under the eighteenth assignment of error. The one involves a consideration of the rights of the defendant in error in the property in question, the other whether it has selected the proper form of action to assert those rights. The defendant in error was duly incorporated by the Court of Common Pleas of Northampton County on the 6th of October, 1853. The company had had an existence and organization as a fire company for some fifty years prior to its incorporation. The application for the charter avers "that the said corporation is intended to be situated in the borough of Bethlehem, in the said county of Northampton." The charter declares that the incorporators have for their "object the protection of the property of our fellow-citizens from fire." Thus the sole purpose for which it was incorporated is clearly and distinctly expressed. Its object was not for the private gain and profit of its members, but for the public benefit; it existed for no other or different purpose. The property which it acquired in aid of its object, was therefore for charitable uses. While the statute of 43 Eliz., C. 4 of charitable uses, is not extended to Pennsylvania, yet the principles of it, as applied by Chancery in England, have long been recognized as in force here by common usage. (Witman *v.* Lex, 17 S. & R. 88; Babb *v.* Read, 5 Rawle, 151; Methodist Church *v.* Remington, 1 Watts, 218; Magill *v.* Brown, C. C. U. S. Brightly's Reports, 347; Thomas *v.* Ellmaker, 1 Pars. Select Eq. Cases, 98; Pepper's Will, Idem, 436; 7 Johns. Ch. 294; Wright *v.* Linn, 9 Barr, 435.) In most of these cases the rule was applied to voluntary associations or unincorporated companies. When applied to incorporations the reason is stronger and the duty of a Court of equity under our statute is free from doubt.

The first section of the Act of 6th April, 1791, (3 Sm. L. 20) authorized the incorporation of citizens of the commonwealth, for "any literary, charitable, or religious purposes." Section one of the Act of 8th of April, 1833 (P. L. 238), extends the provisions of the previous Act to beneficial societies and associations, and to fire engine and hose companies. Section two declares that all corporations established under the foregoing Act, and all that may hereafter be incorporated under this Act, shall be able and capable in law to take and hold real and personal estate, to be employed and disposed of according to the objects, articles, and conditions of the instruments upon which the said corporations are respectively as aforesaid formed or established, or according to the articles and by-laws of said corporations respectively, or of the will and intention of the donors.

The fire apparatus of this company was originally furnished by the Moravian Society, which was the owner of all the real estate in Bethlehem, until a few years prior to the incorporation of the company. As additional and improved apparatus was required, it was provided by subscription or by fairs, concerts, and similar enterprises.

Within the limits of its charter the defendant in error had all the rights of a corporation. It held the legal title to property. Yet it held in trust for the uses and purposes of its creation, that was, for the protection of the property of its fellow-citizens from fire. It had no right to divest it of that general trust nor to divert it from that general purpose. It may in good faith dispose of any specific article, using the proceeds thereof in the acquisition of new or improved apparatus, to be used for the purpose mentioned in its charter. Into whatever form the company changes the property, the trust still inheres. It cannot sell it and divide the proceeds among the members. The company held its property subject to the supervisory power of a Court of Equity. By the thirteenth section of the Act of 13 June, 1836, the Supreme Court and the several Courts of Common Pleas are given all the jurisdiction and powers of a Court of Chancery so far, *inter alia*, as relates to the supervision and control of all corporations, other than those of a municipal character. It is true that among the enumerated powers vested in the corporate officers of a borough by section two of the Act of 3d April, 1851 (Purd. Dig. 168), is one "to make regulations relative to the cause and management of fires" and to "authorize the borough authorities to appropriate money for the purchase of fire-engines, for the use of said boroughs, and to fire companies." But a right to make a general regulation relative to the management of fires, gives no right to the borough authorities, to take out of the possession of an incorporated company, the fire engines and apparatus which are not owned by the borough. It is not given to the borough authorities to decide that the company has forfeited all its rights to the possession and custody of the property it holds in trust, and therefore has no rights entitled to respect. The borough may

Digitized by Google

purchase and own fire engines and apparatus, or it may appropriate money as a donation to a fire company to assist in their purchase. What the borough owns herself she may take possession of and control or sell. What an incorporated company owns the borough cannot control in that manner. In case the contributors to the erection of a church edifice discover the corporation is not using it according to the trust for which it is held, surely it will not be contended that they on their own motion can go and take adverse possession of the building. The property does not belong to the contributors, but to the corporation, to be used by the corporation according to its charter.

The same principle applies to a fire company. Whatever may be subscribed or otherwise donated is given to the corporation to be used by it for the object and purpose declared in its charter. The rights of *cestuis que trustent* therein must be protected and enforced in and through the Courts. (Roshi's Appeal, 19 P. F. Smith, 462.) The fire company is the legal custodian of the property, and is entitled to notice and hearing before its rights shall be impaired.

Nor was the corporation deprived of this right by the fact that a portion of its members assembled without notice and in an irregular manner, and favored the disbanding of the company. The action thus had was insufficient to work a legal dissolution of the corporation or destroy its rights of property. The first section of the Act of 9th of April, 1856 (Purd. Dig. 285, pl. 21), prescribes the manner in which a corporation may be dissolved on its own petition by the Common Pleas of the proper county. A temporary non-user of the property did not divest the rights of the company therein. (Wright *v.* Linn, *supra;* McKissick *v.* Pickle, 4 Harris, 148.)

We conclude, therefore, that the plaintiff in error has no just cause to complain of the answers of the Court in regard to her asserted claim of right to the possession of the property.

The tenth assignment strikes at the form of the action. The declaration was in assumpsit. This action cannot be sustained unless there was an express contract, or unless the law will imply a contract. (1 Chitt. Plead. 99.) It does not lie for a chattel illegally detained. (Willet *v.* Willet, 3 Watts, 277.) The plaintiff cannot waive the tort and recover the value of the goods unless the tort feasor has sold the article and received the money (Idem; Gilman *v.* Wilbur, 12 Pick. 120); or where he has taken it as merchandise to market for the purpose of sale, and in the absence of any evidence to rebut the presumption of a sale and receipt of the money. (McCullough *v.* McCullough, 2 Harris, 295.) This case was correctly said to be ruled by Longchamp *v.* Kenny (1 Douglass, 137, K. B.), but in referring to that case, the remarks of Mr. Justice BURNSIDE are calculated to convey a wrong impression as to the extent to which it goes. The facts of the case were, that tickets for a masquerade party had been delivered to each, plaintiff and defendant, to sell and account for, or return after the party. The defendant got possession of one ticket that had been delivered to the plaintiff; on demand the defendant refused to pay for it or to give any satisfactory answer. Thereupon the plaintiff paid for it, and then brought suit against the defendant. The declaration was for money had and received, and for money paid. In delivering the opinion of the Court, Lord MANSFIELD said: "If he sold the ticket and received the value of it, it was for the plaintiff's use, because the ticket was his. Now as the defendant has not produced the ticket, it is a fair presumption that he has sold it." Hence that case was ruled on the presumption that the defendant had actually received the money for the ticket. If goods be sent to a merchant who refuses to receive them because they are not such as he ordered, and under pretext of re-delivering them substitutes spurious articles, and the genuine ones are not returned or accounted for, the owner may waive the tort and recover the price for which they may be presumed to have been sold by the defendant, in an action for money had and received, but not for goods sold and delivered. (Gray *v.* Griffith, 10 Watts, 431.) Where one tortiously in possession of another's goods converts them into money or securities, assumpsit for money had and received may be maintained. This Court is governed by equitable principles, and the action lies only where the defendant *ex æquo et bono* ought to refund the money received. (Deysher *v.* Triebel, 14 P. F. Smith, 383.) In many cases where the defendant has received goods wrongfully, a contract for the purchase will be inferred, and the plaintiff may waive the tort and recover the amount in an action for goods sold and delivered. (1 Leigh's Nisi Prius, 91.) But if there be no unfair dealing or other circumstances from which an implication may arise under such a count, a recovery cannot be had of the value of specific articles in the possession of the defendant claimed as the property of the plaintiff. (Deysher *v.* Triebel, *supra.*)

Turning to the facts in this case, we find that the borough authorities took possession of the property on the 3d of July, 1873, by exercising dominion and control over it. They retained it in its specific form when this suit was brought four days thereafter. The possession was not taken fraudulently, but under a claim of right. No conversion of it into money or securities had taken place. It was merely detained and held. No implied contract or receipt of money can be implied; the whole evidence rebuts any such pre-

Digitized by Google

sumption. It follows, therefore, that this assignment only is sustained, and for that reason the judgment must be reversed.

Judgment reversed.

Opinion by MERCUR, J. WILLIAMS, J., absent.

July, '75, 150. June 5.

Raydure, Watson & Co. v. Knight.

Remote and proximate cause—Fire communicated by burning oil—Concurring negligence.

Per PAXSON, J. I fear we are carrying the doctrine of negligence too far, and that with its extension, and the disposition of the modern juryman to be generous with the property of other persons, it will become unsafe for a man to embark in any business involving the use of an element of danger.

[In this case, which was decided June 9, 1876, reported 2 WEEKLY NOTES, 713, the following dissenting opinion by PAXSON, J., was accidentally omitted to be filed until October 23, 1876. In view of matters specially referred to therein, the following supplemental report of testimony and points is published, which should be read in connection with the original report.]

On the trial, W. S. Raydure, one of the defendants, and other witnesses, testified to the following effect:—

Oil in a tank is not liable to ignite by a spark falling into it, nor by anything but a blaze. It is customary in the oil regions to leave tanks uncovered.

The fire was discovered about 10 o'clock A. M. on June 22, 1872, a very warm, bright day, with a southwesterly wind. The tank and derrick both caught fire, but the derrick was saved by means of water from a donkey engine pump. During the fire in the tank, and after it had been burning for about two hours, a large portion of the oil was drawn off. There was some water in the bottom of the tank, the steam from which caused the remainder of the oil to boil up, when the tank gave way or exploded, scattering the burning oil in every direction, and driving every one away. At that time the plaintiff's engine house caught fire and burned down. Prior to this occurrence the fire was under control; it was supposed that all danger was over, and people had dispersed During the time which intervened between the beginning of the fire and the bursting of the tank, the plaintiff's engine house could have been taken down and moved, in which case little or no damage would have occurred to his engine, etc.; but it could not have been moved after the oil boiled over, as when the tank gave way the fire was "all around in a moment."

C. E. Knight, the plaintiff, being on the stand, his counsel asked him what damage resulted to him from the stoppage of his working and by the fire. Objected to because such damages were contingent and uncertain; admitted; exception. The answer was, that the interruption of the labor, and the men, for the time, was about $20, and the witness's time $5 per day. (Fifth specification of error.)

The defendants' points (other than those recited in the former report of the case), with the answers of the Court thereto, were as follows:—

(1) The defendants had a right to place their pumping tank where it was built, and of such size as they pleased, and to run an engine, and erect smoke-stacks, to pump their well, where they did, and to use wood for fuel if they chose, without being chargeable with negligence toward the property of their neighbors. *Answer.* This point is affirmed with this qualification: If the oil tank where the fire occurred was left uncovered, and you find from the evidence that fire from the smoke-stack of defendants' engine ignited the oil in the tank, this would not render the defendants liable unless you find it was an act of negligence on the part of the defendants to thus leave the tank uncovered. Negligence, in its application to the facts, was the want of that care which a person of ordinary prudence under the circumstances should exercise. (2) If the defendants were prosecuting their business of pumping oil in the usual way, with the customary appliances and appendages, and an accidental fire occurred in their works, that communicated with and burned the property of the plaintiff, no liability attaches to them in consequence thereof, even if the fire originated in some negligence in the proper care of their own property. *Answer.* If the burning oil in the tank set fire to and destroyed or injured plaintiff's property, then it was the natural and proximate cause, and the point is answered in the negative. (3) Unless the jury believe from the evidence that the defendants' tank ignited by fire communicated from their smoke-stack, that the tank was uncovered, and that it was negligence to leave it uncovered, the plaintiff cannot recover. *Answer.* The 3d point is affirmed. (6) That the evidence shows that the plaintiff was but part owner of a fraction of property injured by the fire, and cannot sue alone and recover for his fractional interest in the property, held in part ownership with others. *Answer.* The 6th point is answered in the negative. (7) If the plaintiff had time and opportunity to have taken and removed his engine house after the damage became apparent, and he neglected to do so, he was guilty of negligence, and contributed to the disaster, and therefore cannot recover. *Answer.* The 7th point is answered in the affirmative.

The answers to the defendants' points were excepted to generally, before verdict, but the

Digitized by Google

answers to the 3d, 6th, and 7th points, were not assigned for error.

PAXSON, J. That the verdict in this case was wrong, and should have been set aside by the Court below, is obvious. The undisputed testimony was that the plaintiff had ample time to have taken down his engine-house, and remove it after the fire commenced, and if he had done so he would have sustained no damage. He was, therefore, guilty of contributory negligence, and the Court so told the jury in its answer to the defendant's seventh point. Notwithstanding this direction the jury disregarded the evidence, and found a verdict for the plaintiff. The failure of the Court below to set the verdict aside is, of course, no ground of error; but it furnishes an additional reason why we should reverse the judgment if the record discloses any real error.

I think the admission of plaintiff's evidence embraced in the fifth specification was clearly erroneous. He was allowed to prove his loss from the interruption of his business. The measure of damages, if he was to recover at all, was the injury to his property by the fire. Authority is not needed for such a self-evident proposition.

I also think that under all the facts of this case, the defendant's first, second, and third points should have been affirmed without qualification. The act of negligence relied upon was the keeping of defendant's receiving tank uncovered. Not a witness said that oil in a tank will ignite from sparks. On the contrary, several witnesses for the defendant swore that it will not, nor from coals or red-hot iron—nothing but a blaze will ignite oil. The plaintiff, although called in rebuttal, did not attempt to controvert this. There was, therefore, nothing from which the jury could find negligence in leaving the tank uncovered. But were this otherwise, there was no evidence that the fire was caused by sparks from defendant's smoke-stack. It was a mere guess on the part of the jury. The most that can be said is, that it might have been thus caused. Nothing is more mysterious than the origin of fires. They often baffle the skill of the most experienced fire marshals and capable experts. This fire might have originated in a variety of ways; by spontaneous combustion (it was an extremely hot day in June with a bright sun); by design, or from the carelessness of plaintiff's own employés in the use of matches, or otherwise. To make the defendant pay for the injury merely because it *might* have been occasioned by sparks from his smoke-stack seems to my mind at least of doubtful propriety.

I fear we are carrying the doctrine of negligence too far, and that with its extension, and the disposition of the modern juryman to be generous with the property of other persons, it will become unsafe for a man to embark in any business involving the use of an element of danger.

The foregoing was written during the last May Term at Harrisburg, where the above case was decided, but through a misunderstanding was not filed. It is filed now as embodying my objections to the judgment of the majority of the Court.

Jan. '76, 55. March 30.

Brady & Logan to use etc. v. Conway.
Merkle's Appeal.

Execution—Distribution of proceeds of sheriff's sale of personalty—Judgment-docket—Effect of omission of the Christian name of one of the partners in the record of a judgment against a firm—Practice.

The separate personal property of A. was sold under writs of *alias fi. fa.* on two judgments, one against A. personally, the other against the firm of which he was a member, the writ on the latter being first issued:

Held, that the judgment against the firm was entitled to be first satisfied out of the proceeds of the sale, although the Christian name of one of the partners appeared nowhere in the proceedings.

Held, further, that the question of irregularity of the record could not be inquired into by an auditor.

Appeal from the Common Pleas of Warren County.

This case was heard, in the Court below, upon exceptions to an auditor's report in the matter of the distribution of proceeds of a sheriff's sale of personal property, sold under two judgments.

The facts of the case are as follows: Brady & Logan, to use of Eaton & Cole, obtained judgment against Thomas Conway. This judgment was assigned to William Merkle. Subsequently J. F. Stearns obtained judgment against Conway & Galligan for $445.06. In the proceedings against Conway & Galligan, the Christian name of Conway nowhere appeared, but his identity with Thomas Conway was admitted. On April 3, 1875, Stearns issued an *alias fi. fa.* on his judgment; and on April 27 Brady & Logan issued a similar writ on their judgment. Under these writs the sheriff sold certain personal property of Thomas Conway, realizing therefrom $350. Both Stearns and Merkle claimed this sum.

The matter was referred to an auditor (D. J. Ball) who awarded the money to Merkle, on the ground that Stearns's judgment was defectively entered in the judgment-docket, holding that such defective entry would postpone its lien to that of the subsequent writ of Merkle.

Stearns filed exceptions to this report of the auditor, which the Court sustained, awarding the money to Stearns. Merkle thereupon appealed, assigning for error this action of the Court.

Digitized by Google

Brown and *Stone* (with them *C. C. Thompson*), for appellants.

Every action against a firm should be brought against all the partners by name. Otherwise the judgment obtained will not bind the separate estates of the partners, real or personal. At any rate, as to money derived from the sale of the separate estates, such a judgment, against the firm merely, must be postponed to judgments against the separate partners.

Parsons on Partnership, 475.
Wyman *et al. v.* Stewart, 42 Ala. 164.
Fox's Digest of Partnership, 162.
Eitzer *v.* Shunk, 1 W. & S. 340.

Dinsmore and *Reeves*, contra.

Although the lien of a judgment against a firm on the separate *real* estate of the partners is invalidated as to subsequent purchasers or judgment-creditors by the absence of the Christian names of the partners from the proceedings, especially the judgment-docket, no such rule applies to the separate *personal* estate of the partners.

Bell's Ex'rs *v.* Newman's Adm'rs, 5 S. & R. 84.
Cumming's Appeal, 1 Cas. 269.
Ridgway, Budd & Co.'s Appeal, 3 Har. 181.
Jones's Estate, 3 Cas. 337.
York Bank Appeal, 12 Id. 458.
Wood *v.* Reynolds, 7 W. & S. 406.
Lawler's Appeal, 7 W. & S. 387.
Roemer *v.* Denig, 6 Har. 482.
Brant's Appeal, 8 Har. 141.

May 8. THE COURT. The property sold was personal estate, the proceeds of which were for distribution. It is admitted that Thomas Conway, as whose property this personal estate was sold, is the same person who was a partner in the firm of Conway & Galligan. The execution of Stearns against Conway & Galligan was not void, and, if irregular, this fact was not to be inquired into by the auditor. The distribution proceeding was itself founded on the sale under this writ. The judgment against the firm by their partnership name was not absolutely void Then as the property sold belonged to Thomas Conway, and as the person named in the writ is the same Conway, clearly his creditor cannot be deprived of the fruits of his execution by the failure to state his Christian name where there is no doubt of the person named. By the Act of Assembly, distribution is to be made according to equity, and equity requires that Thomas Conway's property should pay his own debts.

PER CURIAM. Decree affirmed and appeal dismissed, with costs to be paid by the appellants.

WILLIAMS, J., absent.

[*Cf.* Kindig's Appeal, 2 WEEKLY NOTES, 680.]

July, '75, 20. March 16.

Commonwealth v. Beamish.

Criminal law—Indictment under Act of March 31, 1860, § 118—*School Districts, not corporations thereunder — Forgery — Criminal pleading at common law and under criminal procedure Act of March* 31, 1860, § 13.

The Secretary of the Board of Directors of a school district was indicted for "altering, mutilating, and falsifying with intent to defraud, a certain book and writing known as the duplicate of the taxes" of the said school district:

Held, that the indictment could not be sustained under the 118th section of the Act of March 31, 1860 (Purd. Dig. 349, pl. 171), because a school district is a *quasi* municipal corporation, and not such a body corporate as is contemplated by that Act.

Held, further, that it was good as an indictment for forgery under the common law as modified by our criminal procedure Act of March 31, 1860, the words used to describe the writing falsified being sufficient under the thirteenth section of that Act (Purd. Dig. 379, pl. 18).

Certiorari to the Quarter Sessions of Luzerne County.

This was an indictment against F. Beamish, Secretary of the Board of Directors of the Fourth School District of the city of Scranton, for altering, mutilating, and falsifying, with intent to defraud, "a certain book and writing commonly known as the duplicate of the taxes" of the said school district.

The defendant moved to quash the indictment on the ground that a school district "is not such a body corporate or public company as is contemplated by the Act of March 31, 1860, § 118 (Purd. Dig. 349, pl. 171), under which the indictment is found."

This Act reads as follows:—

"If any director, manager, officer, or member of any bank, or other body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate or falsify any of the books, papers, writings, or securities belonging to the bank, body corporate or public company of which he is a director, manager, officer, or member, or shall make or concur in the making of any false entry, or any material omission in any book of accounts or other document, he shall be guilty of a misdemeanor."

The Court sustained the motion, and quashed the indictment. The Commonwealth took this certiorari, assigning for error the above ruling of the Court.

Alexander Farnham, District Attorney, and *A. Ricketts*, for the Commonwealth.

The words of this Act, "any body corporate," are broad enough to include all corporations, and a Court in construing a statute is not at liberty to disregard the express words.

Com'th *v.* Ins. Co., 13 Penna. 165.
Mayor *v.* Davis, 6 W. & S. 239, 277.

Digitized by Google

Potter's Dwarris on Statutes, 144.
Dame's Appeal, 62 Penna. 417.
Bartolett *v.* Archey, 38 Id. 273.
Howard Association's Appeal, 70 Id. 344.
Gyger's Estate, 65 Id. 311.

A school district is a body corporate.

Act of May 8, 1854, P. L. 620.

S. Woodward, contra.

A school district is not such a corporation as is contemplated by this Act.

Wharton *v.* School Directors, 6 Wr. 363.

May 8. THE COURT. It is very evident that this indictment was designed to be framed under the 118th section of the Act of 31st March, 1860 (Purd. Dig. 349, pl. 171). It was a mistake, however, to assume a school district to be such a corporation as is indicated in that section. The Act of Assembly has conferred on the several school districts certain capacities as bodies corporate, such as to sue and be sued, to purchase and hold such real and personal property as may be necessary for the establishment and support of its schools, and to sell the same when no longer necessary for those purposes, and generally to make other contracts therefor, in their corporate names. Yet it has not made them strictly municipal corporations. They have neither a common seal nor legislative powers. Like counties and townships, they are *quasi* corporations. Within a prescribed sphere they exercise many of the faculties of a corporation. (Wharton *et al. v.* School Directors, 6 Wright, 358.)

That this view of the section accords with the legislative intent is manifest in other parts of the same Act. Thus sections 116, 117, and 119 each contains substantially the same language. "If any person being a director, officer, or manager of any body corporate or public company." Yet other portions of each section clearly show that it does not apply to municipal corporations. Whenever there is any design to extend the penal provisions of the statute, to the officers, books or records of a public office or public corporation, the intent is expressed in unmistakable language. This is done in section 171 (Purd. Dig. p. 365, pl. 255), and again in section 15 (p. 318, pl. 21). Hence it follows that this indictment cannot be sustained under the 118th section of the Act.

A further inquiry is, whether the indictment is good at common law as modified by our criminal procedure.

"Forgery at common law," says Blackstone (4 Com. 247), "is the fraudulent making or alteration of a writing to the prejudice of another's rights;" and by Mr. East is said to be "the false making or altering *malo animo* of any written instrument for the purpose of fraud and deceit." (2 Am. Crim. Law, § 1418.)

This indictment charges that the defendant, a director and secretary of the board of school directors of the fourth school district of the city of Scranton, did, with intent to defraud, alter, mutilate, and falsify a certain book and writing, commonly known as the duplicate of the taxes levied for the use of the said school district for the year ending on the thirty first day of May, A. D. eighteen hundred and seventy-three or thereabouts; it being a book and writing belonging to the said fourth school district. It thus charges: (1) The fraudulent intent. (2) The alteration and falsification. (3) Of a writing which it describes by name. The former two are averred with sufficient precision to sustain an indictment at common law. The third is insufficient. It is true, inasmuch as the fraudulent alteration of a material part affects the whole instrument, the forgery may be specially alleged as constituted by the alterations, or the forgery of the whole instrument may be charged. (*Idem*, § 1480.) Hence an indictment for forging an order for nineteen dollars is supported by evidence that the order was originally made for nine dollars and genuine, and that it had been altered to nineteen dollars. (*Idem*, § 1484. State *v.* Flye, 26 Maine, 312.) Thus, at common law, the indictment need not designate the specific words or facts of the writing altered, but under the averment that the whole is forged, the alteration of the particular part may be proved. Here, however, neither copy nor purport of the whole, nor of the part altered, is set forth or described. It, therefore, fails to answer the requirements of the common law.

The remaining question is, whether it is good under our Criminal Procedure Act of 31st March, 1860. This wrought a great change in criminal pleadings. Section thirteen (Purd. Dig. 379, pl. 18) declares: "In any indictment for forgery, uttering, stealing, embezzling, destroying, or concealing, or obtaining by false pretences, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac simile* thereof, or otherwise describing the same or the value thereof."

If this written instrument is described by the name or designation by which it is usually known, it fills the requirements of the statute.

It is described in the indictment as "a book and writing commonly known as the duplicate of the taxes levied for the use of the school district."

We think the word "duplicate," when used in connection with the collection of taxes, has a well-known and recognized meaning. It is known to all men.

Section 13 of the Act of 8th May, 1854 (P. L. 619), relating to common schools, declares the president shall "issue the duplicate and warrant for the collection of the district taxes." Section 14 declares the secretary "shall prepare the du-

Digitized by Google

plicate of school tax." Section 31 says all the tax levied and assessed "within each school year shall be contained in the same duplicate," and that "the board shall appoint some suitable and competent person as collector of the school tax duplicate for each township, borough, or ward." Section 2 of the Act of 21st April, 1869 (P. L. 87), directs the board "to place in the hands of the treasurer a certified duplicate of the school tax for collection." If the taxes are not paid to him within a specified time, section 3 requires the board to elect a collector, and "have the duplicate placed in his hands" for the collection of the unpaid taxes.

Thus the statute unites with popular language in giving, to the book in question, the name of "duplicate." Hence it follows that the indictment substantially gives the name or designation by which it is usually known.

It therefore follows the learned Judge erred in quashing the indictment.

Judgment reversed. Motion to quash dismissed, and a *procedendo* awarded.

Opinion by MERCUR, J. WILLIAMS, J., absent.

Jan. '76. **Forrester v. Hanaway.** May 31.

Ejectment — Fraudulent conveyance — Confession of judgment in ejectment—Preference in fraud of creditors — Tender of purchase money by plaintiffs in ejectment as holders of an equitable title, when not a prerequisite.

A., being embarrassed, and his equitable interest under a contract of sale of real estate being levied on by creditors, confessed a judgment in ejectment to his vendor under the contract, who had notice of the levy. The latter, having obtained possession, conveyed to a stranger, for a nominal consideration. In ejectment by the purchaser at sheriff's sale under the levy against the vendor's assignee:

Held (reversing the judgment of the Court below), that the confession of judgment, under such circumstances, was in fraud of creditors, and that the plaintiff was entitled to recover, without having made a prior tender of the unpaid balance of purchase money.

Damon v. Bache (7 Sm. 67), distinguished.

Error to Common Pleas of Luzerne County.

Ejectment by E. A. Forrester against Francis Hanaway, for two lots of ground in the city of Scranton.

In 1869, William Merrifield, being the owner of the two lots of ground in question, contracted by two separate agreements to sell the same to Patrick McNamara, the purchase money to be paid partly in cash, and the balance in instalments, within five years. The stipulated cash payment was made on one of the contracts, but not on the other. McNamara entered into possession of both lots, and erected buildings thereon to the value of about $3000, in one of which he carried on business as a merchant. In 1871, he became embarrassed, and several judgments were obtained against him, under which his equitable interest in the premises, under the contracts of sale, was levied on, and advertised to be sold at marshal's sale, on December 16, 1871. At this time there was a balance of purchase money of about $690 due, and to become due, to Merrifield, and the latter, knowing of the intended sale, procured McNamara to execute, under seal, an agreement for an amicable action and confession of judgment in ejectment, which was filed, and judgment signed on Dec. 15, 1871, the day previous to the date advertised for the marshal's sale. On the same day, Merrifield issued a writ of *hab. fac. poss.*, which was executed the next day by the sheriff, and possession delivered to Merriman, who immediately notified the marshal thereof. The marshal's sale was thereupon "stayed by the plaintiff." On the same day, Dec. 16, Merrifield executed a deed for the premises to the defendant, Hanaway, for the recited consideration of $699, acknowledged Dec. 18, and recorded Dec. 20, 1871. The execution plaintiff subsequently issued an *alias vend. ex.*, under which the said premises were, on Feb. 10, 1872, sold to Forrester, the plaintiff in this action, for $625.

Under the Act of April 6, 1869, and its supplements (Purd. Dig. 79), the case was referred to a referee, who reported, *inter alia*, that the deed of Dec. 16, 1871, from Merrifield to Hanaway was made without consideration, and that "Hanaway holds the title as a naked trustee, for a nameless *cestui que trust.*" He further reported, that there being a portion of the unpaid balance of the purchase money due to Merrifield, the confession of judgment in ejectment by McNamara, on Dec. 15, 1871, was not fraudulent as against his other creditors, and that under said judgment in ejectment, and the execution thereon, the whole title, legal and equitable, became vested in Merrifield, and the referee, therefore, found for the defendant.

The plaintiff requested the referee to affirm the following propositions: (1) The confession of judgment in ejectment was made for the purpose of defrauding the judgment creditors of McNamara. *Answer.* The referee refuses to find as a matter of fact that the judgment in the ejectment confessed by McNamara to Merrifield was done to defraud the judgment creditors of McNamara. He has found all the facts in his general finding, and is of the opinion that the law, when applied to those facts, does not constitute fraud on the part of Merrifield that would avoid his judgment in ejectment. (2) The judgment so confessed was void as against the creditors intended to be defrauded. *Answer.* The answer to this point is contained in that to the first point. (3) The

Digitized by Google

plaintiff is entitled to the same possession that McNamara had before he confessed judgment, without tender of purchase money. *Answer.* The plaintiff cannot maintain ejectment upon an equitable title without first paying or tendering the purchase money due to the owner of the legal title, except where the owner of the legal title has unlawfully and fraudulently obtained the possession of the plaintiff. In this case, Merrifield had the right to bring his ejectment for condition broken in contract, and upon obtaining judgment in ejectment, had the right of possession, which he obtained under his *habere facias.* And under the finding of the referee in the whole case the question of tender could not arise, as the referee finds the defendant entitled to recover without regard to a tender.

Exceptions filed by the plaintiff to the report of the referee were overruled by the Court (*per* HARDING, P. J), the report confirmed, and judgment entered for the defendant. The plaintiff took this writ, and assigned for error the action of the Court in overruling his exceptions, and entering judgment for the defendant.

S. B. Price (with whom was *C. E. Royce*), for plaintiff in error.

The referee erred in supposing this case to be identical in principle with Damon *v.* Bache (5 S.n. 67). They differ as to the confession of judgment, which, in that case, was conditional, in this, absolute. There was no lack of vigilance on the part of the creditors in this case, and they had shown unmistakably that they looked to McNamara's equity for payment, and had so informed Merrifield. And further, it is here proven that the debtor's equity was of great value, while in that case it was not. Fraud, in such case, need not be proved positively, but may be inferred from facts calculated to establish it.

Kaine *v.* Weigley, 10 Harris, 179.
Rogers *v.* Hall, 4 Watts, 350.

The principle on which a creditor has a right to accept a preference by judgment confessed, is, that in the race between creditors of the same class, some one must be preferred. But Merrifield, holding the legal title under articles, could not be damnified by the vigilant creditors of McNamara.

Covanhovan *v.* Hart, 9 Harris, 501.

It was not necessary for the plaintiff to tender purchase money before bringing suit, because the transfer of the possession of McNamara to Merrifield was a fraud upon McNamara's creditors.

Bassler *v.* Niesly, 2 S. & R. 352.
D'Arras *v.* Keyser, 2 Casey, 249.
Harris *v.* Bell, 10 S. & R. 39.

After execution and levy on real property in his possession, a debtor cannot transfer the possession, even to the real owner, with a view to defraud his creditors.

Stahle *v.* Spohn, 8 S. & R. 317.
Stauffer *v.* Commish, 1 W. 300.

E. Merrifield (with whom was *Palmer*), contra.

The referee found that there was no *fraud* in *fact*, and that is equivalent to a special verdict.

[AGNEW, C. J. We have decided that the finding of facts by an auditor or referee will not be inquired into by this Court; but, we may inquire into the inferences to be drawn from those facts, *i. e.*, whether upon the facts such and such a state of affairs may be inferred.]

A lien upon an equitable estate is very different from a lien upon a vested legal estate. The former is nothing more than inchoate right, liable to be defeated by the action of the vendor and vendee. Where liens are entered against an equitable estate, their value depends upon that estate, and they survive or perish with it.

Campbell and Pharos' Appeal, 12 Casey, 247.

It is well settled that a judgment cannot be impeached collaterally except for fraud, and it has never been deemed fraud in Pennsylvania for a debtor honestly to prefer one creditor to another by giving a judgment.

Davis *v.* Charles, 8 Barr, 82.
Lowry *v.* Coulter, 9 Barr, 349.
Forsyth *v.* Matthews, 2 Harris, 100.
Bentz *v.* Rockey, 19 Sm. 71.

As to tender the case of D'Arras *v.* Keyser, relied on by the plaintiff in error, *supra*, simply held that the bringing money into Court was unnecessary to sustain the action, the plaintiff having previously made a tender. If the plaintiff could recover in the present action without a tender of the purchase money, it would place the defendant in a position where it would be questionable whether he could get anything. Where the plaintiff relies upon an equitable title, tender of money must precede the action.

Chahoon *v.* Hollenback, 16 S. & R. 425.

Oct. 9. THE COURT. This was an action of ejectment. It was referred under the Act of 6th of April, 1869, P. L. 725, and its several supplements. The main facts found by the referee are substantially these: Merrifield sold the lands in question by two written contracts, to McNamara. The first contract was executed in May, 1869, in consideration of $350, to be paid for the land therein described; $44 thereof to be paid down, and the residue in five equal annual payments, with interest. The other contract was for a lot adjoining the former, and was executed in June, 1869. It stipulated for the payment of $300, of which $50 was to be paid down, and the residue in five equal annual payments, with interest. The $50 down payment was made on the last contract, but no other payment had been made on either contract.

McNamara entered into possession of both lots, erected buildings, and made improvements thereon to the value of from $2000 to $3000 He continued in possession until 16th of December, 1871. At this time the amount unpaid on

Digitized by Google

both contracts was about $693. In January, 1871, the creditors of McNamara began to enter judgments against him. They became liens on his eqitable interest in the lands. Before the first of October following, these liens exceeded $3000. In May, 1871, a *fi. fa.* was issued on one of these judgment liens, and the land was levied on. An inquest was held and the land condemned. In November, 1871, a *vend. exp.* was issued, and the land duly advertised to be sold on the 16th of December following. All these facts were known to Merrifield. Yet, with a full knowledge thereof, on the 15th of December, being one day preceeding the intended sheriff's sale, he and McNamara entered into a written agreement, by which an action of ejectment for the lands was commenced, judgment confessed in favor of Merrifield, with leave to issue a writ of *habere facias*, and the writ was issued on the same day.

On the next day, the writ was executed by giving possession to Merrifield. By deed dated the same day, and acknowledged two days thereafter, Merrifield, for the consideration of $699, therein recited, conveyed the lands to the defendant in error.

When the lands were exposed at sheriff's sale, on the 16th of December, notice was given by Merrifield of his recovery in ejectment, and that possession had been given to him in pursuance thereof. Thereupon the writ of *vend. exp.* was stayed by the plaintiff in the execution. An *alias vend. exp.* was subsequently issued, on which the land was duly sold on the 10th of February, 1872, to the plaintiff in error. A deed therefor was duly executed, acknowledged, and delivered to him.

The purchase by the defendant from Merrifield was not on good and valuable consideration. The defendant did not know either Merrifield, McNamara, nor the land. He never paid anything for the land, and knew nothing about it. C. Smith, Esq., paid the money to Merrifield. Smith called on the defendant, and requested "the use of his name to hold in trust for some one." The name of that "some one" does not appear to have been proved. The referee, therefore, found that the defendant "holds the title as a *naked trustee* for a *nameless cestui que trust.*"

The plaintiff requested the referee to find that the judgment confessed in ejectment was entered into by the parties thereto for the purpose of defrauding the judgment creditors of McNamara. Also, that the judgment confessed was void as to the creditors intended to be defrauded. The referee refused to find as requested; but says he "has found all the facts in his general finding, and is of the opinion that the law, when applied to those facts does not constitute fraud on the part of Merrifield that would avoid his judgment in ejectment." He therefore found for the defendant. The court confirmed the finding and entered judgment.

The correctness of the referee's conclusion of law is the important question in the case. The controversy is between the purchaser at sheriff's sale of McNamara's equitable estate and one who acquired a conveyance from Merrifield in the manner stated. The defendant stands on no higher ground than Merrifield occupied. Did the latter, then, recover the land in such a manner as to successfully remove all McNamara's equitable estate out of the reach of his lien creditors? It is true, where liens are entered against an equitable estate, their value depends on that estate, and they survive or perish with it. (Campbell's Appeal, 12 Cas. 247.) Such a lien creditor runs the risk of the estate of his debtor being recovered by the holder of the legal title, by means of a fair and usual proceeding at law. He has a right, however, to claim protection against a fraudulent combination to divest the lien of his judgment. (Stahle *v.* Spohn, 8 S. & R. 316.) The facts found by the referee show McNamara had an estate worth some $2000, beyond the unpaid purchase-money. Some of that money was not yet due. A part of it was payable about two and a half years thereafter. He was entitled to a conditional verdict to secure him in that further time. We may assume the judgment creditor had knowledge, either actual or constructive, of the written contracts. He then knew that some of the instalments were past due, but he also knew others were payable at future times. He was on the eve of selling the equitable estate, so that the purchaser thereof might with safety pay the purchase-money due on the legal title. If an action of ejectment then commenced had been suffered to take its regular course, ending in a conditional verdict, or if the confession of judgment had stipulated for a payment at some future time, as in Damon *v.* Bache (5 P. F. Smith, 67), the rights of the lien creditor and the purchaser under the same, as well as the rights of Merrifield, could have been duly protected and enforced. The agreement between the owners of the legal and the equitable title, by which the latter was given up, is designated by the referee as "very sharp practice indeed." It was in fact, not only a change of the contract, so as to make instalments payable in the future due at once, but also to yield up for no consideration an estate of large value; an estate then in the grasp of McNamara's creditors, and the proceeds of which they were entitled to receive.

This case must not be confounded with that class of cases in which it has been held that one creditor may be preferred by a confession of judgment, although it be done with the design and effect of removing the property from the reach of

Digitized by Google

another creditor equally meritorious. In those cases, the injury to one is an incident necessarily flowing from the legal protection of the other, who could not otherwise be protected. It is where the estate is insufficient to protect both creditors. In this case Merrifield needed no additional protection. He was already fully secured. A sale of the equitable estate in nowise affected his legal title (Canon *v.* Campbell, 10 Casey, 309); nor his remedy to enforce payment by ejectment. During the impending sheriff's sale, and with unusual haste the agreement as to the times of payment was changed. The judgment was confessed. The whole estate of McNamara was relinquished. The writ of possession was issued and executed. Immediately thereafter, the land was professedly sold for about the amount due for the legal title, being one-fourth its just value, and a conveyance thereof made to a trustee for some unknown person. Who was to permanently enjoy the benefits of the value of the estate thus wrested from McNamara's creditors, the evidence fails to disclose. If Merrifield received no more than the consideration recited in his deed to the defendant in error, they were not enjoyed by him, but by some "unknown person." All the facts proved naturally lead the mind to the conclusion that the primary object of the arrangement was to remove the estate of McNamara out of the reach of his lien creditors. If the conclusiveness claimed for that judgment by the defendant in error be given to it, such will be its undoubted effect. As every sane person is presumed to intend the natural and probable consequence of his own deliberate act, it follows that the facts found prove such to have been the intent. They prove a constructive fraud on the lien creditors of McNamara. In its effect this is tantamount to actual fraud, and the policy of the law makes the act illegal. (McKibbin *v.* Martin, 14 P. F. Smith, 352) Legal fraud, where the facts are ascertained, is for the Court. (Dedrick *v.* Keichenback, 10 S. & R. 90.)

Possession then having been obtained by the holder of the legal title under circumstances which we must declare a fraud on the lien creditors of McNamara, it follows that the purchaser at sheriff's sale is entitled to recover that possession from the defendant in error, without making a tender prior to bringing ejectment. (Harris *v.* Bell, 10 S. & R. 39; Gregg *v.* Patterson, 9 W. & S. 208; Heft *v.* McGill, 3 Barr, 256; Ives *v.* Traes, 5 Id. 121; D'Arras *v.* Keyser, 3 Casey, 240.)

We think, therefore, the able referee and learned judge erred in their conclusions of law, and the assignments are sustained.

Judgment reversed and a *procedendo* awarded.

Opinion by MERCUR, J. WILLIAMS, J., absent.

May, '76, 81. **Malone v. Dougherty.** May 26.

Contract, consideration for, upon release to third parties—Promissory note—Novation.

In consideration of the note in suit, plaintiffs assigned all their interest in a railroad construction contract to the defendant; subsequently the plaintiffs agreed in writing to withdraw the note, provided, that defendant could show that "he did not make any money out of the July estimate made by the company:"

***Held*, that the question whether the defendant had made any money out of the July estimate was properly submitted to the jury.**

Error to the Common Pleas of Dauphin County.

Assumpsit by Dougherty and Seiler on a promissory note made by Malone and Michael J. Barry, to the order of the plaintiffs. Service of process was had on Malone only, who pleaded payment, with leave, etc. (The case is reported, upon a former writ of error, 2 WEEKLY NOTES, 160.)

Dougherty, Seiler, Malone and Michael Barry were partners in a contract for the construction of the Western Maryland Railroad. For the purpose of dissolving the partnership, the plaintiffs offered either to buy the interest of the others in the contract for the sum of $10,000 or to sell their own interest to them for the same price; the latter agreed to buy, and on July 30th, 1867, Dougherty and Seiler, with the consent of Michael Barry, assigned their interest to Malone and Michael J. Barry, part of the consideration being the note in suit, for $5000, payable in forty days. At the same time, by agreement between the parties, the assignees assumed all the debts and liabilities of the copartnership. A few weeks after the note was given, the Railroad Company suspended payment on all work that was being done under the construction contract.

On the 3d of October, 1867, Malone and Barry, having already relinquished, or being about to relinquish to the Railroad Company, their interest in the said contract, received from the plaintiffs the following paper:—

"It is agreed that if Richard Malone can show that he did not make any money out of the July estimate paid by the Western Maryland Railroad, then Daniel Dougherty and myself agree to withdraw note of Malone and Barry for $5000 given us by said parties.

D. W. SEILER,
DANIEL DOUGHERTY,
per SEILER."

Malone testified, under objection by plaintiffs, that he had lost money on the July estimate, and produced a witness to show that one of the plaintiffs had knowledge of the impending suspension of payment. In rebuttal the plaintiffs exhibited the estimates for the month of July to show that Malone had made money that month (part of his estimate being paid after July and prior to October 3d); and called the officers of the railroad

Digitized by Google

company, who testified that Dougherty and Seiler could not have known, at the time the note was given, of any impending suspension of payment, as none was then intended, and that the company paid all of its debts up to April 2, 1868, with a large surplus left in bonds and cash.

The defendant submitted, *inter alia*, the following points: (1) Where a new agreement has been entered into between the parties, based upon a consideration, which is in satisfaction of and a substitute for the original obligation, such new agreement takes the place of the former one, and is in satisfaction thereof; and, even though some of the stipulations of the new agreement may not have been performed by the party claiming the benefit thereof, the remedy of the other party is by action thereon, and not upon the old agreement. *Answer:* "To that we say this point is negatived *in toto* as to the agreement of the 3d of October, and I do not conceive that there is one word of sound law in this point. If a party has nothing to look to but his note, the other party does not agree to do anything; therefore he has a right to look to his note, and he relied upon this writing. The writing is without consideration, is a nullity in itself, unless a different consideration is proved from the one in writing." (2) Assurances made by a party, which have been acted upon by others, are conclusive against the party making them, and will bar any attempt to establish a claim upon their alleged falsity. *Answer:* "There is nothing in the writing of the 3d of October which discharges the note. It stands in full force unless the defendants can show they made no money on the July estimate. The burden of proof rests upon them. They have to show that they made no money on the July estimate . . . Mr. Malone testified that they made no money on the July estimate. The estimates themselves are better evidence than his oath that they made none. If he would produce his account and show what he paid out, that would have due and proper weight with the jury; but the bare fact of a man coming into court, and swearing that he made no money at a particular time—if he had it in his power to show definitely what these expenses were, and what these receipts were—then we say that he should establish it to the satisfaction of a jury; but the bare oath of a party ought to have but little weight with a jury." (5) The paper of the 3d of October, 1867, uses the words "did not make any money," and "paid by the Western Maryland Railroad Company." These phrases are in the past tense, and cannot refer to and include acts subsequent to the time when said paper was signed . . . *Answer:* "We say that the words of the writing and the whole words of the contract evidently refer to the making of money on the July estimate . . . and it does not matter whether that money was paid in a month, of three months or two years . . . The only question is, did they make money? If he can show he (Malone) made no money, then it comes within the words of this contract."

Verdict for the plaintiffs for $7578.33 and judgment thereon. Defendant took this writ, assigning the above answers for error.

Hall and *Jordan*, for plaintiff in error. The obligations (note and agreement) of July 31, 1867, were destroyed by the substitution of the writing of October 3d, 1867, on the doctrine of *novation*, and the remedy must be by action on the latter.

Sibree *v.* Tripp, 15 M. & W. 23.
Babcock et al. *v.* Hawkins, 23 Vt. 561.
Merry *v.* Allen, 39 Iowa, 235.

The writing of October 3d, 1867, should have been construed by the Court. It referred to money *paid*, not *to be paid*, and should have been withdrawn from the jury.

Miller *v.* Fichthorn, 7 Casey, 252.
Broom's Leg Max. 571-575.
Heath *v.* Page, 12 Wright, 130.

J. W. Simonton, contra. The only question in the case was, under the agreement of October 3d, 1867, whether Malone made money on the July estimate, and this was fairly submitted to the jury.

June 5. THE COURT. This case turned upon the writing of the 3d of October, 1867, and the fact on which it was conditioned. The paper is not denied, and its conditional character is proved beyond a doubt. The fact whether Malone had made money out of the July estimate paid by the railroad company was submitted to the jury and found against the defendant. The note in suit was then not affected by the writing, and the plaintiffs were entitled to recover. Many things were thrown into the trial which were of no practical importance unless the jury had found that no money was made on the July estimate. The consideration of the note was sufficient independently, for it was the transfer of the interest of the plaintiffs in the contract of construction. All that related to the release of that contract, was introduced to support the writing of 3d October, 1867, But when that was done it availed nothing without proving its condition.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

[See same case, reported upon a former writ of error, 2 WEEKLY NOTES, 160.]

Digitized by Google

Common Pleas—Equity.

C. P. No. 4. Oct. 28.

Moodie et al. v. Seventh National Bank and Morris, Assignee, etc.

Bank stock certificates — Power of attorney to transfer — Transferability — Negligence — Bona fide purchaser — Antecedent indebtedness.

A., being owner of bank stock, suffered the certificate, with a blank assignment attached, to remain in the hands of B., his business servant, who fraudulently sold the same to C., who paid a portion of the purchase money in cash, and a portion by cancelling a prior indebtedness of B. to him. A. having notified the bank not to transfer the stock to C., the latter filed a bill to compel its transfer:

Held, that A.'s conduct was such negligence as to estop him from reclaiming the stock from a *bona fide* purchaser for value, and that C. was such a holder to the extent of the cash paid by him to C.; *aliter* as to the indebtedness cancelled.

Sur exceptions to Master's report.

The bill set forth that on June 7, 1875, the plaintiffs, Moodie *et al.*, purchased from one Alexander Erwin seventy-five shares of stock of the Seventh National Bank, for which they paid $6450.83, and received the certificate therefor; that the certificate, then standing in the name of the Provident Life and Trust Company, with power of attorney to transfer attached, duly executed by the Company, was delivered to plaintiffs, and had been in their possession ever since; that on application the Bank refused to transfer the stock to the plaintiffs, alleging that one Charles E. Morris, assignee for benefit of creditors of Henry G. Morris, had given them notice not to transfer, as he claimed title to said certificate; that no notice was had by plaintiffs of any adverse claim until Sept. 29, 1875, when their application was refused by the Bank. The plaintiffs averred that the stock was purchased by them in good faith for valuable consideration, without knowledge, notice, or suspicion of any fraud or adverse claim. The bill prayed that the bank be compelled to make the transfer to plaintiff.

The answer of Charles E. Morris, assignee, set forth that on April 29, 1875, Henry G. Morris executed to him a general assignment for the benefit of creditors; that on January 23, 1874, his assignor H. G. Morris purchased two hundred and seven shares of the Seventh National Bank stock from one David B. Ervin, who delivered the same to Alexander Ervin; that about the same date, the latter, acting as Morris's agent, pledged the same to the Provident Life and Trust Company, as collateral security for a loan made to Morris; that thereupon the Company caused the stock to be transferred to its own name, and received from the Bank certificates for the same in its own name—the certificate in question being one of them—and continued to hold them until March 24, 1874, when Morris repaid the Company the debt for which the stock was pledged, when it executed blank assignments, and delivered the assignments and certificates to said Alexander Ervin, agent for Morris, as above; that said Ervin, in fraud of Morris's right, used the certificate in question, among others, for his own personal debts; and that, on April 29, 1875, he ceased to be in Morris's employ. The answer averred that plaintiffs did not *purchase* the said stock, as alleged, but received the same from Ervin as a pledge for antecedent debts, and that the pledge of the stock with them was made under circumstances which ought to have placed an ordinary, prudent business man on inquiry.

The answer of the Bank was in submission to any decree the Court should make.

The case was referred to D. W. Sellers, Esq, as Master, who found the facts, as follows: "(1) That Henry G. Morris was the absolute owner of the certificate sued for, on the date that plaintiffs acquired title, and that the delivery of the same to the plaintiffs, in pursuance of a sale by Alexander Ervin, was without any authority or knowledge of its owner. (2) That the plaintiffs paid for said certificate on June 7, 1875, $6450.83, of which $3700 was paid in cash; $2500 by the surrender of an overdue check of Alexander Ervin for that amount; and the balance by receipting a coal bill due by said Ervin. This payment was made by virtue of a sale by Alexander Ervin to the plaintiffs, who had then delivered to them the certificate, with the power to transfer indorsed thereon. This has since remained in the possession of the plaintiffs, and was produced by them before the Master." He, likewise, found that the plaintiffs were purchasers without notice, and that their title was paramount.

The Master further reported: "On the foregoing findings, the question is sharply presented, whether the purchasers of a chose in action, transferable by power of attorney, can assert their title paramount to the true owner. Certificates of stock are assignable, but not negotiable. But if the owner leaves a power of unlimited and irrevocable disposition with the certificate, his title is divested if the same is delivered to a purchaser without notice. As the title to the plaintiffs passed at the time of delivery, and as no duty is imposed on purchasers where there is nothing on the certificate or power to suggest doubt, there is nothing in law to gainsay the title of the plaintiffs. In this case the law applies somewhat harshly to the owner, Mr. Morris, inasmuch as he by no affirmative act did anything. . . . . It

Digitized by Google

is the ordinary case of a principal suffering by unfaithfulness.

"Inasmuch as the plaintiffs cancelled their indebtedness against Ervin, the holding of the stock by them is on a title which secures to them the whole of the value given for it, but if the stock is worth more than that, the surplus is the property of the owner, Mr. Morris."

The decree reported was: "That unless within fifteen days, Charles E. Morris, assignee, etc., do pay to the plaintiffs the sum of $6450.83, with interest thereon from June 7, 1875, the Seventh National Bank be decreed to transfer, etc. . . . . but if the said assignee shall pay the sum herein decreed to be paid, the said plaintiff shall deliver said certificate," etc.

To these findings, the defendants filed exceptions.

Lewis Waln Smith, for the exceptions.

As the Master found that on June 7, 1875, the certificate was the absolute property of Henry G. Morris, and Ervin's title was a mere naked possession, Ervin's vendee must prove his vendor's title.

Robinson *v.* Hodgson, 23 Sm. 209.

Failing in this, Ervin's title must be taken to be unlawful, and if unlawful, must be either felonious or fraudulent. If felonious, mere possession after robbery is no evidence of title. The general rule is that vendor can sell no more interest than he possesses.

Robinson *v.* Hodgson, *supra*.
Story on Sales, 188 and note.
Williams *v.* Merle, 11 Wend. 80.
Story on Bailments, 52.
2 Kent's Cons. 767.
King *v.* Richards, 6 Whar. 418.

The only exceptions to this are in case of bank notes, promissory notes, or drafts, and coupon bonds, and even here valuable consideration must be proven.

Miller *v.* Race, 1 Burrows, 452.
Grant *v.* Baugh, 3 Id. 1516.
Murray *v.* Larderer, 2 Wallace, 118.

But certificates of stock, not being negotiable, are not within these exceptions; consequently a *bona fide* purchaser for value is not protected against the existing equities of a present owner.

Crouch *v.* The Credit Foncier, 8 Law Rep, Q. R. 374.
Shaw *v.* Spencer, 100 Mass. 382.
Mechanics' Bank *v.* New York and New Haven Railroad, 13 N. Y. 599.
Matthews *v* Mass. Bk., Am. Law. Reg. 1875, p. 162, note.

If fraudulent, the holder must show that he holds *bona fide* and for valuable consideration.

Beltzhoover *v.* Blackstock, 3 Watts, 26.
Knight *v.* Pugh, 4 W. & S. 445.
Brown *v.* Street, 6 Id. 221.
Gray *v.* Bank of Kentucky, 5 Casey, 365.

In such case a *bona fide* purchaser for valuable consideration is he who gives value, but not he who receives stock in payment or security for a pre-existing debt.

Root *v.* French, 13 Wend. 570.

Therefore, if this property were stolen, the purchaser takes no title whatever, and Morris is entitled to the stock; or, if the holder secured title from a fraudulent vendor, he is only protected to the extent of his valuable consideration, given at the time.

S. G. Thompson, contra.

A purchase from an agent who has the certificate of stock, gives title to the purchaser, although the agent sells in fraud of his principal.

Laussatt *v.* Lippincott, 6 S. & R. 393.
Clement *v.* Sey, 12 N. H. 318.
Keyser *v.* Harbeck, 3 Duer, 389.
Rowley *v.* Bigelow, 12 Pick. 307.
Pickering *v.* Busk, 15 East, 45.
Davis *v.* Bradley, 24 Vt. 61.

The delivery of the certificate of stock with power duly executed passes the title to the *bona fide* purchaser, without notice.

Vaughan *v.* U. S., 3 Bin. 394.
Mt. Holly Turnpike Co. *v.* Ferree, 2 C. E. Green (N. J.), 117.
McNeill *v.* Bank, 46 N. Y. 325.
Rice *v.* Rice, 2 Drewry, 73.
Finney's Appeal, 9 Sm. 398.

Purchasers cannot be affected by any latent equities between vendor and third parties.

Crawford *v.* Dox, 5 Hun. 511.
Steamboat Co. *v.* Van Pelt, 2 Black, 373.

Stocks are dealt with in the same way as commercial paper, and the delivery of the certificate with power establishes the presumption that it was passed in the usual course of business.

Holbrook *v.* Zinc Co., 37 N. Y. 616.

Wm. A. Porter, in reply.

C. A V.

Nov. 4. THE COURT. The contention here is relative to the ownership of certificate No. 476, for seventy-five shares of the capital stock of the Seventh National Bank of Philadelphia. The Master finds in fact that the assignee of Henry G. Morris owned the certificate absolutely on the day the plaintiff acquired title to it. That Alexander Erwin sold the same to the plaintiff without the knowledge of said assignee for $6450.83, receiving from the plaintiffs therefor in cash June 7, 1875, $3700, the surrender of an overdue check of said Alexander Ervin for $2500, and the balance by receipting to said Ervin a coal bill theretofore contracted. That the plaintiffs were purchasers without notice, and the certificate was delivered in virtue of a power to transfer indorsed thereon. The Master sustains the plaintiffs' title to the certificate. Both parties admit the facts ascertained by the Master. The defendants except to his deductions from them, supporting plaintiffs' title.

While this certificate bears no stamp of negotiability, it certainly has one of *transferability*.

Digitized by Google

The warrant endorsed on the certificate was put there for no other purpose than to authorize the transfer. How then can the defendants object to the title of the transferee, who holds *bona fide* and for a valuable consideration? Such title is protected by estoppel, not that defendants had not title to the certificate, but they were estopped by their negligence from asserting title. (Turnpike Co. *v.* Ferree, 2 C. E. Greene, 117; McNeill *v.* The Bank, 46 N. Y. 325; Garrard *v.* Haddam, 17 Sm. 82; Sewall *v.* Boston Co., 4 Allen, 277; Shaw *v.* Spencer, 100 Mass. 382.) In other words, their endorsement of the certificate with a warrant to transfer was an act in which inhered the risk of loss in case the certificate found its way to the hands of a *bona fide* purchaser.

This view brings the parties face to face in the equitable maxim: "When one of two innocent parties shall lose by the act of a third, he shall bear the loss who has armed the wrong-doer with power to do the injury." Without the warrant to transfer Ervin could have shown no title. The defendants, or those through whom they claim, by giving the warrant enabled him to do so; and thus they have estopped themselves, impeaching the plaintiffs' title so far as the latter are purchasers for value; that is, to the extent of the $3700 paid by them at the time of the purchase.

In no aspect can they be regarded as purchasers for value as to the check of $2500, surrendered to Ervin, and the coal bill receipted to him. The consideration for those did not pass to Ervin in this transaction and can form no part of the purchase money for the certificate. The plaintiffs merely agreed with Ervin to extinguish the claims for the coal and upon his check. But what consideration was there to support such agreement? Surely nothing but Ervin's fraudulent assertion of title to the certificate. The plaintiffs will scarcely contend for the enforcement of an agreement the consideration of which is confessedly founded in fraud.

This fraud vitiates the agreement, and puts the plaintiffs with Ervin in the same relation which they stood to him before this transaction, with their claims still alive and ripe for recovery against him.

Nor can it be answered that at this time Ervin's circumstances may be so changed that defendants may not now be able to make their money out of him.

Be such even so. The law merely gives a right of recovery, not security that the debtor is able to pay. And if Ervin is not now able to pay, it is the plaintiffs' misfortune that they voluntarily permitted him to become their debtor; and their lot is no worse than the multiplicity of creditors who find themselves in the same dilemma with reference to their insolvent debtors. To assert judicially a different doctrine, would not only give the plaintiffs a right of recovery against Ervin but also the power to compel the defendants to pay his debts. Such a proposition cannot be entertained for an instant.

We, therefore, reverse so much of the Master's finding as holds that the plaintiffs are purchasers for value so far as regards said check and coal bill as part of the purchase money or consideration for said certificate.

Decree accordingly.

Opinion by Briggs, J.

Common Pleas—Law.

C. P. No. 2. **Nisbet v. McShain.** Sept. 30.

Affidavit of defence—Misrepresentation by lessor—Insufficiency.

Rule for judgment for want of a sufficient affidavit of defence.

The copy filed was of an agreement under seal, by which the plaintiff, on behalf of the Grand Commandery of Knights Templar, granted a license to defendants to furnish "edibles and bibibles of any and all descriptions, in the Academy of Music, on the afternoon and evening of June 1st." The consideration was $350.

The affidavit set forth (1) that the copy filed was not such a one as would entitle plaintiff to judgment under the Act of March 28, 1835. (2) That the Academy was closed during a portion of the afternoon, and that free lunches were served in the neighborhood, and that plaintiff concealed these facts from defendants.

Henry C. Olmsted, for the rule, was not called on to argue the first point. As to the second, he contended that it was not within the terms of the agreement that the Academy should be open during the entire afternoon. That the facts which plaintiff is charged with having concealed were not such as came specially within plaintiff's knowledge, nor such as he was bound to reveal, nor were they material to the contract.

John A. Clark, contra.

Rule absolute.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] THURSDAY, NOV. 23, 1876. [No. 8.

Supreme Court.

May '76, 1. May 16.

Huntingdon and Broad Top Mountain R. R. & C. Company v. Decker.

Railroad company—Master and servant—When master liable to one servant for negligence of his fellow-servant—Evidence—Improper admission of—Effect of subsequent withdrawal from jury—Trial—Errors and appeals—Practice.

A master who employs an incompetent servant, knowing his incompetency, is chargeable with the consequence of the servant's negligence, to another servant employed in the same service.

Where testimony which is calculated to prejudice or affect the minds of the jury has been improperly admitted during the trial, its subsequent withdrawal by the Court, after the arguments of counsel, accompanied by an instruction that the jury should dismiss from their minds any impression which had been made by the particular testimony withdrawn, does not cure the fault of its admission; and in such case a *venire de novo* will be awarded.

Delaware and Hudson Canal Co. *v.* Barnes, 7 Cas. 193, affirmed.

Error to the Common Pleas of Huntingdon County.

Case by Mary Decker against the Huntingdon and Broad Top Mountain Railroad and Coal Co. to recover damages for the death of Adolphus Decker, the plaintiff's husband, who was killed by a collision on the said railroad.

Adolphus Decker was employed as an engineer by the railroad company defendant, and was killed on November 1, 1872, by a collision of his engine with another engine on the same road. At the time of the collision he was running south, hauling what was called "Cumberland Coal Train No. 2," from Huntingdon to Mount Dallas, a distance of forty-five miles. This train left Huntingdon on the morning of November 1, and passed Saxton, a station half-way between Huntingdon and Mount Dallas, on time. Between that point and Mount Dallas, the collision occurred with the local freight train which was running north. This local freight train had a regular schedule by which it would properly pass Cumberland Coal Train No. 2, at Riddlesburg. On this day, however, the local freight was behind time, and in such case it was the duty of its conductor, Jacob Bowser, to keep out of the way of the other trains. Bowser, of course, knew this rule, and, moreover, received before leaving Mount Dallas, the following telegraphic order from J. McKillips, the superintendent of the road:—

"Telegraphic train order No. 2.
"Coal train will be represented. Run accordingly.
"Correct, J. McK. J. McK."

Bowser also was killed by the accident, and this order was found in his pocket after his death. It appeared from a remark made by Bowser that he misread it, and acted as if it had read, "Coal train No. 2 will *not* be represented," etc. Instead, therefore, of remaining at Mount Dallas, or lying over at one of the sidings between that point and Riddlesburg, he pushed on to Riddlesburg, the regular passing place; though he was behind time, and had lost the right of the road. This was the sole cause of the accident.

At the trial the plaintiff offered to prove by J. Chappell, for the purpose of showing negligence on the part of the defendants, in retaining in their employ a man whose habits they knew to be intemperate, that on the day of the accident, a few hours after it occurred, he (Chappell) met Mr. McKillips, the superintendent, who said Bowser had gone against his orders; that witness replied this was not the first time Bowser had done this, and then McKillips said, "Don't you know that I have discharged him three or four times for getting drunk and disobeying orders, but he would promise to obey orders, and I would employ him again." The defendant objected to plaintiff's proving conversations with superintendent McKillips, he being a competent witness, and such proof being only admissible to contradict him if he should deny the matter alleged. Objection overruled and evidence admitted. Exception.

The plaintiff likewise offered to prove by the same witness that McKillips, as superintendent, had the entire control and management of the road, its hands, machinery, trains, etc.; that he employed Bowser, the conductor of the local freight; that Bowser was a reckless conductor, and of intemperate habits; that he had been repeatedly discharged by McKillips for disobedience of orders and drunkenness, and employed again by him, after notice from the engineer of Bowser's train that he would leave the service of the company unless he was put on another engine or Bowser was discharged, and that McKillips promised to see what he could do, and said "wait a little." Objected to as irrelevant, on the ground that previous special acts of incompetence are not matters for the jury as to general character, and further, that there can be no recovery against the company for an injury done to one servant by the carelessness or mistake of another in the same service. Objection overruled and evidence admitted. Exception.

Digitized by Google

The plaintiff offered to prove by John Hughes that the defendants employed as their superintendent John McKillips, a man of known intemperate habits, and committed to him the general management of the road, covering the employment and discharge of all hands, the making of schedules, and the running of all trains; that Bowser's train, on the day of the accident, was not running on schedule, but on orders from McKillips, who was under the influence of liquor on that day, and that for years before the accident the general reputation of McKillips for fitness and competency for the position he held was bad. This evidence was offered to show negligence of the defendants in employing an unfit superintendent; and to show such personal negligence of the superintendent on the day of the accident as contributed to the death of plaintiff's husband. Objected to. The Court admitted the evidence for the purpose alone of showing the incompetency of the superintendent to run trains by special orders on the day of the accident. Exception.

The plaintiff also offered to prove by W. W. Fisher, that on the 19th of April, 1870, and from that time until the 29th July, 1870, he was the engineer of Bowser's train; that Bowser's character as a conductor was that of a reckless, careless man; that he (the witness) complained of him to John McLaughlin, the train-master, three different times; that he afterwards complained of him to Mr. McKillips, the superintendent, and that Mr. McKillips told him that McLaughlin had spoken to him about it; and that he left the road or left that train on account of Bowser's carelessness or recklessness; that Bowser's general reputation as a railroad man was that of one who was unfit for the position of conductor. This to be followed by evidence that he continued to bear that reputation up to the time of the accident at which Decker was killed. Objected to, on the ground that the time during which his character was proposed to be proven, being more than two years before the accident occurred, was too remote to be evidence. Objection overruled, and evidence admitted. Exception.

The Court, Dean, P. J., instructed the jury that, although it is a general rule that when one fellow-workman is injured by the carelessness of another, their employer is not responsible, yet if the carelessness is the result of previous incompetence or a general negligent habit known to the employer, the employer is responsible; and charged, *inter alia:* "As to the evidence relating to McKillips' habits rendering him unfit for his position, gentlemen, we withdraw that evidence entirely from your consideration. It was admitted by us in view of the fact that at an early stage of the case it was urged by plaintiff that the accident might have been caused by clashing or contradictory orders issued by McKillips. From the evidence here in the case on both sides the orders to Bowser were proper and intelligible, and you would be bound to so find from the evidence, because the evidence is undisputed, that from no direct act of McKillips did the accident occur. This being the case his character and habits have nothing whatever to do with the issue, they have no bearing on it, and you will dismiss from your minds any impression made by the testimony in this particular, with reference to McKillips' habits and unfitness. It was received in view of another theory which it was thought might be drawn from the evidence."

Verdict for plaintiff for $5000 and judgment thereon. The defendants took this writ, assigning for error, *inter alia*, the admission of the evidence excepted to. The charge of the Court was excepted to before verdict, but was not specified for error.

S. L. Brown (with him *J. M. Bailey*), for plaintiffs in error.

The doctrine that a master is liable for his servant's carelessness, when the injury is the result of incompetence known to the master, cannot be sustained, and evidence as to Bowser's character and competency was therefore irrelevant and inadmissible.

Ryan *v.* Cumberland Valley R. R., 11 Har. 384.
Weger *v.* Penna. R. R., 5 Sm. 460.
Caldwell *v.* Brown, 3 Id. 456.

The direction of the Court to the jury to disregard the evidence as to McKillips' incompetency did not cure the fault of its admission.

Penna R. R. *v.* Butler, 7 Sm. 335.
Del. & Hud. C. C. *v.* Barnes, 7 Cas. 193.
1 American Railway Cases, 567.

R. M. Speer (with him *E. S. McMurtrie*), contra.

A master is liable to his servants for any injury resulting from want of due care in the employment of fellow servants.

Sher. & Red. on Negligence, § 86.
Angell on Highways, § 400–405.
2 Hill on Torts, 474.
Weger *v.* Penna. R. R., 5 Sm. 460.
1 Redfield on Railways, 520.
Keegan *v.* W. R. R., 4 Selden, 175.
Ardesco Oil Co. *v.* Gilson, 13 Sm. 146.
Johnson *v.* Bruner, 11 Id. 58.

Where evidence improperly admitted has been withdrawn, its admission is not the subject of a writ of error.

Unangst *v.* Kraemer, 8 W. & S. 401.
Miller *v.* Miller, 4 Barr, 319.
Peterson *v.* Speer, 5 Cas. 494.
Boyd *v.* Boyd, 1 Watts, 365.

Oct. 9. The Court. The first assignment of error is to the admission of the declarations of the superintendent of the company made on the day after the accident.

It is a well-established rule that the declarations of an agent, made at the time of the par-

Digitized by Google

ticular transaction, which is the subject of inquiry, and while acting within the scope of his authority, may be given in evidence against his principal, as a part of the *res gestæ*. It is equally as well settled that the declarations of an agent, made after the transaction is "fully completed and ended," are not admissible. (Magill *v.* Kauffman, 4 S. & R. 320; Hough *v.* Doyle, 4 Rawle, 291; Clark *v.* Baker, 2 Whar. 340; Bank of Northern Liberties *v.* Davis, 6 W. & S. 285; Penna. R. R. Co. *v.* Books, 7 P. F. Smith, 339.) The declarations of officers of a corporation rest upon the same principles as apply to other agents. (Idem.)

A question was raised whether the declarations, testified to by John Chappell, were not made on the day of the accident, and immediately thereafter. A reference to his testimony clearly shows them to have been made on the next day. After he had testified to a conversation he had had with the superintendent, on the day or evening of the accident, and before the evidence covered by this assignment was offered, the question was put to him, "Did he say anything about Bowser having disobeyed orders?" To this the witness answered, "He did not say that until the next day." Again after the Court decided the evidence admissible, the first question put to him was, "You stated you had a conversation with McKillips the day after the accident about Bowser?" To this the witness answered, "yes," and proceeded to narrate it. The objection is not to proving the fact of the superintendent's knowledge of Bowser's improper conduct and habits, but to the mode of proof. The evidence ought not to have been received.

We see no error in admitting the evidence covered by the second and fourth assignments. It was clearly competent to prove Bowser's accustomed disobedience of orders and his habitual drunkenness; that these facts were known to the superintendent, who had the entire control and management of the road, including the right to employ and to discharge conductors and hands. Where a railroad company employs a conductor who is unfit for the business, and knows this unfitness, it is chargeable with the consequences of the conductor's negligence even to one employed in the same general service. Knowledge of the superintendent, possessing the general powers stated, is knowledge to the company. (Frazier *v.* Penna. R. R. Co., 2 Wright, 104; Caldwell *et ux. v.* Brown *et al.*, 3 P. F. Smith, 453; O'Donnell *v* Allegheny Valley R. R. Co, 9 idem, 239; Ardesco Oil Co. *v.* Gilson, 13 Idem, 146; Patterson *v.* Pittsburg and Connellsville R. R. Co, 26 Idem, 389.) When a conductor is shown to be habitually intoxicated, it raises a presumption of negligence in case of accident. (Penna. R. R. Co. *v.* Books, *supra.*)

The third assignment relates to the incompetency of the superintendent on the day of the accident. Unless some act of his contributed to the accident, it mattered not what his habits were. Hence no evidence should have been received of his general incompetency, unless it was shown that it contributed to the injury.

In this case it is shown that the order of the superintendent was correct and proper. It is shown that the collision was caused by the carelessness of Bowser in not correctly reading the order, or in not obeying it. There was therefore, error in receiving evidence of his incompetency. It is true when the Court charged the jury it withdrew from their consideration the evidence tending to show him unfit for the position; but did this cure the evil? In Shaeffer *v.* Kreitzer (6 Binn. 430); Nash *v.* Gilkeson (5 S. & R. 352); Ingham *v.* Crary (1 Penna. Rep. 338), it was held that when evidence had been improperly admitted which was calculated to affect the minds of a jury, the error was not cured by the direction of the Judge that it should not be regarded. In Unangst *v.* Kraemer (8 W. & S. 391), and in Miller *v.* Miller (4 Barr, 317), the former cases were somewhat modified. But in the Delaware and Hudson Canal Company *v.* Barnes *et al.* (7 Casey, 193), all the cases were reviewed. The cases are there distinguished, and it is shown that in both of the latter the evidence was withdrawn from the jury immediately after it had been given. The manifest reasoning of the Court was to hold that whenever the testimony removed was of such a character as to inevitably tend to prejudice the minds of the jurors, the error was not cured by the Court telling them, after the argument had closed, not to consider the testimony.

In this case the evidence had undoubtedly produced an impression on the mind of the jury. It was calculated to impair the effect of his testimony in regard to other facts in the case. Although the Court did say to them that his character and habits had nothing to do with the issue, and that they should "dismiss from their minds any impression made by the testimony in this particular," yet, in so far as it affected his general reputation as a witness, it was not withdrawn, nor could its effect be entirely removed.

Under the whole evidence and charge of the Court we discover no substantial error in the remaining assignments.

Judgment reversed and a *venire facias de novo* awarded.

Opinion by MERCUR, J. WILLIAMS, J. absent.

[*Cf.* Patterson *v.* Pittsburg and Connellsville R. R. Co., 1 WEEKLY NOTES, 569.]

Digitized by Google

Jan. '75, 91. Feb. 24

Wistar v. City of Philadelphia, to use, etc.

Municipal claims — City of Philadelphia — Ordinance authorizing recurbing of sidewalks at expense of property owners — Broad Street, improvement of—Acts of April 16, 1838, § 3, *and February* 2, 1854, § 40—*City ordinances.*

An Ordinance of the Councils of Philadelphia, of December 31, 1872, provided for the recurbing of Broad Street, at the expense of the owners of the adjacent property, with cut granite and on a new line. In a *sci. fa.* sur municipal claim, the defendant averred that the work was done for the general improvement of the city, and was illegally charged to individual lot owners:

Held, that this was a case of special taxation, unauthorized by any Act of Assembly.

Powers of municipality relating to improvements of streets and pavements at expense of owners of property fronting thereon, discussed and defined.

Error to the District Court of Philadelphia.

This was a *scire facias*, brought by the City of Philadelphia, to the use of Joseph Johnson, James Holgate, and Lafayette Horter, against Richard Wistar, on a municipal claim for setting 121½ feet of cut granite curbstone in front of a property of the defendant, on the east side of Broad Street, above Race Street.

The defendant filed an affidavit and supplemental affidavit of defence, setting forth (1) that in 1870, in pursuance of a notice from the Highway Department, the sidewalk and curb in front of this property had been repaired in accordance with then existing laws and ordinances; that in 1873 they were still in perfectly good condition, but that in the latter year the city set the expensive cut granite curbing, on a new line, as indicated by a plan of revision made by the Board of Surveys, outside the old curbstone, without taking up the latter, leaving an unpaved surface between said two curbstones; for the price of which new curbing this suit was brought; that the said new alignment and curbing was done to aid in carrying out a project for making Broad Street a great ornamental thoroughfare, without any pretence that there were any defects in said footway, or that it was not sufficient for the public travel; and that no allowance was made for the old curb; (2) that this recurbing was done under a city ordinance of December 31, 1872, which was passed without authority of law, the Act of Assembly relied on to support it not having been approved until April 28, 1873; (3) that the ordinance of December 31, 1872, if ever valid, was repealed by an ordinance of May 19, 1873, several months before this recurbing was done; (4) that the work was done by direction of, and under a contract with, the Highway Department, which was not authorized by any act or ordinance, but, on the contrary, was forbidden by the act of April 21, 1855, § 20. (P. L. 269; Digest of City Ord. p. 106, pl. 1.)

The Court granted a rule *nisi* to show cause why judgment should not be entered for want of a sufficient affidavit of defence, which, after argument, was made absolute. (Reported 1 WEEKLY NOTES, 93.) The defendant took this writ, assigning for error the entry of said udgment.

E. Spencer Miller and *J. Howard Gendell*, for plaintiff in error.

The extensive improvements of Broad Street, in carrying out which this work was done, were clearly intended for the benefit of the city at large. All legislation, then, State or municipal, imposing the expenses thereof on the adjacent property owners, is manifestly unconstitutional.

Hammett v. Philadelphia, 15 Sm. 146.

Even if the legislature could constitutionally empower the city to pass an ordinance such as that of December 31, 1872, it is evident that they did not do so. The only act under which such a power could possibly be claimed was not passed until April 28, 1873. The ordinance of December 31, 1872, which fixed the width of the sidewalk at twenty-eight feet, was repealed by that of May 19, 1873, fixing its width at twenty-two feet. Notwithstanding that, this curb was laid twenty-eight feet from the house line, and is therefore actually in the cartway.

This work was done under a contract with the Highway Department, but, when goods, labor, etc., are required for the city, councils should provide for receiving sealed proposals, preceded by advertisement, and no contract should be awarded to any except the lowest and best bidder. None of these formalities were complied with in this case. See—

Act of April 21, 1855, § 20, P. L. 269.
Act of May 31, 1856, § 25, P. L. 573.
City Ordinance of June 10, 1870.
City v. Reilly, 10 Sm. 467, affirmed in—
City v. Stewart, 1 WEEKLY NOTES, 242.

D. W. Sellers, contra.

No defence to a *sci. fa.* sur municipal claim can be admitted, except a denial that the work was done, or a proof of payment or exorbitant charge.

Act of April 16, 1840, § 9, P. L. 412.
Act of April 19, 1843, § 1, P. L. 342.
Act of March 16, 1844, § 4, P. L. 115.
Act of February 2, 1844, § 40, 44.

The validity of these acts has been recognized in—

City v. Sutter, 6 Cas. 55.
City v. Tryon, 11 Id. 401.
City v. Wistar, Id. 427.
Lipps v. City, 2 Wr. 503.
City v. Burgin, 14 Id. 539.
Lea v. City, 1 WEEKLY NOTES, 189.

May 8. THE COURT. What we have to deal with here, is the affidavit of defence. Does it set

Digitized by Google

forth a sufficient ground to defeat the plaintiff's recovery? Want of power to impose the alleged liability is clearly a good defence. The question is not whether the legislature might authorize such a claim to be made, but whether this authority has been granted.

The original and supplemental affidavits are diffuse, setting forth many things unnecessary to be noticed. Premising that the claim filed is a naked charge for 121½ feet of curbstone laid opposite the defendant's lot, without circumstances stated, except that the work was done in pursuance of the ordinance of December 31, 1872, after adjustment of the curb line, and a contract made for paving the street, we may gather and condense the following facts from the affidavits of defence: That about three years before the new curbing was set, the footway opposite defendant's lot had been well paved, and the curb set at his expense; that they were of proper and sufficient width, similar in style to those in other parts of the city, and well done according to the laws and ordinances of the city; that they were in good order and condition, needing no repair or improvement, and no resetting, alteration, or substitution; that the new curbing was no repair, but that the city chose of her own purpose to change the alignment of the curb and pavement, and to require a new and most expensive granite curb to be set on the new line, costing more than treble the expense of the former curb, without any allowance for the cost of the former curbing.

On these facts the question is, did the laws conferring authority on the city to pave footways and curb them at the expense of the owners of the ground fronting thereon, confer the power to set new and costly curbs on a new line at the expense of the owners? As is remarked by WOODWARD, J., in City *v.* Tryon (11 Casey, 402): "This is a power of special taxation, and must have explicit legislation to support it." The property in question lies on Broad Street, between Race and Vine, and is therefore within the old city. The only legislation to which we have been referred, or which I have found, is in the Consolidation Act of Feb. 2, 1854, and in the 40th section, viz., "That it may be prescribed by ordinance that paving of streets, except at the intersection thereof and of footways, and laying water-pipes within the limits of the city, shall be done at the expense of the owners of ground in front whereof such work shall be done, and liens may be filed by said city for the same, as is now practised and allowed by law."

It may be conceded that curbing is a necessary part of paving, to separate and support the footway from the cartway.

It may be conceded, also, that a general power to pave implies a power to repair and repave when the condition of the cartway or footway requires it; and of this, *prima facie*, the city officers may judge. The affidavit asserts that this was not a repair, but a new alignment and alteration of the curb. Then does the 40th section of the Act of 1854 confer a power, at pleasure, to change, take up, alter, and relay pavements, and reset curbs at the expense of the owner of the front, who has recently paid for a good pavement or curb, and, therefore, to do this as often as the city may choose to alter its plans of improvement? Without referring to any power in the legislature to confer such an authority, the question is, is this the true scope and design of the legislation before us—is it the interpretation we should give to the section? We think not. A power so onerous upon the citizen must be plainly conferred, if, indeed, it is not obnoxious to the charge that it is palpably oppressive and unjust. It is in derogation of the rights of private property, seeking to lay a special tax on a small class of citizens. The foundation of this power to tax specially is the benefit the object of the tax confers on the owner of the property. The law simply provides for the paving of streets and footways, at the expense of the front owner. What would any one ordinarily understand is meant by paving streets at the expense of the owners of ground fronting thereon? Clearly that paving which is customary. An unpaved street is inconvenient and disagreeable, and property lying on it is less valuable. To remove these evils the city paves, and the owner whose property is thus benefited is required to pay for it. Such a law is not unjust, and, as thus understood, the legislature passes it, and the Courts sustain it. Paving in this form is beneficial to the public and to the property owner. But if we say the city may change its pavements at pleasure, and as often as it pleases, at the expense of the ground owner, we take a new step; and there must be explicit legislation to authorize such taxation. If the 40th section were before the legislature on its passage, would any member suppose for a moment he was committing to the city a power to alter its pavements, take up, relay, experiment on one kind, then on another, and so *toties quoties*, as a change of views or of interests might dictate, and that this should be done at the expense of the ground owners, without their consent, and notwithstanding they had already paid fully for that improvement of the street which was the basis of their taxation? Clearly, no one would take such a meaning from the 40th section, or he would at least doubt this intent; and if doubtful it is not explicit. If, while the pavement is good and stands in no need of repair, the city may tear it up, relay, and charge the owner again with one excessively costly, it would be exaction, not taxation. Of course the city may change its plans of improvement and experi-

Digitized by Google

ment to suit the views of those in power, and, if it be unwise, the corrective lies in the popular vote to remove those guilty of such folly and lavish expenditure. But under the 40th section no such changes and experiments can be made at the expense of the lot owners, who have no power to correct the evil. We are not at liberty to impute such a design to the legislature, unless it has plainly expressed its meaning to do this unjust thing. Whether the legislature can do so is not our question. We must not force the words of the law, but in these times of jobbing and corrupt practices, adhere to the strict line of interpretation set before us by our predecessors. There must be explicit legislation to support special taxation. It was in this spirit Justice WOODWARD wrote, in The City *v.* Tryon, *supra*, and in which he was led, in City *v.* Hoxie (2 Wright, 339), to say that there was no authority for the building of culverts within the old city, at the expense of the lot owners. (See also Reed's Ex'r *v.* City of Erie, Leg. Int. May 19, 1876, p. 184.) For these reasons we think the defendant was entitled to a trial by jury of the facts set forth in his affidavit.

It is proper here to advert to the case of Lea *v.* City of Philadelphia (1 WEEKLY NOTES, 189), which was commented upon in the argument. That was a case of *repair*, having no bearing on this. It is proper to say that the obscurity supposed to exist in the opinion does not exist in the original on file, but in the report, and is owing to the attempt to condense it by the reporter. The reported opinion certainly is not clear.*

Judgment reversed and a *procedendo* awarded.

Opinion by AGNEW, C. J. WILLIAMS, J., absent.

On May 22 the following additional opinion was filed.

PER CURIAM. Since the filing of our opinion in this case, we have been referred to the Act of 16th April, 1838, § 3 (P. L. 626), authorizing the Councils of Philadelphia "to make and establish as many rules and regulations as to them may seem expedient, for the better regulation of porches, benches, door-steps, railings, bulk windows, areas, cellar-doors," and a large number of other subjects proper for city regulation, concluding—"and at the expense of the owner or owners of the property adjoining, to regulate grade, pave and repave, curb and recurb the said footways or sidewalks." It is evident this section is no more than a collection and consolidation, in a short compass, of the various subjects of general regulation, and the provision for paving and repaving simply conveys the ordinary power for this purpose. It was not intended to subject the property of the citizens to arbitrary changes of policy, or of opinion, or caprice which follow changes in councils, or in their views of improvement. We cannot suppose the legislature meant to convey any such extraordinary and oppressive authority. If we did, then the later Consolidation Act of 1854 must have been intended to restrict it. Johnson and Numon's Appeal (25 P. F. Smith, 96) is no recognition of the Act of 1838 as giving a wider grant of power; but, as Justice GORDON remarks, the Act of 1854 is the nerve through which the city derives its power.

We perceive no reason to alter the opinion filed in this case.

May, '76. May 2.

The Farmers' Mutual Fire Insurance Company v. Bair & Shenk.

Same v. Samuel Groff, to use of Bair & Shenk.

Evidence—Contract of insurance, as shown by agent's receipt, before policy issued—Discrepancy between dates of receipt and policy—Fraudulent alteration of date.

The question of alleged fraudulent alteration in the date of a receipt for premium upon a policy of insurance, though supported by vague evidence only, should

---

* The following is a full copy of the opinion on file referred to by the CHIEF JUSTICE:—

Lea v. City of Philadelphia. } Error to the District Court of Philadelphia County.

"PER CURIAM.

"The true construction of the claim and effect of the evidence in this case is, that the work done to the pavement in front of the defendant's property, was substantially and really a repair, and not a renewal or second construction of the pavement. It is true there is looseness in the language of the papers, but taking the whole case we think it was a substantive repair of the pavement, falling under the ordinance of the city, to be paid for by the owner of the frontage, and to be done by the supervisor of the highway, by means of labor, and not by contract.

"In view of the evidence, we discover no error in the instructions.

"Judgment affirmed."

(Filed January 18, 1875.)

The following is the abstract of said opinion, reprinted from the report in 1 WEEKLY NOTES, 189:—

"Jan. 18, 1875. PER CURIAM. Judgment affirmed on the ground that the work done on the pavement was substantially a repair, and not a renewal of the pavement, falling under the ordinance, to be paid for by the owner of the frontage, and to be done by the supervision of the highway, by means of labor, and not by contract."

[It was only in the first half of the first volume of WEEKLY NOTES that the plan of attempting to condense the opinions of the Supreme Court was pursued. In the latter half of that volume, throughout the second volume, and in the current volume up to date, the opinions of the Supreme Court, whether *Per Curiam* or by any of the Justices, including dissenting opinions, have been invariably printed in full.—ED.]

Digitized by Google

be submitted to the jury, especially when surrounding circumstances tend to illustrate the issue.

Where a policy of insurance and a receipt for premium contained different dates, giving rise to confusion as to the terms of the contract, the jury, from extrinsic evidence, must decide which paper contains the true date.

Attaching creditors have the right to ask that a policy of insurance be reformed, by substituting the real date of the beginning of the contract.

Error to the Common Pleas of Lancaster County.

These were attachments in execution on judgments held by Bair & Shenk against John K. Barr, issued against the said John K. Barr, defendant, and the Farmers' Mutual Fire Insurance Company, garnishees. The garnishees pleaded "nulla bona."

Under this issue the material facts were as follows: On May 3, 1870, Barr signed and delivered to G. R. Hendrickson, agent for the Insurance Co., garnishees, an application for insurance on certain specified property, "in the sum of $3800, for the term of three years from the 3d day of May, 1870, at noon." He received from said agent a certificate or receipt, reciting the application, the payment of the premium, and stating that he would be insured in said sum, for three years from date, if approved by the directors. This receipt, when produced on the trial by the plaintiffs, bore date "May 31*st*, 1870." The application having been approved, the Company issued to Barr a policy, which bore date May 6, 1870, insuring the property in said sum, "from the *third day of May*, 1870, at 12 o'clock noon, until the *third day of May*, 1873, at 12 o'clock noon." Barr retained this policy until September 11, 1871, when he assigned it as collateral security to one Reynolds, a lien creditor. On May 19, 1873, the property described in the policy was burned.

It further appeared that Barr had previously been insured in said Company, as to property other than that burned, under a policy for which application was made on May 31st, 1867; and a receipt, by one Zeller, then agent for the Company, was given on the same day, *for the term of three years from that date.* He also had been insured in other companies.

On the trial, before LIVINGSTON, P. J., the plaintiff offered in evidence the two receipts, dated respectively May 31, 1867, and May 31, 1870; and offered to prove by the defendant, Barr, that the latter, upon Hendrickson's solicitation, in the fall of 1869, agreed to make an additional insurance, *the same to take effect from the expiration of his then insurance;* that in pursuance of that arrangement, Hendrickson then made a survey, and, about the beginning of the following May, received the premium and made an insurance *for three years from May 31st, the expiration of the old policy.* Objected to; admitted; exception.

The witness testified, in support of the offer: "Mr. Hendrickson made the survey of the buildings, with the understanding that the insurance was only to take effect from the expiration of the other insurance, which expired on May 31st. Some time before the expiration of the old policy—it must have been about the beginning of May—I called on Hendrickson, at Mount Joy, and he proposed that I could pay my premium there, as I was not in the habit of getting to Mount Joy very often. I paid the premium to him and took his receipt, with the understanding that it was to take effect from May 31st, the expiration of the old policy. I took this insurance in place of other insurances; Zeller insured the house for $4000; I had my other buildings insured in other companies; I dropped them and took all in this company. . . . The second day after the fire, I went to Zeller, who was then agent of the company, and gave him notice of the loss. He said he had received notice from the head office that the policy had expired." Barr further testified that Mr. Hendrickson did not allow him any sum as the surrender value, or return premium for the unexpired term of his old policy.

On being shown the receipt dated May 31st, 1870, he said: "The dates in this receipt are now as they were when Mr. Hendrickson gave it to me. I never noticed the discrepancy or mistake between the receipt and the policy until my attention was called to it by Mr. Zeller, after the fire."

The defendants put in evidence the policy, dated May 6, 1870, and called G. R. Hendrickson, who testified that he took the application and gave the receipt on May 3d, when the old policy was surrendered; and that, in charging for the new policy, he deducted fifty-five cents, the value of the old policy for the time it had then to run, from 3d to 31st of May; that he had no recollection of anything being said about the new insurance running from May 31st; and that Barr never made any objection to the new policy, which read from May 3d, 1870, to May 3d, 1873. In relation to the date of the receipt "May 31st, 1870," he said: "This receipt is all in my handwriting, with possibly the exception—I won't say positively—of the figure 1 in both places where it occurs in the dates; the letters *st*, after the dates, don't look like my writing to me. I don't say that the 1 in the cancelled stamp is not my 1—that I did not make it; I judge the figure 1 in both places; I have great doubts that they are in my handwriting. There is nothing in the 1 on the stamp to indicate it is not in my hand, except my reasoning. . . . I don't know that I have any recollection except what the papers show. Barr

Digitized by Google

and I had some conversation, but I would not undertake to repeat it"

John H. Zeller testified, also on behalf of defendants, that Barr came to him three or four days after the fire, and, when witness showed him by the register that the policy had expired on May 3d, he said he thought it had to run until the 31st of May, and found fault with the witness for not notifying him.

The plaintiffs requested the Court to charge that if the agent of the company agreed that the insurance should run for three years from May 31st, 1870, and gave him a receipt for premium paid in accordance therewith, the plaintiffs are entitled to recover, notwithstanding the policy, by mistake of the company or its agent, specifies different dates from those so agreed upon and set forth in the receipt. *Answer:* The taking of the application of a person for insurance, fixing the terms of it, and receiving the premium are sufficient evidence of an insurance, without the issuing of a policy, when it thereby appears that the contract is complete and nothing wanting *but* the issuing of the policy. In this case there was more to be done; the directors were to approve; they issued a policy, and thus expressed approval of its risk; and if the jury, from all the evidence, find that the contract or agreement between John K. Barr and Mr. Hendrickson, the agent of this company, was that, in consideration of the premium paid, John K. Barr was to be insured from May 31, 1870, for three years, and in accordance with that agreement Barr paid the premium demanded for such insurance, plaintiffs would be entitled to recover, notwithstanding the policy issued may bear date different from that agreed upon and set forth in the receipt for the premium as the time from which the insurance was to date.

The defendants presented, *inter alia*, the following point: (4) If the jury believe from the evidence that the receipt given to Barr by Hendrickson was altered in date from May 3d to May 31st, 1870, the plaintiff cannot recover. *Answer.* There is no evidence in this case of any alteration of the dates of the receipt. Barr swears the dates therein are the same now as when he received it from Hendrickson, the agent, and Hendrickson does not swear that they have been changed or altered. The jury need not consider the question raised by this point.

Verdicts for plaintiff in both cases, for $2592.58 and $504.29 respectively. The garnishees took this writ, assigning for error the admission of the evidence excepted to and the answers to the points as given above.

T. E. Franklin and *H. M. North*, for plaintiffs in error.

The Court erred in withdrawing from the jury the question of fact, whether the date of the receipt had been altered. But "the application and the policy constitute the contract" (Ins. Co. *v* Sailer, 17 Sm. 112), and the receipt, even if originally dated May 31, was provisional only; it merged in the policy, and the latter cannot be contradicted by the former.

W. Leaman and *S. H. Reynolds* (with whom were *Dickey* and *Shenk*), for defendants in error.

The actual agreement to insure between the parties, as evidenced by the receipt for premium, was the contract.

Carpenter *v.* Ins. Co., 4 Sand. N. Y. Ch. Rep. 408.
Ins. Co. *v.* May's Exec'r, 2 WEEKLY NOTES, 43.
Ins. Co. *v.* Porter, 3 Grant, 123
Palin *v.* Ins. Co., 20 Ohio, 529.
Perkins *v.* Ins. Co., 4 Cowan, 645.

The date in the policy was clearly a mistake which could have been reformed in equity, and it will be treated here as though corrected. The allegation of alteration of date in the receipt was not sustained by any evidence sufficient to be submitted to the jury, and the question was therefore properly withdrawn by the Court.

Oct. 9. THE COURT. In the fourth point of the defendants below, the Court were asked to charge that "if the jury believe from the evidence that the receipt given to Barr by Hendrickson was altered from May 3d to May 31st, 1870, the plaintiff cannot recover." The answer was: "There is no evidence in this case of any alteration of the dates of the receipt. Barr swears the dates therein are the same now as when he received it from Hendrickson, the agent, and Hendrickson does not swear that they have been changed or altered. The jury need not consider the question raised by this point." This question was the pivot on which this whole controversy turned. The application for the increased insurance was made by Barr on the 3d of May unquestionably. If it was agreed between Hendrickson and himself that the policy was to protect the property from the 31st of May, and if in accordance with that agreement the receipt was post-dated, the plaintiffs below, as attaching creditors of Barr, had the right to ask that the policy should be reformed by substituting the date which was really fixed for the commencement of the contract in lieu of that which was adopted by the company in consequence of the agent's mistake. The act of the agent in effecting the insurance having been ratified by the execution of the policy, there is nothing in the general facts on the record to indicate that the discrepancy of twenty-eight days between the date agreed on and the date mistakenly adopted could have had any essential bearing on the question of the good faith of the contracting parties, or on the obligation of the contract itself.

As the case stands, the material inquiry is, whether there was any evidence of the alleged alteration of the receipt, which should have been

Digitized by Google

submitted to the jury? On the 31st of March, 1867, an insurance on a dwelling-house, kitchen, smoke-house, and certain household furniture—amounting to $4000—was procured by Barr from the defendants through the instrumentality of John H. Zeller, at that time their agent at Mount Joy. In the autumn of 1869, George R. Hendrickson, who had been appointed agent in Zeller's place, made a survey with a view to the insurance of other property belonging to Barr. On the 3d of May, 1870, an application was made for a policy for $8800, embracing the $4000, covered by the policy of 1867, and $4800 on the other property. The insurance was specified to be "for the term of three years from the third of May, 1870, at noon," and the application was dated "May 3d, 1870." The policy which was dated on the sixth day of May, 1870, stipulated for the payment of damages by fire to the property insured occurring between the third day of May, 1870, and the third day of May, 1873. The date of the expiration of the risk, "3d May, 1873," was legibly endorsed upon the policy. A fire occurred on the 19th of May, 1873, resulting in the loss of property not covered by the insurance of 1867, but included in the risk taken in 1870.

On the trial, the plaintiffs produced the receipt of Hendrickson purporting to have been given "May 31, 1870." It was alleged on behalf of the defendants that this receipt had originally been dated "May 3, 1870," and had been altered by the addition of the figure and letters "1st." It was apparent that a vacant space had been left between the figure or figures expressing the day of the month and the figures which indicated the year, and that this space had been left without a connecting scroll and entirely blank. Barr testified that when he took the receipt it was "with the understanding that the insurance was to take effect from May 31st, the expiration of the old policy," and that the dates originally inscribed remained unaltered. He also testified that he had not observed before the fire the discrepancy between the receipt and the policy. On the part of the defendants, Hendrickson, the agent, was called as a witness. He stated that the receipt of the 31st of May, 1870, was in his handwriting, with the possible exception (he was not able to speak positively) of the figure "1" in both places (at the foot of the paper and in the cancellation) where it occurred in the dates. He said that the letters "st" did not look to him like his writing. On cross-examination, he added that "there was nothing on the stamp to indicate it was not in his hand except his reason." He said also that, when the new insurance was effected, he made an allowance to Barr of 55 cents for the premium on the cancelled policy of 1867, for the period between the 3d and 31st of May, 1870.

In view of these general facts, how can it be said that there was no evidence to affect the integrity of the date of the receipt in controversy? According to Barr, the understanding was distinct that the risk was to begin on the 31st of May. According to Hendrickson, the understanding was that it was to begin on the 3d of May, and, in pursuance of that understanding, he swore that he refunded the premium on the first policy for the twenty-eight days it had yet to run. Then the terms and date of the application and the stipulations of the policy were explicit and unmistakable. While the evidence of Hendrickson was vague, it still raised a question whether the receipt produced in Court was in the precise form in which it was originally executed. The fire occurred more than three years after the insurance was effected, and no objection to the terms of the policy had been made in the interval. It is true Barr swore he did not discover the discrepancy, and it appears that the policy was assigned to S. H. Reynolds, a lien creditor, on the 11th of September, 1871, and was probably therefore not in the hands of Barr from that time till the accident happened. Still the fact remains that the policy was received and retained without objection.

All these were facts bearing directly on the point contested. But aside from these, there were surrounding circumstances which, as tending in some degree to illustrate the issue, should have been submitted to the consideration of the jury. The property destroyed by the fire was not included in the policy of 1867. Evidence was given by the plaintiffs to prove that this property was protected by policies of other companies, which were dropped by Barr when he obtained the insurance from the defendants in May, 1870. The policies so dropped were not shown, and no proof was made in regard to the dates of their expiration. Barr simply testified: "I had my other buildings insured in other companies; I dropped them and took all in this company." As the record stands, the theory of the defendants presents the peculiar case of an insurance to the amount of $4800 to take effect twenty-eight days after the date of the application, while nothing is offered to show that the property was not, during that interval, left wholly unprotected.

It is possible that a thorough investigation by a jury may enable them to account for the confusion in these instruments on the ground of accident, and not on the ground of an alteration of dates. In its general terms, the receipt of 1870 is almost an exact duplicate of that given by Zeller on the 31st of May, 1867. In the application signed by Barr, the date was stated as "May 3, 1870." It was for the jury to say how and why the change was made from the

Digitized by Google

numeral adjective expressed in the word and figure "May 3" in the application, to the ordinal number expressed by the word, figures, and letters "May 31st" in the receipt.

While the application and policy could be reformed by proof that the receipt showed the true terms of the contract, certainly the receipt could also be reformed by proof that the true terms were contained in the contemporaneous papers. One instrument would not necessarily control the other. The point was one which it was not the province of the Court to decide, for it rested upon extrinsic evidence. It may be that, in copying the receipt of 1867, the day of the month on which that had been given was copied also by Hendrickson through a natural inadvertence. This is mere speculation, of course, for such a question could only have been passed upon by the jury, and to them, in connection with the general facts developed on the trial, it ought to have been referred. The other questions in the cause were accurately ruled, but there was error in the answer given to the fourth point of the defendants, and the ninth assignment of error therefore is sustained.

Judgments reversed, and *venire facias de novo* in each case awarded.

Opinion by WOODWARD, J. WILLIAMS, J., absent.

Jan. '74, 255. Feb. 3.

McIlvaine's Appeal.
In re Thirty-fourth Street.

Errors and Appeals—Certiorari—Appeal—Road cases in Philadelphia County—Act of 29 March, 1829—Special allocatur—Practice.

The distinction between an appeal and a certiorari is marked, and should not be lost sight of. An appeal brings up the case upon its merits; a certiorari brings up the record only, and upon such writ the Appellate Court can look merely at the regularity of the proceedings.

The Act of March 23, 1829 (P. L. 93), which provides that no certiorari shall issue to the Quarter Sessions of Philadelphia County in proceedings for opening roads and assessing damages, unless upon affidavit of the party, and a special allocatur by the Supreme Court, is still in force.

Certiorari (styled in the paper-books an appeal) to the Quarter Sessions of Philadelphia County.

This case came before the Court below upon exceptions to the report of a jury appointed to assess damages for the opening, straightening, and widening of Thirty-fourth Street.

The material facts of the case were as follows: The Act of April 14, 1868 (P. L. 1083), a supplement to the general Park Act of March 26, 1867 (P. L. 547), authorizes the City Councils to widen and straighten any street laid out upon the public plans of the city as they may think requisite to improve the approaches to Fairmount Park, and provides a special mode of proceeding for such improvements. In accordance with this Act the Councils, by ordinance of June 24, 1871 (Ordinances of 1871, 291), ordered the widening and straightening of Thirty-fourth Street by lines clearly defined. This ordinance was approved by the Park Commissioners, and the change in the lines was duly made by the Board of Surveys on the public plan of the city. On July 11, 1871, the Councils passed the following resolution (Ordinances of 1871, 326):—

Resolved, That the Chief Commissioner of Highways be and he is hereby authorized and directed to notify the owners of property embraced within the lines of Thirty-fourth Street, from Market Street to the south side of Aspen Street, in the Twenty-fourth Ward, as ordered to be widened and straightened by the Ordinance of Councils, entitled "An Ordinance to widen and straighten Thirty-fourth Street, in order to improve it as an approach to Fairmount Park," approved June 24th, 1871, that at the expiration of ninety days said street will be widened and straightened, and opened as so widened and straightened, in accordance with said Ordinance, and that so much of their ground as will be embraced within the lines thereof, when so widened and straightened, will be required for public use.

(This resolution was printed in the paper-book of plaintiff in error, but it was not contained in the record proper.)

On November 28 of the same year, Thomas Costigan, one of the owners of land fronting on the said street, petitioned the Court of Quarter Sessions for a jury to assess damages, and the Court appointed six viewers for that purpose, who viewed the premises, assessed the damages, and made a report, to which Hugh McIlvaine, another of the property-holders, filed, *inter alia*, the following exceptions: (1) The Councils of the city had no lawful authority to enact the resolution of July 11, 1871; (2) This Court obtained no jurisdiction by virtue of the resolution under which the petition on which the report was filed was presented. The City filed, *inter alia*, the following exception: (3) It was unnecessary to extend Thirty-fourth Street diagonally, from Sycamore Street to Thirty-fifth Street.

The Court of Quarter Sessions, PEIRCE, J., dismissed McIlvaine's exceptions, sustained the exception of the City, and confirmed so much of the report as was unaffected thereby.

McIlvaine thereupon took this writ of certiorari, assigning for error the action of the Court in dismissing his first two exceptions and in sustaining the third exception of the city.

Upon the case being called, in the Supreme Court, counsel for the city moved to quash the writ on the ground that, under the Act of March 23, 1829 (P. L. 93), no certiorari to review road

Digitized by Google

proceedings in the Quarter Sessions could be taken without a special allocatur.

D. W. Sellers, for McIlvaine.

Councils had no authority to enact the resolution of July 11, 1871, and that resolution conferred no jurisdiction on the Court of Quarter Sessions, for the Act of March 26, 1867, § 3, prescribed minutely the manner of proceeding when land is to be taken to improve the approaches to the park. This was an unlawful attempt to proceed in such a case under the general road law of April 21, 1855. Especially was the appointment of *six* freeholders on Costigan's petition illegal, for the Act of 1867 provides that in these cases a jury of twelve disinterested freeholders shall be appointed.

The ordinance of June 24, 1871, ordered the widening and straightening of Thirty-fourth Street, to improve it as an approach to the park, and only for that reason was the ordinance legal. But the Court, by sustaining the third exception of the city and approving the plan as modified by it, entirely destroyed the value of this improvement as an approach to the park.

C. H. T. Collis, City Solicitor, for the city, and *J. A. Gerhard* (with him *E. Spencer Miller*), for property-owners.

The appointment of *six* jurors was entirely correct, under either the Park Act or the general road law, for the supplement to the Park Act of April 14, 1868, specially reduced the number of park jurors to six.

March 13. THE COURT. A writ of certiorari was sued out by Hugh McIlvaine to the Court of Quarter Sessions of Philadelphia to bring up the record of said Court in the matter of the proceedings to assess the damages for the widening of Thirty-fourth Street. The case is inaccurately termed an appeal, and the parties are treated as appellant and appellee in the respective paper-books. This is erroneous. There is no appeal in the case. The distinction between an appeal and a certiorari is marked, and should not be lost sight of. An appeal brings up the case upon its merits; a certiorari brings up the record only, and upon such writ we can look merely at the regularity of the proceedings. (Duff's Road, 16 P. F. S. 459.)

A motion to quash the certiorari was made upon the argument. The reason assigned was that the writ had not been allowed by this Court, or by one of the justices thereof. This involves a question of practice of some importance. The 2d section of the Act of 23d of March, 1829 (P. L. 93), provides: "That from and after the passage of this Act no writ of certiorari shall issue from the Supreme Court of this State to remove any proceedings of the Court of Quarter Sessions of the County of Philadelphia under the Act of Assembly for opening and laying out of public roads, streets, or highways, and for assessing damages for opening the same unless the party applying for such writ shall make oath or affirmation that the same is not intended for delay, but because he firmly believes that injustice has been done in the Court of Quarter Sessions; and unless such writ of certiorari shall be especially allowed by the Supreme Court, or a Justice thereof, for just and reasonable cause shown to them or him, and that any writ of certiorari issued against the provisions of this Act, shall be void and of none effect." This Act was held to be still in force in the case of Road from Thomas' Creek (3 Whart. 17). It was contended in that case that by the general road law, passed on the 13th of June, 1836, this provision of the Act of 1829 was virtually repealed, and that by the Act of 16th June, 1836, relating to the jurisdiction and powers of Court, a *certiorari* is to issue of course. But the Court said that the Act of 13 June, 1836, contained an express saving of the special and local Acts, and that a special allocatur was still necessary for the removal of proceedings in the Quarter Sessions, relative to the opening of roads in the county of Philadelphia. Such has been the uniform construction of the Act of 1829, from that day to this, and the practice has been, with rare exceptions, in harmony with it. We might quash this writ without further discussion, but as it was taken out under an impression that a special allocatur was unnecessary and the case has been fully argued, we would not quash under the circumstances if upon examination we find that the plaintiff would be entitled to a special allocatur immediately thereafter.

I have looked in vain through this record for anything on which to base the plaintiff's assignments of error. The resolution of councils referred to in the first and second assignments is not set out in the record and is not before us. It is true that in the petition of Thomas Costigan for the appointment of a jury to assess the damages for the widening of Thirty-fourth Street, it is stated "that the select and common councils of said city by a resolution duly approved July 11, 1871, directed the chief commissioners of highways to notify the owners of property through and over which Thirty-fourth Street from Market to Aspen Streets passes, that after three months from said notice the same would be required for public use according to the widened and straightened lines as an approach to the Park, and which notification has been received." Assuming the resolution to be as set forth in the petition we fail to perceive any error on the part of the Court below in appointing a jury to assess the damages for the widening of the street. The Act of April 14, 1868 (P. L. 1083), provides: "That the councils of the city of Philadelphia be and they are hereby authorized to widen and straighten any

Digitized by Google

street laid out upon the public plan of said city as they may think requisite to improve the approaches to Fairmount Park." If, as was contended, the damages for the widening of the street were required to be assessed under the Act of March 26, 1867 (P. L. 547), to which the Act first above-named is a supplement, it would still be the duty of the Court of Quarter Sessions to appoint the jury. For anything that appears upon this record the damages may have been "ascertained, adjusted, and assessed in like manner" as is prescribed by the Act of 1867. We are unable to say in this proceeding from what is legitimately before us, that city councils had no authority to enact said resolution, or that the Court below had no jurisdiction.

The third assignment alleges that the Court below erred in sustaining the third exception filed on behalf of the city. The record does not show any such exception or ruling. It does disclose three exceptions filed by the plaintiff all of which were dismissed by the Court and the report confirmed. The first and second of said exceptions are sufficiently covered by what has already been said. The dismissal of the third exception is not assigned for error.

We are unable to see anything in this record which would justify us now in granting a special allocatur.

Writ quashed.

Opinion by PAXSON, J. WILLIAMS, J., absent.

Common Pleas—Law.

C. P. No. 1. March 18.

Oelschlager v. Larbling.

Execution—Abandonment of levy—Alias execution—Practice.

Rule to set aside *fi. fa.*

Judgment was entered March 1, 1870, on a warrant of attorney attached to a single bill of the defendants, on which a *fi. fa.* issued and was returned "nulla bona." An *alias fi. fa.* was then issued to June Term, 1872, and a levy having been made on the personal property of defendants, it was returned "served, advertised, and unsold for want of buyers."

On February 6, 1876, a rule was granted for a sheriff's interpleader, a relative of the defendant being a claimant of the goods, but, no security being entered, all benefit under the interpleader was apparently abandoned.

The plaintiff subsequently, on June 14, 1876, issued a *pluries fi. fa.* and levied upon other property of defendant, whereupon the present rule was taken.

R. P. White, for the rule. The goods levied on under the *alias fi. fa.* are still in the custody of the law, and the execution is *prima facie* a satisfaction of the judgment. The plaintiff cannot issue another execution until the interpleader is disposed of. The proper way of proceeding would be to issue a *vend. ex.* against the unsold goods.

Yocum, contra. The plaintiff is not bound by the interpleader because it was never perfected and the levy under the *alias* can be abandoned.

THE COURT. Looking at the case in any aspect, we think the plaintiff had a right to abandon the first levy and issue another *fi. fa.*

Rule discharged.

[*Cf.* McCulloch *v.* Logan, *ante*, 88; Bryan *v.* Paul, *ante*, 64.]

C. P. No. 1. **B——— v. H———.** May 13.

Landlord and tenant—Surrender—An affidavit stating a surrender without alleging an acceptance thereof is insufficient.

Rule for judgment for want of a sufficient affidavit of defence.

Covenant on a lease to recover three months' rent of premises leased by plaintiff to defendant.

The affidavit of defence set forth that defendant had surrendered possession of the premises before the expiration of his term because plaintiff was committing adultery with his wife, by reason of which he was obliged to leave his home; that after surrendering and leaving the house plaintiff made a proposition to his wife that she should remain in possession without paying any rent, which she accepted and remained until the expiration of the term, during which time defendant's wife and the plaintiff continued said adulterous intercourse.

W. Drayton, for the rule.

The crime of the wife does not relieve defendant from responsibility for the rent.

Mauby *v.* Scott, 2 Sm. Lead. Cases, *282, note.

The surrender was not accepted, and therefore was incomplete.

Shields, contra.

Rule absolute.

[See Extinguisher Co. *v.* Brainerd, 2 WEEKLY NOTES, 473.]

Digitized by Google

C. P. No. 2. Nov. 4.

Holden v. Woodward and Carson.

Affidavit of defence—Filing may be equivalent to an appearance—Practice.

Rule to strike off rule to plead.

Debt on a bond. The sheriff returned *nihil* as to Woodward, and "service accepted" as to Carson. A copy of the bond was filed, and the defendant Woodward filed an affidavit of defence. On Oct. 19, 1876, plaintiff filed a narr. and took a rule on both defendants to plead. Defendant Woodward then took this rule.

Byron Woodward (P.P.), for the rule, argued that the rule to plead was improperly taken, defendant Woodward not being in court.

Letchworth, contra.

Where a defendant who has not been served, makes an affidavit of defence, the Court will order an entry of appearance, *P.P.* Any act admitting that defendant is regularly in court and desires to contest the claim is equivalent to an appearance.

Morton *v.* Hoodless, 1 Miles, 46.
Weaver *v.* Stone, 2 Gr. 422.

THE COURT. This rule to strike off is premature. If we were to make it absolute, plaintiff would be without remedy; while if judgment is entered under it, defendant may obtain a rule to strike it off, and the question whether the filing of an affidavit is equivalent to an appearance will then be fairly before us for decision, and the parties will have an opportunity to be heard in the Supreme Court.

Rule discharged.

C. P. No. 2. Nov. 4.

Commonwealth ex rel. The Attorney General v. Daily.

Quo warranto—Practice—Preliminary rule to show cause why the writ should not issue.

Rule to quash a writ of *quo warranto.*

The attorney-general filed a suggestion setting forth that Thomas Daily was on October 10, 1871, elected Surveyor and Regulator of the First District of Philadelphia, for the period of five years; that he, therefore, entered upon and is now discharging the duties of his office, but that he has failed to enter security as required by law.

The docket entries showed the filing of the relation and issue and return of the *quo warranto.*

Bansford, for the rule, argued that this writ was improperly issued, it having been issued on an *ex parte* statement, and without a rule to show cause, citing—

Commonwealth *v.* Jones, 2 Jones, 365.
Commonwealth *v.* Burrell, 7 Barr, 34.

J. W. M. Newlin, contra. The case of Commonwealth *v.* Jones was at the suit of a private relator

C. A. V.

Nov. 11. THE COURT. The cases where a preliminary rule to show cause has been required are of writs under the statute where the relators were private individuals, and the reason of the requirement is stated by Chief Justice GIBSON to be that the Court may stand between the accused and a vexatious or malicious prosecution by a displaced officer or a disappointed applicant. No such reason exists where the writ is issued at the instance of the attorney-general on his official responsibility, and we do not find that in such cases any rule has been required.

Rule discharged.

Oral opinion by MITCHELL, J.

C. P. No. 3. **Guth v. Anderson.** April 1.

Amendments at bar—Affidavit of defence law—Mistake of date in copy filed—Amendment permitted at bar, and thereupon, judgment.

Two rules: (1) to amend copy of a promissory note on which this suit was brought; (2) rule for judgment for want of a sufficient affidavit of defence.

In the copy of the note filed, the date was written May 6, 1876, instead of May 6, 1875. The affidavit of defence suggested that the copy filed showed on its face that the action was prematurely brought.

Hopple, Jr., for the rules. There is no defence alleged on the merits. Amendments of formal matters have frequently been permitted at bar.

Linnard *v.* Booz, 1 WEEKLY NOTES, 82.
Gustine *v.* Cummings, Id. 105.
Bold *v.* Harrison, Id. 154.
Lippincott *v.* Hopple, 2 Id. 186.

C. A. V.

THE COURT made both rules absolute.

C. P. No. 3. **Lindsay v. Casselberry.** Nov. 11.

Affidavit of Defence—Promissory note—Parol agreement contradicting the writing—Insufficiency.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note by payee against maker. The affidavit alleged that the defendant was not indebted in any manner to the plaintiff; but was induced to give the note in suit in exchange for other notes to which he, the defendant, was not a party, solely upon the promise, representation, and agreement of the plaintiff that the defendant's said note could be renewed at maturity, or that real estate would be taken in payment thereof; that at the maturity of the note the defendant was ready and willing

Digitized by Google

and still is ready to renew the same, or to pay it in real estate.

J. A. Sinn, for the rule.

J. Rich Grier, contra.

In a suit between the original parties a written instrument may be explained, varied, or even contradicted, where it is shown that but for the oral stipulations, made at the time, the party affected would not have executed the instrument.

Shughart *v.* Moore, 1 WEEKLY NOTES, 598.
Caley *v.* R. R. Co., 2 Id. 313.
Kostenbader *v.* Peters, Id. 531.
Hains *v.* Rapp, Id. 595.
Fries *v.* Fox, Id. 263
Ross *v.* Hanna, Id. 222.
Elliott *v.* Adams, 3 Id. 44.

THE COURT. The affidavit is, in any aspect, insufficient, in that it does not set out the agreement with particularity, nor does it allege a tender of a deed for the real estate.

Rule absolute.

C. P. No. 4. Oct. 21.

McCambridge v. Casselberry.

Affidavit of defence—Bank check—Want of averment of presentation and notice of non-payment to the maker.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a bank check by the holder against the drawer.

The affidavit of defence set forth that the check was drawn by J. R. Casselberry to Chas. M. Martin, or order, and was given upon the express understanding and promise that the deponent was to have in consideration therefor negotiable paper, which promise had not been fulfilled; that no averment of presentation and demand and refusal of payment was made in the copy filed, nor that the drawer of said check had notice.

J. W. Patton, for the rule.

J. R. Grier, contra.

Rule discharged.

C. P. No. 4. **Houston v. Allen.** Oct. 7.

Affidavit of defence—Bank check—Holder for collection only—Fraud in obtaining signature—Duress—Forgery.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit by holder against maker on a check purporting to be drawn by the defendant July 10, 1876, on the Bank of Germantown, payable to his own order and indorsed by him.

The defendant's affidavit set forth that he was informed and believed, and expected to prove, that the plaintiff was a holder for collection only, for the purpose of preventing a just defence against the real holder, to the following effect, viz.: that the signature and endorsement were forgeries, traced on an unsigned blank check, which had been stolen from the deponent, by imitating a signature and address obtained from deponent, upon a sheet of foolscap paper, by duress and without consideration.

H. G. Smith, for the rule.

Rule discharged.

[As to the allegation that plaintiff is holder for collection only, see Williams *v.* Harding, 1 WEEKLY NOTES, 344; Bank *v.* Witzman, Id. 359; Salter *v.* Askin, Id. 388; Carter *v.* Wallace, Id. 146; Sowers *v.* Ernest, Id. 443; Gustine *v.* Cummings, Id. 105; Brown *v.* Walton, *ante*, 76, and cases cited in note. As to defence of forgery, duress, or fraud in obtaining signature, in an action by holder: Bunting *v.* Power, 1 WEEKLY NOTES, 554; Damm *v.* Ortlieb, Id. 576; Falconer *v.* Witzman, 2 Id 225; Mackey *v.* Richardson, Id. 226; Brown *v.* Reed, Id. 230; Broadbelt *v.* Huddleson, Id. 293; McGrory *v.* Reilly, Id. 587; R. R. Co. *v.* Shay, *ante*, 45.]

Orphans' Court.

Peale's Estate.

Will—Devise—Construction of—Distribution per capita or per stirpes—Particular words—"Share and share alike"—"To and among"—Devise to children of A, when children born after testator are included.

Exceptions to adjudication of the account of Robert Patterson, trustee under the will of Stephen Girard.

This account arose under the provisions of the thirteenth section of the will of Stephen Girard, by which he gave to his niece, Mrs. Carolina Haslam (afterwards married to Franklin Peale)—

"The sum of ten thousand dollars, to be paid over to a trustee . . . to pay the dividends and interest thereof, from time to time, as they shall accrue, to my said niece for her separate use during the term of her life, and from and after her decease to pay and distribute the capital to and among such of her children and issue of deceased children and in such parts and shares as she, the said Carolina, by any instrument under her hand and seal, executed in the presence of at least two credible witnesses, shall direct and appoint, and for default of such appointment then to and among the said children and issue of deceased children in equal shares, such issue of deceased children, if more than one, to take only the share which the deceased parent would have taken if living; but,

Digitized by Google

if my said niece Carolina shall leave no issue, then the said trustee or trustees, on her decease, shall pay the said capital and any interest accrued thereon *to and among Caroline Lallemand* (grand-niece of the said Carolina) *and the children of the aforesaid Antoinette Hemphill, share and share alike.*"

Mrs. Carolina Peale, formerly Mrs. Haslam (the decedent), and Mrs. Hemphill were nieces of Stephen Girard: the former died in October, 1875, leaving no issue. Caroline Lallemand (afterwards Mrs. de St. Marsault) died after the testator and during the lifetime of Mrs. Peale (formerly Haslam), leaving three children, all now living. Letters of administration upon her estate were granted to one of them, Caroline H. de St. Marsault.

Mrs. Antoinette Hemphill left nine children, two of whom came *in esse* after the death of Stephen Girard, and five of whom died before Mrs. Peale, all intestate, unmarried, and without issue in the lifetime of their father, who, by his will, left all his property and estate to his four children, Ellen E. Girard, Elizabeth Hemphill, Virginia Rey, and Caroline G. Hunsworth, who were living at the time of Mrs. Peale's death. Mr. and Mrs. Hemphill both died before Mrs. Peale.

In the hands of the trustee were $10,127.88, invested in U. S. bonds and City 6's, which the Court, by the decree of adjudication, directed him to sell, and, after deducting the expenses of the audit, to pay equal shares of this sum—that is, one-tenth each—to the administratrix of the estate of Caroline de St. Marsault (formerly Lallemand) and the nine children (or their legal representatives) of Mrs. Antoinette Hemphill.

To this decree exceptions were filed by Caroline H. de St. Marsault, administratrix of the estate of Caroline de St. Marsault (formerly Lallemand): (1) that the distribution should have been made by stocks, one equal moiety to the exceptant, and the other moiety to the children of Antoinette Hemphill. (2) That if the first exception should not be sustained, and the distribution made *per capita* between the exceptant and the children of Mrs. Hemphill, yet only those of her children who were living at the death of the testator (seven in number) were entitled, and the fund should be divided into eight equal parts, and one-eighth part awarded to the exceptant.

McCall, for exceptant.

The meaning of the testator was to divide the fund, upon the death of Mrs. Hemphill, in two parts—one to go to Mrs. Lallemand, and the other to the children of Mrs. Hemphill, substituted in the place of their mother. In all cases where, under a bequest to one and the children of another, it has been held that the legatees all took *per capita*, it has been on the ground that the children are presumed to be referred to as individuals and not as a class; but this presumption yields readily to any circumstance showing that the testator meant to refer to them as a class.

Fissell's Appeal, 3 Casey, 55.
Miller's Appeal, 11 Casey, 323.
Minter's Appeal, 4 Wr. 111.
Risk's Appeal, 2 Sm. 269.

In Dible's Appeal (2 WEEKLY NOTES, 236), the Court distinguished that case from Minter's Appeal: there the words "share and share alike" precede the bequest, while in Dible's Appeal they follow; and in Minter's Appeal the intent to bequeath by classes was evidenced by separating each one successively by the copulative conjunction *and*.

No stress is to be laid on the word *among*. Johnson defines it "conjoined with others, so as to make part of a number"; Webster, "between," "amidst." See also in Minter's Appeal (*supra*).

Flinn *v.* Jenkins, 1 Coll. 365.
Shand *v.* Kidd, 19 Beav. 310.

S. F. Flood, contra.

The rule is, that, in a devise or bequest made to several persons standing in the same degree to the testator, they take *per capita* and not *per stirpes*.

Redfield on Wills, Part II. p. 905, § 12.
2 Jarman on Wills, *111.
McNeilledge *v.* Galbraith, 8 S. & R. 43.
Dible's Appeal, 2 WEEKLY NOTES, 236.
Bender's Appeal, 3 Grant, 210.

As to the second exception, the rule is that where a particular estate is carved out with a gift over to the children, such gift will embrace not only the objects living at testator's death, but all who may subsequently come into existence before the period of distribution.

2 Jarman on Wills, *75–6, and the authorities there cited.

As to the force of the words "to and among," as distinguished from the word "between," see—

Casterton *v.* Sutherland, 9 Vesey, 445.
Hennison *v.* Blake, 1 Phila. R. 132.

As to the words "share and share alike,"—

Dible's Appeal, 2 WEEKLY NOTES, 236.

Fissell's Appeal, Miller's Appeal, and Minter's Appeal (*supra*) are not authority here, for the legatees took as expressed by testators.

C. A. V.

OCT. 14. THE COURT. The judge auditing directed distribution to be made *per capita*, and awarded one-tenth of the fund to the administratrix of Caroline Lallemand, and one-tenth to each of the now living children of Mrs. Hemphill, and to the representatives of each of her children who are dead.

It is claimed by the administratrix that distribution should be made *per stirpes* between Caroline Lallemand and the children of Mrs. Hemphill, by awarding one-half of the fund to the estate of her intestate, and one-half to the class referred to; or, that the children of Mrs. Hemphill born after Mr. Girard's death should be excluded from sharing in the distribution, and that one-eighth

Digitized by Google

of the money should be awarded to her as administratrix.

In McNeilledge *v.* Galbraith *et al.* (8 S & R. 43), decided in 1822, DUNCAN, J., *arguendo*, observes: "Let us illustrate this by a few instances. . . . So a bequest to a brother and the children of a deceased brother, though under the Statute of Distributions they would take *per stirpes*, by express bequest they take *per capita*." The rule in England is thus stated in Hawkins on Wills, *113: "Under a devise or bequest to the children of A. and of B. as tenants in common, *prima facie* the children take *per capita*, not *per stirpes*. The rule is the same when the gift is to A. and the children of B."

In Minter's Appeal (4 Wr. 111), the words were: "The balance and residue of my estate I order and direct my executors to divide equally, share and share alike, amongst the children of my brother, Adam Minter, deceased, and the children of my brother, Martin G. Minter, deceased, and to my sister, Barbara Saval. It is my will, that said Barbara and the children of said brothers, Adam Minter and Martin G. Minter, shall have the residue of my estate, share and share alike." Under this clause the Court directed a distribution *per stirpes*.

In Risk's Appeal (2 P. F. S. 269), the words were: "I will and direct that my real estate shall be divided (as it now is) equally between my beloved children, George, Joseph, and the children of Catharine. . . . . The residue shall be equally divided as aforesaid between my beloved children, George and Joseph, and the children of my beloved daughter Catharine." It was decided that the children of Catharine took *per stirpes*.

The basis from which these conclusions were reached seems to be this. The Statute of Distributions regulates succession and participation, when none is determined by a will, and if, in a will, the testator makes a doubtful determination, the doubt will be solved in favor of the mode pointed out by the statute, which is the only rule to fall back upon. This canon of construction is further aided by the rule that when the testator designates the objects of his gift by their relationship to a living ancestor, they take equal shares *per capita*. In the absence of such designation, differences of degrees in relationship to the testator may be considered. Thus it is said in Minter's Appeal, "if he meant that his nephews should be each equal to his sisters, the word *each* would have made his meaning clear" So in Risk's Appeal, it is said, "no motive is discernible for making each of the grandchildren equal with his own children, all of whom he repeatedly calls 'beloved.'"

In Dible's Appeal (2 WEEKLY NOTES, 236), the words were, "the balance to be equally divided amongst my three last-named sons, my daughters, and grandchildren within mentioned, share and share alike."

The Court distinguish Minter's Appeal (*supra*), saying: "It is unlike the bequest in Minter's Appeal. There the words 'share and share alike,' preceded the entire bequest; here they follow, and being separated from the words 'equally divided,' and carried to the end of the bequest, tend to show an intent to qualify each legacy by referring to the persons preceding. In Minter's Appeal the intent to bequeath by classes was evidenced by separating each one successively by the copulative conjunction 'and.' Here it is otherwise, and all are thrown into a single expression, as if it were at one breath."

It may be observed that in Minter's Appeal the testatrix bestowed her bounty in two different testamentary expressions. The first is remarked upon in Dible's Appeal. The second follows the first and *closes* with the words "share and share alike." Each was undoubtedly designed to make the same dispositions. It may therefore be concluded that the intention of the testatrix, whatever it was, is not revealed by the words "share and share alike," since they precede the first bequest and close the second. Nor are we aided by the significance of the use or disuse of "and," for it occurs in the expression of Mr. Girard's will, which we are now interpreting.

If these remarks are reasonable, we do not find Dible's Appeal a guide. We are therefore left to the principles underlying the other cases cited. Considering then that Caroline Lallemand and the children of Mrs. Hemphill were all in the same degree of relationship to the testator, and discovering nothing in the will which indicates that he meant to be more bountiful to her than to them, we conclude that he meant that she and they should share equally. But who are "they" whom the testator contemplated. The law says those living at his death when the gift is immediate; those born and to be born when a life-interest precedes. But we do not find any case in which after-born children are let in, except as against their own brothers and sisters. We therefore think that the administratrix of Caroline Lallemand is entitled to receive one-eighth of the fund, and that the remaining seven-eighths should be equally divided between the four living children of Mrs. Hemphill and the representatives of the five who are deceased, or seven-seventy-secondths to each.

The first exception is dismissed. The second is disposed of by what is said above.

Opinion by DWIGHT, J.

[*Cf.* John's Est., 2 WEEKLY NOTES, 632; Bittner's Appeal, *ante*, 70.]

Digitized by Google

Weekly Notes of Cases.

Vol. III.] *THURSDAY, NOV.* 30, 1876. [No. 9.

Supreme Court.

May, '76. May 17 & 18.

Penna. R. R. Co. v. Morgan.

Railroad Company—Negligence—Whether failure to stop a train on seeing a child on the track in front of it is negligence—When such failure to stop is excusable.

A failure to stop a train, when a child is seen on the track in front thereof, is not necessarily and in all cases negligence on the part of the railway employés.

Where a child, on the track in front of an approaching train, evidently saw its danger in time to escape, and attempted to run off the track:

***Held*, that the engineer had a right to presume that it would succeed, and to run his train accordingly:**

***Held*, further, that where the child, in such case, was prevented from escaping by an unavoidable accident, occurring too late for the engineer to stop his train, the railroad company was not responsible for running over it.**

Error to the Common Pleas of Blair County.

Case by Eliza Morgan, a minor, by her next friend, Martin Morgan, against the Pennsylvania Railroad Co., to recover damages for injuries caused by a train on the said railroad running over and injuring the plaintiff.

The evidence offered at the trial was to the following effect: On October 15, 1874, a distributing or repair train was backing out from Hollidaysburg on the Morrison's Cove Branch of the Pennsylvania Railroad, to a point a little southeast of the town, where some railroad repairs were in progress. The train consisted of a cabin car in front, ten cars following, and an engine pushing from behind. The fireman and flagman were stationed on the cabin car as a look-out. There was a conflict in the evidence as to the speed of the train, the train hands all testifying that it did not exceed five or six miles per hour, while several witnesses for the prosecution said that the speed was unusually and alarmingly rapid. The fireman testified that when about 520 feet from a private road, just within the borough limits, in a very sparsely settled portion of the town, he saw two children, a boy and a girl, on the track just at the crossing of this road; that when not less than 163 feet from the spot, he called to them; that they immediately started to run off the track, the boy succeeding in escaping, but the little girl, the plaintiff, caught her foot in some way; that as soon as he perceived this, he made every exertion to stop the train, but was unable to do so before the first two cars had passed the crossing. Mrs. Morgan, the child's mother, and a Mrs. Meinthal, testified that on seeing the child's danger and hearing her cries, they ran, one sixty, the other a hundred feet, to her aid, made three or four ineffectual attempts to extricate her foot, and then, while the train was passing, held her body back, in order that nothing but her foot might be injured. The foot was not exactly run over, but forced out from the shoe by the wheel of the first car and much lacerated. Medical witnesses testified that the ankle-joint was permanently stiffened. The evidence was conflicting as to precisely where the child's foot was caught, Mrs. Morgan saying that it was in a hole in the plank of the crossing just *outside* of the track, while other witnesses testified that it was between the rail and the inner plank of the crossing. The plaintiff was about five years old at the time of the accident.

The defendants submitted, *inter alia*, the following points: (2) The fireman, having, when the car was within about 167 feet of the child, warned her by hallooing at her to get off the track, and she then having started to move off, he was entitled to the presumption that she would get away from the track in time to avoid the danger; and under these circumstances, there was no duty imposed upon the men in charge of the train to make an effort to stop, and the failure to do so was not negligence. They were not negligent in failing to use precaution where they had no reason to apprehend danger to the child. *Answer.* As a whole, we decline to affirm this point. (3) The child's foot getting fast, as it did, was an unforeseen contingency, which the defendants could not be expected to anticipate or guard against; and if the jury believe the child would have got out of the way of the train but for that accident, the defendants are not responsible for the injury. *Answer.* We decline to affirm this point.

Dean, P. J., said in his charge: "The Supreme Court, in one of the late cases,* say in reference to the degree of care which is to be exercised under such circumstances: 'The degree of care required of the servants of the company in such a case, is in some measure dependent upon the capacity of the injured party. If an adult should place himself on the railroad where he has no right to be, but where the company is entitled to a clear track and the benefit of the presumption that it will not be obstructed, and he should be run down, the company would be liable only for wilful injury—that is, for wilfully running the cars over him—or for gross or wanton negligence. But, if a child of tender

* Phila. & Reading R. R. Co. v. Spearen, 11 Wr. 300.

Digitized by Google

years should do so and suffer injury, the company would be liable for want of ordinary care. While in the case of an adult they would be liable only for wilfully running over the man, or for gross negligence amounting to wantonness and recklessness in running over the adult, yet in the case of the child they are liable for want of ordinary care. The principle may be illustrated thus: If the engineer saw the adult in time to stop his train, but the train being in full view, and nothing to indicate to him a want of consciousness of its approach, he would not be bound to stop his train. Having the right to a clear track, he would be entitled to the presumption that the trespasser would remove from it in time to avoid the danger; or, if he thought the person did not notice the approaching train, it would be sufficient to whistle to attract his attention without stopping. But if, instead of the adult, it were a little child upon the track, it would be the duty of the engineer to stop his train upon seeing it. The change of circumstances from the possession of capacity in the trespasser to avoid the danger, to a want of it, would create a corresponding change of duty in the engineer. In the former case, the adult, concurring in the negligence causing the disaster, is without remedy; in the latter, the child, not concurring, from a want of capacity, the want of ordinary care in the engineer would create liability. But if the train were upon the child before it could be seen, or if it suddenly and unexpectedly threw itself in the way of the engine, the engineer being incapable of exercising the measure of ordinary care to save it, the child would be without remedy, for the company's use of its track is lawful, and the presence of the child upon the track is unlawful.

"'There is no absolute rule as to negligence to cover all cases. That which is negligence in one case, by a change of circumstances will become ordinary care in another, or gross negligence in a third. It is a relative term depending upon the circumstances, and, therefore, is always a question for the jury upon the evidence, but guided by proper instructions from the Court.'

"Those in charge of this train did not stop it before it reached the crossing.

"[The Supreme Court say—and the difference in the facts between that case and this would not materially affect the ruling—'where a child is upon the track, they are bound to stop upon seeing it, because they have no right to assume that the child knows its danger, or has the capacity to apprehend danger, or has the capacity to flee from it, as in the case of an adult.'] Of course, if they had stopped it before it reached the crossing, the child would not have been injured. In failing to stop the train before it reached the child, did they fail to exercise that ordinary care, which, under the circumstances, a man of ordinary prudence and caution, conducting a business of that kind, at that particular place, and surrounded by the particular circumstances, should have exercised? . . .

["It was the duty of those on the train, on seeing the child or children of this age upon a crossing, to stop the train until the children either ran off, or until those in charge of the train got off and removed them. Children of such tender years are not to be expected to have the capacity to apprehend or avoid danger, and it was the duty of those on the train to get off and remove them, if they could get them off the crossing in no other way.] . .

"To some extent, in defendants' view of the facts, the reason for imposing upon those in charge of the train a different course of conduct, than when an adult is on the track, seems to fail; [it occurs to us, however, that, even if this be a correct view of the evidence, as taken by defendant, it does not follow from the facts necessarily that there was an absence of negligence on the part of defendant. Was not the failure of the child to get from danger owing to its want of care in avoiding the crevice between the plank and the rail; or, was not its foot caught and there held because of its physical incapacity to remove it? Are not these facts for your consideration, assuming them to be facts? Would not an adult have avoided sticking his foot between the plank and the rail, or, having got it there, would he not with the exercise of more physical effort have extricated it instantly, in view of the approaching danger, even if he had left his boot in the crevice, or to some extent injured his foot? Does not the reason to a greater or less extent apply, notwithstanding the forcible argument which is urged by defendant, in this case, in view of the evidence as the defendant claims it to be?

"If so, if the child either had not the capacity to avoid the dangerous crevice, or if it had not the physical capacity to extricate it, after it was caught, then it comes back to the same question as in the case where the child had been run over without having attempted to escape:] Was there ordinary care in defendant in not stopping immediately on seeing a child of tender years upon a crossing which they were about to cross or towards which they were running? Was it ordinary care in them to continue to approach that crossing with children upon it, and seeing them, at a distance of more than five hundred feet?"

Verdict for plaintiff for $2000, and judgment thereon. The defendant took this writ, assign-

Digitized by Google

ing for error, *inter alia*, the refusal of the Court to affirm the points given above, and the portions of the charge quoted in brackets.

D. J. Neff, for plaintiff in error. When the fireman called to the child to apprise her of her danger, and she thereupon attempted to run off the track, he had the right to suppose that she would succeed. The catching of her foot was an accident impossible to foresee, for the results of which he was not responsible.

Bannon *v.* B. & O. R. R. Co., 24 Md. 108.
P. & R. R. Co. *v.* Spearen, 11 Wr. 304.
Pierce on American R. R. Law, 280.
Chic., Qu. & Bur. R. R Co. *v.* Stumps, 55 Ill. 367.

S. S. Blair, contra, had not his paper-book ready when the case was called, and it was not received.

Oct. 10. THE COURT. The charge of the Judge in this case is so generally fair and accurate we feel some difficulty in coming to a conclusion which results in a reversal. But by inadvertence, or possibly a slight confusion, he seems to have fallen into an error, which excluded the defence from its only probable ground of success. We concur in the view of the Judge, that the foot of the plaintiff must have been caught in the space left for the flange of the car wheels, between the rail and the inner plank of the crossing; and therefore that the injury arose from no defect in the construction of the crossing.

The plaintiff's case evidently depended on the second branch of alleged negligence, to wit, in running the train at an immoderate rate of speed in disregard of the place and the circumstances of the occurrence. The Judge rightly charged that negligence was a question for the jury to be decided upon the circumstances in evidence. His error was a substantial denial of this principle in a subsequent part of the charge. The witnesses for the defendants testified that the speed of the train was not too rapid, but only at the rate of about five or six miles an hour—that the train was fully under control, the hands in their proper places, that the train could be stopped in a space less than its own length, and in fact was stopped before the engine, at the rear end of the train, had reached the crossing—that when the children were seen on the crossing the flagman on the front car hallooed to them and they started to run off—the boy running straight across the track, and the girl obliquely—that to every appearance they knew their danger, and were likely to avoid it, the boy escaping entirely, and the girl (the plaintiff) reaching the rail, and apparently passing off.

In a moment or two the flagman saw that the child was fast, and heard her hallooing, and gave the signal for stopping immediately to the engineer, who reversed his engine, and whistled down brakes. At this time the front car was between one hundred and one hundred and twenty feet from the crossing. Mrs. Morgan, the mother of the child, hearing the cries of the child, and her neighbor, Mrs. Meinthal, ran a distance of sixty feet, and Mrs. Meinthal, a distance of one hundred feet to the child, and made three or four attempts to extricate the foot, before the cars reached the crossing, and the mother then held her body out from the track while the wheel pushed the foot out, leaving the shoe in the crevice. The wheels were sliding under the influence of the brake, otherwise in turning all the evidence shows that the foot would have been cut off. These facts are also strong evidence of the slow speed of the train, Mrs. Meinthal having run nearly as far as the train had to go, when the signal for down brakes was given. Under these circumstances the defendants contended that no duty lay upon those having charge of the train, to come to a full stop, until it was discovered that the little girl's foot was caught, or for some reason she could not escape, as appearances had indicated she would, and then that everything possible was done to avoid the injury. The weight of this argument was felt by the Judge, who said—"to some extent in defendants' view of the facts, the reason for imposing upon those in charge of the train, a different course of conduct than when an adult is on the track, seems to fail." He had stated the duty as to an adult in these words: "if the engineer saw the adult in time to stop his train, but the train being in full view, and nothing to indicate to him a want of consciousness of its approach, he would not be bound to stop his train. Having the right to a clear track, he would be entitled to the presumption that the trespasser would remove from it in time to avoid the danger; or if he thought the person did not notice the approaching train, it would be sufficient to whistle to attract his attention, without stopping." But the Judge, referring to the view above stated, added, "that even if this be a correct view of the evidence as taken by the defendant, it does not follow necessarily that there was an absence of negligence on the part of the defendant." He then puts these questions: "Was not the failure of the child to get from danger owing to its want of care in avoiding the crevice between the plank and the rail; or was not its foot caught and held there, because of its physical incapacity to remove it?" Referring these questions to the jury, he then comes to the instruction which it seems to us is faulty. "If so (he says), if the child either had not the capacity to avoid the dangerous crevice, or if it had not the physical capacity to extricate it, after it was caught, then it comes back to the same question as in the case where the child

Digitized by Google

had been run over without having attempted to escape." That case was stated in this precedent instruction: "Where a child is upon the track, they are bound to stop on seeing it, because they have no right to assume that the child knows its danger, or has the capacity to apprehend danger, or to flee from it, as in case of an adult." The case as thus put by the Judge was therefore just as if those in charge of the train had not been misled by the attempt of the children to escape, and the actual escape of one of them. Its effect was wholly to exclude the defence, notwithstanding the jury was bound under the evidence to find that there was every reason to believe that the children would be off the crossing before the train would reach it, and that the girl's escape was frustrated by a mere accident, and that everything possible had been done to avert the injury as soon as her true situation was discovered, and that in all else, speed, management, and control of the train, there was no fault on the part of the company. The quotations given from the charge were taken from the case of Phila. & Reading R. R. Co. *v.* Spearen (11 Wright, 300). But that case states no inexorable rule, that a train must stop under all circumstances, when a child is seen upon the track; on the contrary, if its appearance there is so sudden and unexpected that the engineer is incapable of exercising the necessary measure of care to save it, the child is without remedy. In principle this is not different from a case where a sudden change of circumstances causes an accident to a child, where immediately before there was no reason to believe an injury would ensue. The instruction of the learned Judge cannot be sustained unless we hold that in no case and under no circumstances will a railroad company be excused, in the rightful exercise of its right of passage on its own track, unless it stops its train whenever a child is seen upon the track. A principle so general would include even the case of a child led by the hand by its adult nurse. The jury then would not determine the question of negligence, but the law would determine it for them. But clearly it is for the jury to say whether it is negligence not to stop, even in the case of a child; for the question depends on a proper view of all the facts.

The case did not go to the jury on the question of reasonable speed under the circumstances of time, place, person, etc.—but under this instruction the jury was bound to find negligence in the company, because the train was not stopped before it reached the crossing.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by AGNEW, C. J. WILLIAMS, J, absent.

[See Penna. R. R. Co. *v.* Lewis, 1 WEEKLY NOTES, 550.]

Jan. '76. 247. June 8–9.

Jackson to use of Hoffa v. Morter.

Setting aside sheriff's sale after acknowledgment of deed—When within power of the Court—Misrepresentations by purchaser at sale—Fraud in procuring waiver of inquisition—Estoppel by matter in pais against setting up such fraud.

Fraudulent representations made by a purchaser at sheriff's sale, whereby others are dissuaded from bidding, constitute sufficient ground for setting the sale aside, even after the acknowledgment of the sheriff's deed, provided the application is made in time.

A sheriff's deed was acknowledged at September Term, 1874. A rule to open the judgment and set aside the sale was taken in December, 1874, and discharged in February, 1875. A second rule to set aside the sale and strike off the acknowledgment was granted, on different grounds, at March Term, 1875. In the absence of any evidence of a delivery of the deed to the purchaser, prior to the granting of the latter rule:

Held, That the application was not too late.

The defendant in the execution, from whom a waiver of inquisition had been fraudulently obtained, was present at the sheriff's sale thereunder, but made no announcement of the manner in which the waiver had been obtained.

Held, That he was thereby estopped from alleging the fraud as a ground for setting aside the sale.

The authority of Hope *v.* Everhart, 20 Sm. 231, doubted.

Error to Common Pleas of Sullivan County.

Two judgments were entered by the prothonotary, without the appearance of an attorney, in favor of Jackson Brothers and George D. Jackson & Co., respectively, against Volentine Morter, upon two judgment notes, of which the following are copies:—

$70.85. Dushore, Pa., Dec. 27, 1871.

One day after date, for value received, I promise to pay to Jackson Brothers, or bearer, the sum of seventy dollars and eighty-five cents, with interest, without defalcation or stay of execution; and I do hereby confess judgment for the same, with costs of suit, and waive the right of inquisition or appeal and all the exemption acts of the State of Pennsylvania.

Witness my hand and seal.

his
Witness: VOLENTINE X MORTER, [SEAL.]
HUGH PRISLIN. mark

$112.58. Dushore, Sullivan Co., Pa., June 23, 1874.

One day after date I promise to pay to George D. Jackson & Co., or bearer, one hundred and twelve and 58-100 dollars, with interest, for value received; and I do hereby confess judgment for the above sum, with costs, waiving the right of inquisition, stay of execution, and all exemption laws.

Witness my hand and seal.

his
VOLENTINE X MORTER, [SEAL.]
Witness: mark
LEVANAH MORTER.

These judgments having been assigned to Jacob

Digitized by Google

Hoffa, executions were by him issued thereon to September Term, 1874, by virtue of which, or of one of which, certain real estate belonging to the defendant, was levied upon and sold by the sheriff, without an inquisition, to Jacob Hoffa, the equitable plaintiff, for $545. This sale took place on September 22, 1874, and upon the following day the deed therefor was duly acknowledged by the sheriff in open Court. The writs of *fi. fa.* under which the property was sold were not returned to the prothonotary's office for some time after the acknowledgment of the deed, contrary to a rule of the Court which required that the same should be so returned before the acknowledgment of the sheriff's deed.

In December, 1874, the defendant obtained a rule to show cause why the judgments should not be opened, the defendant be let in to a defence, and the sale set aside. This rule was discharged by the Court, without argument, on February 23, 1875.

On the 30th of March following a rule was granted on the plaintiff to show cause why the sheriff's sale should not be set aside, and the acknowledgment of the sheriff's deed be stricken off, upon the ground that Morter, the defendant in the executions, as alleged in his affidavit upon which the rule was granted, did not intend to sign away the right of inquisition, that his signature to the note was procured by fraud, and that the purchaser at sheriff's sale had, by collusion and fraud, obtained the property at much less than its real value. Under this rule depositions were taken. Morter, the defendant, testified that he could neither read nor write, and had executed the notes by making his marks, without their being read to him, or his attention being in any way called to the waiver of inquisition contained therein; and that he would not have signed them had he been aware that he was parting with any of his legal rights. His testimony, that the notes were not read to him was corroborated by the witnesses present at their execution, and was not rebutted by the plaintiff.

It was proved that Jacob Hoffa, the sheriff's vendee, had made assertions to various persons, prior to and at the time of the sale, to the effect that the purchaser of the property would have to keep the defendant's father, who resided thereon, for life, and also pay to the defendant's sister $100. Several witnesses testified that they refrained from bidding at the sale by reason of this statement, and one of them testified that he had bid $540 ($5 less than the price which the property was bought for by Hoffa), and would have bid higher had he not believed Hoffa's statement. Hoffa denied the assertion attributed to him, but otherwise failed to contradict the defendant's evidence. It was shown that Morter was present at the sale, and had made no announcement as to how the waiver was obtained. It was also proved that he knew that Hoffa had purchased the property within a few minutes thereafter. There was no evidence as to the date of delivery of sheriff's deed to Hoffa.

After argument, the Court (INGHAM, P. J.) made the rule absolute, holding (1) That the process under which the rule was made not having been returned to the prothonotary's office, in accordance with the rule of Court, the acknowledgment was irregular and should be stricken off. (2) After reviewing the evidence the Court said: "We cannot avoid the conclusion that the note was not read to the maker when he signed it, and only a partial statement of its contents made to him, and that the important clause, waiving the right of inquisition, was concealed from him. A waiver so obtained must be regarded as void." (3) That the purchaser having "designed a fraud, by using the falsehood imputed to him, and gained his object in purchasing the land by closing the mouth of his competitor, was guilty of such fraud as vitiated the sale."

Plaintiff excepted to this opinion and ruling of the Court, and took this writ, assigning for error, *inter alia*, the opinion and judgment of the Court as above set forth.

De Witt (with him *Dunham*, *Thompson*, and *Maynard*), for the plaintiff in error.

The acknowledgment of the sheriff's deed in open Court cured the irregularity occasioned by the failure of the sheriff to return the execution within the time prescribed by the rule of Court.

Shields *v.* Miltenberger, 2 Har. 76.

Under Hageman *v.* Salisbury (24 Sm. 280) the waiver of inquisition is part of the record, and defendant is estopped thereby from setting up that he did not intend to make it. The defendant's presence at the sale, with the knowledge of the waiver and of the means by which it was obtained, without announcing the same, estops him from now alleging it in avoidance of the sale.

The Court below had no power to make the rule absolute. The evidence being conflicting as to whether there was fraud at the sale and in obtaining the waiver, an issue should have been awarded to determine the same.

A. Logan Grim, contra, contended that Miltenberger *v.* Shields, *supra*, applied only to irregularities occurring up to the time of sale, and not to those existing at the time of the acknowledgment.

A waiver of inquisition, in a judgment entered directly by the prothonotary, without the agency of an attorney, under the Act of 24th February, 1806, is no part of the record, and evidence is admissible to prove fraud in obtaining it.

Buehler *v.* Rogers, 18 Sm. 9.
Hope *v.* Everhart, 20 Sm. 231.

Hageman *v.* Salisbury, *supra*, cited by plain-

Digitized by Google

tiff in error, does not overrule Hope *v.* Everhart, but carefully distinguishes it.

The misrepresentations made by the sheriff's vendee at and before the sale, as found by the Court below from the evidence, constituted fraud on the part of the purchaser, and the sale was therefore properly set aside.

Oct. 9. THE COURT. All the assignments of error relate to the power of the Court to strike off the acknowledgment of a sheriff's deed, and set aside the sale. That it possesses the power under some circumstances, cannot be questioned. It naturally flows from the right to supervise an act of its officer, and to amend its own records. On what grounds, and within what time the power may be exercised, presents another question. That the Court may, for sufficient cause, set aside the sale before the deed has been acknowledged, is very clear. That it may exercise a like power, after acknowledgment, but at the same term, appears to be conceded by the authorities. Whether it may, after the term at which the deed was acknowledged, and after being duly recorded and delivered, does not appear to have been distinctly ruled by this Court. In fact, the cases declaring the legal effect to be given to the acknowledgment of a sheriff's deed, are not in entire harmony. This is shown by Mr. Justice BELL, in Shields *v.* Miltenberger (2 Harris, 76). He therein reviews the authorities and follows the case of Crowell *v.* Meconkey (5 Barr, 168). It was there held that the acknowledgment not only covered all irregularities in the process and sale, but that it had a curative power operating beyond such defects. In McFee *v.* Harris (1 Casey, 102), it was said "after acknowledgment of the sheriff's deed in open Court, the title of the sheriff's vendee cannot be affected by mere irregularities, however gross. Nothing but fraud in the sale, or want of authority to sell, can defeat this title." In Crowell *v.* Meconkey, *supra*, and in Mitchell *v.* Freedly (10 Barr, 208), it was held that where a sheriff's sale was confirmed without objection, and the proceeds had been applied to the debts of the defendant, it had the same effect as if paid to the debtor, and would estop him from denying the validity of the sale. So in Sprogg *v.* Shriver (1 Casey, 282), it was held that where real estate had been sold by the sheriff without a regular condemnation or waiver of inquisition, the defendant must object within a reasonable time, and such reasonable time was before the confirmation of the sale and the acknowledgment of the sheriff's deed to the purchaser. These cases, however, were actions of ejectment. The question was as to the validity of the title acquired by the purchaser at sheriff's sale. They did not necessarily determine the causes for which the Court might set aside a sheriff's sale; nor the time within which the equitable powers of the Court may thus be exercised.

The decision of a Court of Common Pleas confirming a sheriff's sale and ordering a sheriff's deed to be acknowledged, is not the subject of a writ of error. It is an act which belongs to the discretionary powers of the court below. (Rees *v.* Berryhill, 1 Watts, 263; Sloan's Case, 8 Watts, 194.) Where, however, the title of the purchaser has been fully confirmed, where the term has passed, and the deed has been recorded and delivered, a different case is presented. All irregularities and minor defects have been waived or cured. If want of power to sell, or gross fraud in the sale, is alleged, the purchaser has a right of trial by jury. In Chadwick *v.* Patterson (2 Phil. Rep. 275), Mr. Justice SHARSWOOD said: "It is exceedingly doubtful whether the Court has any power over a sheriff's deed after it has been acknowledged. We have vacated such an acknowledgment at the instance of the purchaser, where he has produced the deed itself and delivered it up to be filed and cancelled." In Stephens *v.* Stephens (1 Phil. Rep. 108), it was held, in an opinion given by Mr. Justice LOWRIE, that it is no objection to the setting aside a sheriff's sale, where the deed is still in the hands of the sheriff, that a term has elapsed since the acknowledgment of the deed. While these are not the decisions of this Court, yet the learning and experience of the judges who delivered the opinions, give great weight to their conclusions. Much must depend on whether the sale or acknowledgment was made through fraud, and with what promptness the application is made, to avoid the sale.

In this case the deed was acknowledged at the September term. On the 30th of March following, the rule was granted, to show cause why the acknowledgment should not be stricken off and the sheriff's sale be set aside. The December and February terms had intervened. It is true at the December term a rule had been granted to show cause why the judgment should not be opened, the defendant let in to a defence, and the sale be set aside. At the February term that rule had been discharged. The last rule was no continuation of the former, although it covered a part of the same ground. It is not shown to have been based on the same alleged facts. We have not been furnished with a copy of either affidavit on which a rule was granted. The opinion of the Court, and the depositions, show the grounds on which the acknowledgment was vacated, and the sale set aside. One is for alleged fraud in procuring the waiver of inquisition in the judgment note; the other for fraudulent representations which deterred persons from bidding at the sheriff's sale. Neither opinion nor depositions show that the deed had been delivered before the rule was granted. The purchaser appears to have had possession of it, when the depositions were afterwards taken. In his paper-book, the plaintiff

Digitized by Google

claims a previous delivery. This is expressly denied by the defendant. In the absence of all proof we cannot assume a previous delivery.

We will not review the conclusion of the Court as to the weight of the evidence, but will look at it to ascertain the ground of their action. Morter swears, that he was present at the sheriff's sale, that within five or ten minutes after the sale he knew it was purchased by Hoffa. The record showed the waiver of inquisition. Morter knew at the time of the sale, all the facts bearing on the execution of the note in which the inquisition was waived; yet he gave no notice; he made no objection; he suffered the sale to proceed. He had full opportunity then to object to the proceedings; and again, before the deed was acknowledged. He remained silent when he ought to have spoken. He is therefore now estopped from setting up in avoidance of the sale, the alleged fraud in the execution of the note. The authority of Hope *v.* Everhart (20 P. F. Smith, 234), relied on by the defendant in error, was very much shaken, if not substantially overruled, by the case of Hageman *et al.* *v.* Salisbury (24 *Idem.* 280). Yet if it had not been, it in nowise presents the application of the doctrine of estoppel. The learned Judge therefore erred, in holding that this portion of the case entitled the defendant to relief.

The remaining ground is the alleged fraudulent representations of the plaintiff, whereby persons were dissuaded from bidding. This allegation was controverted, yet the Court found it to be true. The averment thereof gave the Court a right to inquire into the fact. We will not review the correctness of the conclusion; we assume it to be correct. If correct, it was undoubtedly a sufficient ground for setting aside the sale, if the application was made in time. Was it so made? The record stops with the bare acknowledgment of the deed. It is not shown to have been either recorded or delivered; nor is it shown that Morter did not act with promptness, after obtaining a knowledge of the facts preventing a fair sale. When the rule was granted, the title of the purchaser had not been perfected. The deed remained in the hands of the sheriff. Such being the case, we cannot say that it was too late for the Court to inquire into the legality of the sale. In so inquiring, it might consider the fact that the acknowledgment had been taken in violation of its rule. The mere fact, however, that the writ had not been returned at the time, is insufficient to destroy the validity of the sale. That omission may be cured by an acknowledgment of the deed in open Court, reciting a sale under the writ. The correct and better practice undoubtedly requires a return of the writ on which the sale was made; yet where the power of sale exists, and the sheriff has set forth in his deed the manner in which he has executed the writ, and the Court accepts the acknowledgment and confirms the sale, the title passes to the purchaser. (Gibson *et al.* *v.* Winslow, 2 Wright, 49.) We see no sufficient ground to reverse the judgment.

Judgment affirmed.

Opinion by MERCUR, J.

[In St. Bartholomew's Church *v.* Bishop Wood (2 WEEKLY NOTES, 254), a sheriff's sale of realty was had under a *fi. fa.* on which a fraudulent waiver of inquisition had been endorsed without authority from the owner, a corporation, and a sheriff's deed was acknowledged and delivered. The sheriff's vendee then sold the property to a *bona fide* purchaser for value, without notice. It was held, in an ejectment against the latter by the former owner, that the defendant was protected in his title. But the Court said (*per* WOODWARD, J.): "Even after the acknowledgment of the sheriff's deed, if the first purchaser had retained the property, it is probable that the hands of the Court would have been laid upon the process, on the ground that irregularity so gross would be held to amount to fraud. . . . . It is true that the acknowledgment by the sheriff of a deed executed by him is not such *res adjudicata* as precludes an inquiry into the legality of the proceedings by which the sale was made. (Bradee *v.* Brownfield, 2 W. & S. 271.) And the absence of authority, or the presence of fraud, utterly frustrates the operation of a sheriff's sale as a means of transmission of title, and may be insisted on after acknowledgment. (Shields *v.* Miltenberger, 2 Har. 76.) While Spragg *v.* Shriver (1 Cas. 284), might justify some doubt on the question, in the case of a sale under a *venditioni exponas*, it is clear that an acknowledgment will not cure the want of a sufficient inquisition, or a waiver of it, in the case of a sale under a *fieri facias.* (Gardner *v.* Sisk, 4 P. F. Smith, 506.)"

In Leeds *v.* Artzt (2 WEEKLY NOTES, 507), the Court of C. P. No. 3, of Phila. Co., after acknowledgment of a sheriff's deed, set aside the sale (made under a *lev. fa.*), it being admitted, however, that no title passed, the deed operating only as a cloud on the title. The same Court, in Paul *v.* Lynch (Id. 478), refused to strike off a rule to open judgment and set aside a sheriff's sale (under a *lev. fa.*), which rule had been granted after acknowledgment of the deed, on the ground of a conspiracy to defraud; LYND, J., remarking, however, "Your title to the real estate cannot be shaken in this proceeding. We have no longer control over the sheriff's sale, but it may be that depositions would show that the mortgage had been paid, and you would have to make restitution." And on a subsequent hearing of the rule to open judgment and set aside the sale, on the ground of after-discovered evidence that a portion of the debt had been paid before the sale (Id. 587), the Court opened the judgment, but refused to set aside the sale.

On the question of fraud in the execution of the waiver of inquisition by a defendant who could not read, and to whom it was not read, it was said *per* GIBSON, C. J., in Greenfield's Estate (2 Harris, 496), and affirmed in Penna. R. R. Co. *v.* Shay (*ante*, 45), that "if a party who can read will not read a deed put before him for execution; or if, being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection either in equity or at law."]

Digitized by Google

Jan. 76, 247½. **Hoffa's Appeal.** June 8-9.

Errors and appeals—Practice.

An appeal does not lie from the judgment of a Court setting aside a sheriff's sale.

Certiorari to Common Pleas of Sullivan Co.

This was an appeal by Jacob Hoffa from an order of the Court below, making absolute a rule entered by the defendant to show cause why the acknowledgment of a sheriff's deed should not be stricken off, and the sheriff's sale set aside. The facts are the same as those in Jackson to use of Hoffa *v.* Morter, reported *supra.*

De Witt, for appellant.

Grim, for appellee.

Oct. 9. THE COURT. As an appeal does not lie from the judgment of the Court setting aside a sheriff's sale, this appeal is dismissed.

Opinion by MERCUR, J.

[See Laird *v.* McCarter, 2 WEEKLY NOTES, 213.]

May, '76, 85. May 17.

Borie, Trustee, v. Crissman, Adm'r, et al.

Rent, apportionment of—Rent in kind—Emblements—Stat. 11, *Geo. II., ch.* 19—*Act of* 24 *Feb.* 1834.

Where a life-tenant leased a farm, reserving rent in kind, and died during the term:

Held **(reversing the judgment of the Court below), that the rent accruing but not due until after the death of the life-tenant, should, under the Act of 24 Feb. 1834, be apportioned between the administrator of the life-tenant and the remainder-man, the former receiving the proportion which had accrued at the death of the life-tenant.**

Error to the Common Pleas of Blair County.

This was an amicable action of debt on a bond, brought by C. L. Borie, trustee for Lewis & Trotter, against F. Crissman, administrator of Catherine Crissman, and J. B. Westley.

The following facts were submitted, in a case-stated, to the Court, the right to sue out a writ of error being reserved to each party: Daniel Crissman devised his real estate, a farm in Tyrone township, Huntingdon County, to his wife, Catherine Crissman, for life, with remainder to his children. Crissman died in 1833, and his wife thereupon entered into possession of the land. During her lifetime the tenants in remainder sold all their interest to the plaintiff in this action. On December 20, 1873, Mrs. Crissman leased the farm to G. W. Kyper, for one year from April 1, 1874, the consideration being, *inter alia*, two-thirds of all spring grain and one-third of all fall grain raised on the farm, to be delivered at Altoona mills or Tyrone mills. Mrs. Crissman died September 18, 1874, and the landlord's share of the crops for the year (all sown before her death, but the full crop not harvested until the next summer) was delivered to her administrator, F. Crissman, he binding himself to the plaintiff by bond, with J. B. Westley as surety, to deliver up the grain, if it should be adjudged to belong to the plaintiff. This action of debt was brought on the bond, to bring these facts before the Court.

Judgment for the defendants on the case-stated, to which the plaintiff took this writ, assigning for error the above mentioned action of the Court.

R. M. Speer (with him *E. S. McMurtrie*), for plaintiff in error.

The grain in the administrator's hands is rent, not emblements, and he is entitled to only so much thereof as had accrued at the death of Mrs. Crissman. The rent not then due should go to the plaintiff, as an incident to the reversion.

1 Parson's on Contracts, 516.
Green *v.* Osborn, 17 S. & R. 171.
Ex parte Smyth, 1 Swanst. 337.
Williams on Real Property, 58.
2 Sharswood's Blackstone, 122.
3 Kent's Com. 614.
Blight *v.* Blight, 1 Sm. 420.
Act February 24, 1834, Purd. Dig. 415.
Smith *v.* Wistar, 5 Phila. 145.
Henderson *v.* Boyer, 8 Wr. 220.

D. J. Neff (with him *R. A. Clark*), contra.

Kyper was a *cropper* (*i. e.* a farm laborer paid by a share of the crops) rather than a tenant, and the relation between him and Mrs. Crissman was that of tenants in common. The grain in controversy was therefore emblements, and was rightly adjudged to the administrator.

Fry *v.* Jones, 2 Rawle, 12.
Adams *v.* McKesson's Ex'rs, 3 Sm. 83.
Taylor's Landlord and Tenant, 152.

Oct. 9. THE COURT. The rent reserved in the lease of Mrs. Crissman to G. W. Kyper, was in kind, the grain and hay to be delivered at Altoona after they were harvested and prepared for market. At that time, then, was the rent due and not before. (Lamberton *v.* Stouffer, 5 Sm 284.) In the mean time, before the grain was harvested and ready for delivery, Mrs. Crissman, the life tenant, died. Under these circumstances, were the rule of common law still in force, this rent would fall to the reversion. (2 Blk. Com. 175-6.) Indeed, the subtenant might have abandoned the premises and paid rent to no one. To remedy this evil the statute of 11 Geo. II., ch. 19, sec. 15, provided that the executor of the life tenant should be entitled to recover a ratable proportion of the rent accruing between the last day of payment and the death of the lessor. (Ibid. 124.) So our Act of 1834, secs. 7 and 30, secures to the executor or administrator of the life-ten-

Digitized by Google

ant an apportionment of the rent accruing for the "last year or quarter of a year or other current period of payment." The current period, in the case in hand, was the whole of the year for which the lease was drawn; the rent, *inter alia*, two-fifths of the spring and one-fifth of the fall grain to be delivered as in said lease stated. The combined value of these products would be rent for the current period, and it ought to be apportioned according to the theory above stated. So, that part of said rent, now in the hands of the administrator, and which is the subject matter of the case-stated, should be divided between the parties in the same proportion that the time from the beginning of the lease to the death of Mrs. Crissman bears to the whole year.

The judgment is reversed and a *procedendo* awarded.

Opinion by GORDON, J. WILLIAMS, J., absent.

May, '76, 71 & 72. May 18 & 19.

Appeal of Copely et al.

In re estates of G. L. Lloyd and H. Lloyd.

Practice before Auditors—Summary adjudication pending accidental absence of parties—Peremptory refusal of request for rehearing—Executors—Chargeable with interest on balances remaining in their hands for long periods—Commissions, when five per cent. on principal is excessive—Errors and appeals.

Where an auditor adjudicated exceptions to an account in the absence of the exceptants and their counsel, nothwithstanding notice by telegraph that the latter were belated by a railway detention, and peremptorily refused a rehearing, and the Orphans' Court confirmed the report:

Held, that as the matters in controversy required investigation, such action was too summary, and warranted a reversal of the decree, and a *procedendo*.

Where it appeared, *prima facie*, that an executor converted United States bonds into money, which he retained for five years uninvested, expecting the unfavorable termination of a suit against the estate:

Held (provisionally, subject to a more complete investigation of the facts), that he was chargeable with interest on the amount so retained.

Held, further (subject as aforesaid), that five per cent. on the entire principal and income of an estate was an excessive executor's commission, when it appeared that the assets had been easily collected, and the other duties of the trust easily performed.

Appeal from the Orphans' Court of Blair County.

This case was heard in the Court below upon exceptions to an auditor's report in the matter of the accounts of W. H. Gardner, administrator *d. b. n. c. t. a.* of Gilbert L. Lloyd, and executor of Hannah Lloyd.

The facts of the case are as follows: Gilbert L. Lloyd died in 1863, leaving a will in which his wife, Hannah Lloyd, was appointed executrix and sole devisee. Hannah Lloyd died January 6, 1870, leaving a will in which she appoined W. H. Gardner her executor, and bequeathed to him a large portion of her estate, in trust to pay over certain legacies. At her death Gardner was also appointed administrator *d. b. n. c. t. a.* on Gilbert Lloyd's estate to dispose of certain claims against it, which were still in litigation. One of these claims, that of T. Farrell, was not decided until June 4, 1875, when a judgment for $11,325.75 against the estate was found, which, with the expenses of suit and two other small claims, amounted to $13,978.23.

Gardner filed his final accounts in July, 1875. From these it appeared that assets to the amount of $67,036.18 came into his hands as executor of Hannah Lloyd, in government bonds, mortgages, judgment notes, and other interest-bearing securities, which he reduced to money almost immediately, selling government bonds worth $26,000 on February 12, 1870, receiving other large sums very soon thereafter, and the last small payments by August 1, 1871. He claimed credit for various small disbursements from 1871 to 1873, but from the account it would appear that the bulk of the estate remained in his hands until June 18, 1875, when he claimed credit for $43,710 paid to legatees, as trustee, and $13,978 28, the amount paid on account of G. Lloyd's estate. But a tabular statement of monthly receipts and disbursements, prepared by the appellants, showed monthly balances in Gardner's hands from February, 1870, to June, 1875, averaging $18,000, which would indicate that large advances were made to legatees before June 18, 1875, when he first claimed credit for them. The account contained a charge for executor's commissions of $3351.80, five per cent. of the whole assets.

To these accounts John Copely and ten others of Mrs. Lloyd's residuary legatees filed exceptions, alleging that Gardner should have charged himself with interest on the large balances remaining in his hands for long periods, and that his charges for services as executor were exorbitant. The matter was referred to an auditor, John Creswell, who fixed September 14, 1875, for a hearing. The proceedings were, however, adjourned at the instance of the accountant until September 25, and at the adjourned meeting the exceptants and their counsel were unable to attend, owing to a railway detention. A telegraphic dispatch, however, was sent to the auditor, asking a continuance, notwithstanding which the auditor heard and determined the exceptions in their absence. The exceptants applied for a rehearing, which the auditor refused

Digitized by Google

on the ground that the audit had been adjourned *sine die*, and that he had, therefore, no authority to grant a rehearing.

On October 27 the auditor filed his report dismissing the exceptions. Copely and the other residuary legatees objected, in various exceptions, to the confirmation of this report, on the ground that the auditor should not have refused a rehearing or dismissed their exceptions. The Orphans' Court, however, confirmed the auditor's report absolutely.

The exceptants thereupon took this appeal, assigning for error the above-mentioned action of the Court.

D. J. Neff (with him *A. A. Stevens*), for appellants.

The executor should have kept the sums retained to meet the Farrell claim, etc., invested in some easily convertible interest-bearing security. Otherwise he is chargeable with interest.

Verner's estate, 6 Watts, 250.
Bruner's Appeal, 7 Sm. 46.
Light's Appeal, 12 Har. 181.
Biles's Appeal, Id. 335.
Rocke *v.* Hart, 11 Ves. 60.
Parker's Estate, 14 Sm. 311.
Hughes' Appeal, 3 Id. 500.
Aston's Estate, 5 Whar. 242.
Lucken's Appeal, 11 Wr. 358.
3 Redfield on Wills, 400–406.

In this estate the duties of the executor were very light. The assets were easily and speedily collected, and all lawsuits concerning the estate were conducted by counsel, for whose services an ample allowance was made. Five per cent. commissions were, therefore, exorbitant.

Whelen's Appeal, 20 Sm. 411.
Pusey *v.* Clemson, 9 S. & R. 204.
Walker's Estate, Id. 223.
Snyder's Appeal, 4 Sm. 68.

S. S. Blair (with him *A. S. Landis*), contra.

The legatees were in fact all paid within a year from the testator's death, and only sufficient balance was retained to meet the expected adverse termination of the Farrell suit. Now it is well settled that an administrator may retain a reasonable amount of the estate in his hands to meet expenses and to pay claims in suit against the estate, without being liable for interest on such amount.

Davis' Appeal, 11 Har. 206.
Parker's Estate, 14 Sm. 310.

Five per cent. is the reasonable and usual allowance to the executor for settling up an estate. Wherever less has been charged, the executor's duties were unusually light, mere paying over of unconverted assets, etc.

Pusey *v.* Clemson, *supra.*
Askew *v.* Odenheimer, Bald. 336.
Skinner's Estate, 4 Phila. 189.
Gable's Appeal, 12 Caa. 395.
Whelan's Estate, *supra.*
Eshelman's Appeal, 24 Sm. 48.

Oct. 16. THE COURT. These appeals are from decrees of the Orphans' Court confirming the report of an auditor upon the account of W. H. Gardner, administrator *de bonis non cum testamento annexo* of Gilbert L. Lloyd, deceased, and confirming the report of the same auditor upon the account of the same accountant as executor of the last will and testament of Hannah Lloyd, deceased. A third account of the trusts created by Mrs. Lloyd's will has been brought up by the record. That, however, contained the distribution of the fund charged to the accountant as executor. The particular items in the account as administrator *de bonis non* were made subjects of exception only as they resulted from and were connected with the errors alleged to have been committed in the adjustment of the executor's account. The disposition of the executor's account, therefore, will decide all the questions raised.

The decision by the auditor of the exceptions referred to him, in the absence of the counsel of the legatees of Mrs. Lloyd, was unusually prompt, and the refusal to open the case on their application for a rehearing was unusually peremptory. This summary action is to be regretted, for its effect must be to delay the determination of this controversy. With no means of ascertaining the true merits of the questions at issue beyond the facts which the accounts themselves disclose, there would be hazard of injustice to the appellee if this Court should undertake to make a final decree. The conclusions of the auditor are not warranted by any evidence contained in his report. Whether these conclusions would be sustained by the actual facts attending the settlement of the estates could only be known as the result of thorough investigation, and no investigation has been had.

Mrs. Lloyd's will was proved on the 10th of January, 1870. On the 12th of February, 1870, the executor converted United States bonds into cash to the amount of $26,187.41. He charged himself the same day with a cash balance in the First National Bank of $1168.52, and with the balance of a judgment of Patterson *v.* Irwine, and the proceeds of a judgment of Wighaman *v.* Irwine, amounting together to $3128.03. He received from H. L. Patterson $5000 on the 26th of February, $2500 on the 6th of March, and $6000 on the 16th of May, 1870. Various sums were paid him up to the 1st of August, 1871, including such items as Hollidaysburg water bonds, $2050, on the 23d of August, 1870; Juniata bonds, $3325, on the 22d of September, 1870; and Hollidaysburg Seminary mortgage, $10,857 50, on the 25th of March, 1871. As early as the 1st of August, 1871, the entire assets of the estate of Mrs. Lloyd, amounting to $67,036 18, passed into his hands in cash. And

Digitized by Google

in his hands the whole fund remained until June, 1875, except $3448.26 paid out in the course of administration, and $2077.95 shown by the account on the estate of Gilbert L. Lloyd to have been expended in the progress of a contested litigation. On the 18th and 21st of June, 1875, $11,900.23 were paid to satisfy the Farrell judgment, for costs and counsel fees connected with that judgment, and for fees to the register. The payments to the legatees, amounting to $43,710, appear to have been made on the 21st of June, 1875.

It is manifest from this statement that a very large sum of money remained in the possession and under the control of the appellee for a period exceeding five years. Nothing shown as to the circumstances of the estate warranted the sale of the United States bonds in 1870. It is not enough to say that the time when the payment of the Farrell claim would be demanded was indefinite, and that, as administrator *de bonis non* of Gilbert L. Lloyd's estate the appellee could be suddenly called on to meet that. In actual fact, the demand was not made upon him until June, 1875. If earlier payment had been required, $26,000 of government securities, immediately and constantly available, were ample resources to satisfy a claim of $13,000; and the possession of those securities, with the means within reach from other sources, afforded perfect protection against any requisition to which the appellee could possibly have been made subject. The other assets were mainly in large sums and were promptly paid. It is not conceivable that a business man of average sagacity, owning such an estate in his own right, under the circumstances disclosed, would have so managed it as to render it for five years utterly unproductive. The tabular statement appended to the paper-book of the appellants exhibits an average balance of $18,229.23 in the hands of the appellee throughout a period of sixty-four months, the interest on which would amount to $5843.35. Even a larger sum would seem indicated by the items in the several accounts. But the statement refers to a "schedule of monthly payments made," which may have included advances on account of legacies. As the case stands upon the facts, it is one to require a surcharge of interest against the appellee. If this Court were to undertake to make it, however, under the lights afforded them, a possible wrong might be inflicted which it would be difficult and perhaps impossible to cure. In order to insure a fair hearing of the equities of the parties, the record must go back for a fresh reference of the original exceptions to an auditor, an investigation by him, and a decree in view of the new inquiry by the Orphans' Court. Such a decree made up under the eye of a law judge would seem advisable. The submission of such questions as this case presents to associate judges is always a hazardous experiment.

The remaining question arises out of the executor's claim for commissions. He has charged five per cent. on the whole principal of the estate. A trustee should be justly compensated for services, responsibility, and risk. The character of the trust he has administered, the nature of the duties he has performed, the extent and value of the labor he has bestowed, and the kind of securities in which he has found the funds of the estate to be invested when it came to his hands, are all elements to be considered in adjusting the amount of his allowance. Of the $67,036.18 to which this estate amounted, $53,047.94 were collected in only seven different sums, and $42,190.44, covering six of these sums, were received between the 12th of February and the 22d of September, 1870. No facts have appeared to show that even the usual labor of an executor has been performed by the appellee. The credits taken as executor seem to have been for ordinary disbursements, and those taken as administrator *de bonis non* were for items connected with the claims of Farrell, Christy, and McNamara alone. At least reasonable fees were paid to counsel, for $595 were allowed to the appellee as executor, aside from the account of Mr. Blair against the testatrix of $539.41, and $520 were allowed to him as administrator *de bonis non*. As has been said, the conversion in 1870 of all the United States bonds into cash was unjustifiable. All the exigencies of the estate could have been met by retaining them as the testatrix had left them until the use of their proceeds was required. The principal sum in dispute in the Farrell case did not exceed $5000. The final judgment was entered for $4215.23 besides costs. To the extent of over $40,000, the duties of administration appear to have been little more than clerical. Indeed, the sums disbursed to the legatees in the trust account were $43,710. Collected without difficulty or delay as the assets were, with no doubt or controversy attending the distribution, and with no proof of exceptional or even of ordinary services, the claim for compensation was too large. But upon this question, as well as upon that relating to the surcharge of interest, it is feared that if this Court were to act finally now, rights of the appellee might be destroyed which he would be able to establish by satisfactory proof. It was said at the argument on his behalf that he had many suits to look after; that he procured a large amount of new testimony in the Farrell case; and that he was compelled to make frequent journeys to Cambria County to adjust items of business there in which Mr. Lloyd had been concerned. It is true that details of this kind ought to have appeared on the face of the accounts, or in evidence before the

Digitized by Google

auditor; and it is true also that the entire absence from the record of all illustrative or explanatory facts was the result of the summary and hurried action of the auditor and of the ill-advised and persistent opposition that was made to a rehearing on the application of the counsel for the appellants. But the truth still remains that a decision in view of the existing conditions of the case would be made in ignorance of possibly justifying circumstances which the appellee would have had the right in a thorough investigation to prove, and might produce in a different direction consequences as mischievous as those which flowed from the mistaken haste of the auditor and the Orphans' Court.

The decree is reversed, the report of the auditor is set aside, and a *procedendo* is awarded.

Opinion by WOODWARD, J. WILLIAMS, J., absent.

March, '76. **Sheetz's Appeal. Sheetz v. Sheetz.** May 31.

Will — Devise — Construction of — Ambiguous phrases — Conflicting clauses, interpretation of — Prior clause, when not repealed by later clause.

While there is no doubt that of two contradictory clauses in a will, the first must give way and the last take effect, yet the two clauses must refer to the same subject matter, and the last must be fully inconsistent with the first.

If the first and main provision plainly covers the whole subject, and is defined in terms that exclude all doubt, and the second and subsidiary provision may be capable either of a general construction, subverting entirely the first provision, or of a partial construction, modifying only the original gift, the latter construction should ordinarily be adopted.

The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and that may justly have either of two opposite interpretations.

Appeal from the Decree of the Orphans' Court of Berks County.

John Sheetz, who died Feb. 28, 1869, by his will, dated Aug. 25, 1868, devised *inter alia* as follows:—

"Fourth. I give and devise unto my son John A. Sheetz, the farm situate in Heidelberg Township. . . . To have and to hold the same in fee simple, at the valuation of fifteen thousand dollars, and my said son John A. Sheetz shall pay no rent for the period he shall have occupied said farm, and all moneys which I have paid heretofore unto my said John A. Sheetz shall be null and void, and no charge against him; and my said son, John A. Sheetz, shall pay the said sum of fifteen thousand dollars ($15,000) unto the heirs of Isaac K. Sheetz in the following manner, to wit: without interest, my grandson, John Albert Sheetz, one of the heirs of my said Isaac K. Sheetz, shall receive eight thousand dollars ($8000), to wit: six hundred dollars ($600) when he arrives at the age of twenty-one years, and the remainder in six hundred dollar ($600) payments annually thereafter, without interest, as aforesaid, until paid. And my granddaughter, Catharine E. Sheetz, one of the heirs of my said son Isaac K. Sheetz, shall receive seven thousand dollars ($7000); six hundred dollars ($600) when she arrives at the age of twenty-one years, and the remainder in six hundred dollar ($600) payments annually thereafter, without interest. Together being the valuation money aforesaid for said farm. But in case it should happen that two of the above payments should become due in the same year, only one shall be paid to the heir entitled to, so that said heirs are paid equally in payments as aforesaid."

The said John A. Sheetz, son of the testator, was born May 17, 1821, and consequently at the time of making the will was nearly forty-eight years of age. John Albert Sheetz, grandson of the testator, became twenty-one years of age July 5, 1871, and received his first and second payments in 1871 and 1872. Catharine E. Sheetz, granddaughter of testator and the appellant, became of age January 7, 1873, and received her first payment in that year. On the tenth of January, 1874, claiming that by the provisions of the will, she was entitled to an annual instalment, she presented her petition to the Orphans' Court of Berks County, asking for a rule to show cause why a citation should not issue against John A. Sheetz, requiring him to pay her the second instalment of $600.

A citation was issued and John A. Sheetz filed his answer, alleging, that under the will, there was no payment due her at that date, and claiming that she was entitled to no payment or payments until January 7th, 1875, and thereafter only every alternate year.

After two arguments in the Orphans' Court of Berks County, HAGENMAN, P. J., filed an opinion, deciding that Catharine E. Sheetz was not entitled to the payment of $600 annually, but only in alternate years, and that she was not entitled to demand her second payment before January 7, 1875, and he accordingly dismissed the petition.

From the decree dismissing the petition this appeal was taken.

Daniel and *Jas. N. Ermentrout*, for appellant.

In construing a will, the reasonable and natural interpretation is always to be preferred. Alternating the payments would allow twenty-six years to make the payments, the last payment not being made until 1895. It is not reasonable or natural to suppose that the testator intended to impose upon his son, the devisee, who was 48 years old at the date of the will, the burden of paying this amount until he was seventy-five, or to impose it upon his heirs. In construing a will plain and distinct words are to be controlled only by those equally plain and distinct, and this last clause is neither plain nor distinct. Insensible clauses must be rejected.

Digitized by Google

Hamm *v.* Meisenhelter, 9 W. 351.
Horwitz *v.* Norris, 10 Sm. 287.
McBride *v.* Smyth, 4 Sm. 245.

The expressed purpose of making this one payment is equality in the *number* of payments. Alternate payments cannot produce this. The contingency contemplated was the children's coming of age before his death, in which event there might be more than two payments, due, one or both, in the same year; then he intended that there should not be more than one payment of $600 to each child within the first or any other year.

W. M. Derr (with whom was *C. G. Derr*), contra.

The words of the will are: "But in case it should happen" (*i.e.* when it happens) "that two of the above payments" (viz, $600) "become due in the same year, only one" (*i.e.* $600) "shall be paid to the heir entitled." This event occurred when Catharine became of age; John A. Sheetz's payment for that year, therefore, had to give way to the rights of Catharine, "the heir entitled" thereto, because the time of reaching her majority was the definite time fixed for her first payment. Annually thereafter, the devisee is to pay $600, but in biennial payments, to the two legatees. By this construction, the devisee would each year pay exactly $600, from 1871 to 1895, when the last payment would be due, in that year paying John $200 to make up his $8000, and Catharine $400 to make up her $7000.

(It was stated in the argument, but not mentioned in the paper-books, that the will had been written for the testator by a German, although put into the English language.)

Oct. 9. THE COURT. John Scheetz made his will on the 25th August, 1868, which, with two codicils requiring no present consideration, was proved on the 25th February, 1869. He devised a farm containing two hundred and thirty acres, in Heidelberg township, in the county of Berks, to his son John A. Scheetz, at a valuation of $15,000, which, by the following words, he directed the devisee to pay: "My said son John A. Scheetz shall pay the said sum of $15,000 unto the heirs of Isaac K. Scheetz in the following manner, to wit: without interest, my grandson, John Albert Scheetz, one of the heirs of said son Isaac K. Scheetz, shall receive eight thousand dollars, to wit: six hundred dollars when he arrives at the age of twenty-one years, and the remainder in six hundred dollar payments annually thereafter, without interest, until paid as aforesaid. And my granddaughter, Catharine E. Scheetz, one of the heirs of my said son Isaac K. Scheetz, shall receive seven thousand dollars, six hundred dollars when she arrives at the age of twenty-one years, and the remainder in six hundred dollar payments annually thereafter, without interest: together being the valuation money aforesaid for said farm." These bequests were followed immediately by this qualifying clause: "But in case it should happen that two of the above payments should become due in the same year, only one shall be paid to the heir entitled to, so that said heirs are paid equally in payments as aforesaid."

John Albert Scheetz arrived at the age of twenty-one years on the 5th of July, 1871, and the payments directed by the will were made to him in that year, and in 1872, Catharine E. Scheetz became of age on the 7th of January, 1873, and received her first payment. At this point this controversy began. On the 10th of January, 1874, a petition was presented to the Orphans' Court for a citation against John A. Scheetz, the devisee, requiring him to pay an instalment of six hundred dollars for that year alleged to be due and payable to Catharine E. Scheetz. This demand was resisted, under the clause in the will qualifying the bequests to the legatees, on the ground that a fair construction of the language of that clause made the instalments payable biennially to each legatee; each being entitled to receive six hundred dollars in every alternate year. The construction thus contended for was adopted by the Orphans' Court, and the petition was dismissed.

While there is no doubt that of two contradictory clauses in a will the first must give way and the last must take effect, yet the two clauses must refer to the same subject matter, and the last must be fully inconsistent with the first. If the main provision plainly covers the whole subject, and is defined in terms that exclude all doubt, and the subsidiary provision may by conjecture be made either general or partial, and may be capable by construction either of subverting entirely or modifying only the original gift, such a subsidiary provision must, in the ordinary case, be confined to its partial or restricted operation. It is said in 1 Redfield on Wills, *438, the "plain and distinct words are only to be controlled by words equally plain and distinct." Such words, to have a controlling effect, must at least have a definite and certain meaning. The clearly expressed purpose of a testator is not to be overborne by modifying directions that are ambiguous and equivocal, and may justly have either of two opposite interpretations.

Was it the design of John Scheetz in his will to give these legatees each only six hundred dollars in cash in alternate years, thus extending the time of final payment to the year 1895? Such, certainly, was not the design as manifested by the words of obvious and unmistakable import used in making bequests. Each legatee was to receive six hundred dollars at the age of twenty-one years, and the remainder in six hundred dollar payments every year thereafter, and this direction the sub-

Digitized by Google

sequent words did not in terms revoke or cancel. It must be an implication then, that the provisions for annual payments in the principal clause creating the bequests shall be converted into provisions for biennial payments, under the operation of the qualifying clause. Are the terms broad enough to work so material a change? That is, does a necessary implication result from the words used? To warrant the application made of them by the Orphans' Court and insisted on by the appellee's counsel, they must be incapable of any other legal, grammatical, and rational construction.

The language of the restricting clause was English, but it was written by a German, and the expression written was the English rendering of an idiomatic German phrase. "But in case it should happen," that is, when the time arrives, or, when it happens, "that two of the above payments shall become due in the same year, only one shall be paid to the heir entitled to, so that said heirs are paid equally in payments aforesaid." Two ideas were in the testator's mind. One of them had reference to the point of time certain to arrive at Catharine's majority, when instalments to both legatees would become payable. The other had reference to the equality of the amounts to be received which he desired should subsist between them. "Only one shall be paid," was the language, "so that said heirs are paid equally." And this was to be "in case it should happen"—when at the time it should happen that an instalment should become payable to Catharine as well as to her brother. It was manifestly to make the sums paid to the two legatees equal out of the first four instalments, that the clause was framed. With that view Catharine was to receive her legacy for 1873 and 1874, and the payments to John Albert during those years were to be pretermitted. Thenceforth the main bequests were to be undisturbed, and, beginning with 1875, both legatees were to receive their annual instalments until the whole of both legacies should be satisfied.

It is true that, under this construction, after the payment to Catharine in full, two annual instalments will still remain due to John Albert. But the provision to have equality between them was to have force when the payments to Catharine were to begin, and not when they were to end. The interpretation of the clauses thus made adapts it to the time when it was to become operative, insures the equality which was the purpose declared to be in view, and while maintaining the symmetry of the main bequests, gives it ample, adequate, and rational effect. The right of Catharine E. Scheetz to receive the instalments of 1874, to the exclusion of her brother, was conferred by the will of her grandfather, and ought to have been enforced by the Orphans' Court. Decree reversed and a *procedendo* awarded.

Opinion by WOODWARD, J. WILLIAMS, J., absent.

Jan. '75, 121. **Geddes' Appeal.** June 28.

Equity — Constructive fraud — Partnership — Partners, relations inter se — Purchase by one partner from another through the interposition of a third party whose agency was concealed — Rescission of sale — Executed contract — Delay in filing bill — Evidence — Master's report as to facts — Finding of master where testimony is equally balanced, conclusive in Appellate Court.

It is not fraud *per se* for one partner to purchase from another the latter's interest in the firm through the interposition of a third party, concealing the fact that he and not the third party is the real purchaser. In the absence of actual fraud or inadequacy of price, such a sale, deliberately made and fully executed, will not be set aside, especially after the lapse of several years.

Proof of fraud must be clear and satisfactory to induce a court of equity, under such circumstances, to avoid such a contract.

Where the testimony in regard to a fact is equally balanced, with a single witness on each side, the master may nevertheless find the fact, and his finding is conclusive in the Appellate Court.

Appeal from the Common Pleas of Union County.

This was a bill in equity, filed March 30, 1870, by Samuel Geddes, against James S. Marsh, Peter Beaver, Levi Rooke, and Thomas Beaver, to set aside a conveyance by complainant to the respondent Thomas Beaver, of an interest in the Union Furnace, on the ground that said conveyance was procured by fraud. The answers denied the allegations of fraud.

This case, together with another suit by one Joseph W. Shriner, against the same respondents, was referred to a master, who found the following facts:—

In 1853 the Union Furnace was erected by the firm of Geddes, Marsh & Co., and from that time to 1863 was successively owned and operated by that and various other firms, in all of which the complainant, Samuel Geddes, and one Joseph W. Shriner were partners. From April 1, 1863, the ownership of the furnace was as follows: The respondents, James S. Marsh, Peter Beaver, and Levi Rooke together owned $\frac{13}{20}$ of the furnace; Samuel Geddes $\frac{3}{20}$, Joseph W. Shriner $\frac{2}{20}$, and the estate of Frederick Marsh, dec'd, $\frac{2}{20}$. Levi Rooke was the only partner resident at the furnace, and he had the general superintendence of its working, and charge of the moneys of the firm, and received for his services an annual salary. The other partners each lived about four or five miles from the furnace. The business was not under the control of any partner or partners to the exclusion of others, but all the members of the firm had access to the books and could get information from the bookkeeper, Mr. Kremer.

Digitized by Google

From 1857 to 1863 the business of the furnace had not been profitable. In April, 1863, Thomas Beaver, who had previously to that time been a partner, sold his interest for fifty per cent. of its cost, and went out of the firm. Some years prior to 1863, Geddes, the present complainant, had himself desired to sell out his interest, and had requested one Jonathan Wolfe to effect a sale for him. Wolfe accordingly endeavored to sell Geddes' interest to Peter Beaver, but failed. During 1863 the furnace made some money, and on January 1, 1864, there was a balance in its favor of $12,000 over the liabilities and the investments of the partners. In January, 1864, a profit was made of $3362.79, and in February and March, 1864, a further profit of $13,006.88, making a total profit for the first three months of 1864 of $16,449 67. On April 1, 1864, the shares of Samuel Geddes and Joseph W. Shriner in the furnace were together worth $33,833.37.

About February 1, 1864, Peter Beaver, after an interview with the other respondents, called upon Jonathan Wolfe and stated that they would purchase Geddes' and Shriner's interests in the furnace for $23,000; that they did not desire this for themselves, but for Thomas Beaver, whom they desired to have an interest in the furnace because they could thereby get their coal and dispose of their iron to greater advantage. This offer was communicated by Wolfe to Geddes, who thought it too low and asked $26,000 or $28,000 for the interests. He was advised by Wolfe not to sell unless he got his price, and replied that he would not sell if it were not for the unpleasant relations existing between himself and the other members of the firm, but that the iron business was looking up at that time and afforded him an opportunity of becoming disconnected in business from the other members of the firm, and if he should fail in accomplishing this object at this time, another favorable opportunity to sell might not arise. Geddes insisted upon Shriner's interest being sold with his, as Shriner was indebted to him on partnership accounts, and the purchase money of Shriner's share would be received by Geddes in payment of that indebtedness. The proposed sale was not looked upon with favor by Shriner, who stated to Wolfe that they had run the furnace whilst it was a dragging business, and now when it was making money he did not feel like being put out of it. While the subject of the sale was agitated, Shriner went several times to the furnace and asked for a balance sheet. This he did not get, as it was stated that they were too busy, and also that the bookkeeper was sick and could not make out a balance sheet. On February 10, 1864, Geddes wrote to Levi Rooke requesting a balance sheet, to which Rooke replied, stating that the liabilities of the firm were about $63,600, and the personal assets $58,230; that the furnace cost about $104,000; that the investments of all the partners amounted to $105,000, of which $52,000 was interest; that the investments of Geddes and Shriner together amounted to a little over $30,000, and that this statement was nearly correct, but that there might be "a thousand dollars one way or the other." This letter concluded with an invitation to Geddes to call as soon as the bookkeeper recovered and look it over himself, as the illness of the bookkeeper would put him back so that he would not be able to make out a balance sheet for some time. After this Shriner in a conversation with Rooke stated that he had seen this letter and was not satisfied with it. On March 1, 1864, Peter Beaver and Levi Rooke agreed with the bookkeeper that if the latter could purchase for them the Geddes and Shriner interests for less than $25,000, he could have the difference between that sum and the purchase money. The bookkeeper subsequently had a conversation with Shriner and reported to Peter Beaver that he could buy the interests for $24,000. He, however, did nothing further in the matter at that time, but after some further negotiations between the parties, Samuel Geddes agreed to a sale of the interests for $25,775 51. About the last of March, 1864, Shriner went to James S. Marsh and expressed reluctance at going out of the business at a loss. He stated that he ought to have better terms than Geddes, as he had worked at and took an interest in the furnace, while Geddes had done nothing. At his request Marsh saw Levi Rooke and Peter Beaver, and they finally agreed to give Mr. Shriner $2000 extra. At Shriner's request this arrangement was kept secret from Geddes in order that the $2000 might not be paid to the latter on account of the indebtedness before referred to. On March 28, 1864, Shriner consented to a sale of the interests, and on April 2, the deeds were executed to Thomas Beaver, who, afterwards by deed dated December 30, 1865, and recorded January 3, 1866, conveyed the shares to Peter Beaver, James S. Marsh, and Levi Rooke. In June, 1864, the firm gave to the bookkeeper $1000 upon his statement that he could have made that much if he had not been interfered with in buying the Geddes and Shriner interests.

On March 3, 1870, Geddes and Shriner each filed a bill for a reconveyance of his interest. The master reported that there was no evidence to indicate that complainants knew they were selling to their co-partners, but that the whole testimony went to show that they thought they were dealing exclusively with Thomas Beaver; that, after the deeds were executed, but on the same day, Shriner became aware that the sale was really for the benefit of his co-partners, but that there was no evidence that Geddes had any knowledge of that fact prior to the filing of his bill.

Digitized by Google

The master was of opinion that the purchase by one partner of the interest of another through the secret agency of a third person, did not constitute constructive fraud, and that in this case no actual fraud had been shown, nor any gross inadequacy of price sufficient to avoid the sale. He therefore reported that the bills should be dismissed at the cost of complainants. To this report, complainant filed the following exceptions:—

(1) That the master finds as a fact that Joseph W. Shriner requested that the payment of the extra $2000, to be paid to him, should be concealed from Mr. Geddes, when the testimony is that Shriner swore that Beaver so requested, and Beaver swore that Shriner so requested, the testimony being balanced and there being nothing in the whole case to show that Shriner is unworthy of belief.

(2) That the testimony shows, and it should be so distinctly found by the master, that the purchase made by Thomas Beaver was made under a concerted arrangement between said Beaver and respondents, designedly concealed from complainants, and that it was made for several thousand dollars less than the property was worth, under a misapprehension of its value, produced by the acts and declarations of the respondents as to its value; that the fact that Geddes would not sell unless Shriner sold, and the subsequent secret agreement to pay Shriner $2000 more than was paid Geddes, although their interests were relatively of the same value, was a fraud upon Geddes; that the arrangement made with the bookkeeper, John Kremer, to give him the difference between what they were willing to pay and what he could purchase the interests for, was in fraudulent violation of the rights of complainants as co-partners, and explains the reason why no detailed statement of the business was given by the bookkeeper, in answer to the repeated demands of Mr. Shriner.

(3) That the master erred in ruling that the interposition of Thomas Beaver to purchase for respondents was not, in itself, such an undue concealment as avoided the transaction at the option of complainants.

(4) Also, in ruling that the facts proved, do not prove a fraudulent agreement by the respondents to obtain the interests of complainants by undue concealments and misrepresentations of the value of the property.

(5) That the master erred in not deciding the sale to be void.

The Court below (JUNKIN, P. J., delivering the opinion) dismissed the exceptions and confirmed the report.

Complainant took this appeal, assigning for error the overruling of his exceptions and the confirmation of the report. Each exception was the subject of a separate assignment of error, numbered in the order in which the exceptions are given above.

Linn & Dill, for appellant.

The partnership between the parties constituted of itself such a relation of trust and confidence as to impose on respondents the burden of showing that they took no advantage of complainant, that they gave to him all the information they possessed, and that the price was fair and adequate.

Story's Equity Jur., sect. 323.
Fox *v.* Mackreth, 1 Lead. Cas. Eq. 72, Hare & Wallace's Note.
Leisenring *v.* Black, 5 W. 303.

The concealment by respondents of the fact that they were the real purchasers of complainant's interest was of itself constructive fraud. It placed the appellees in a position where their duty conflicted with their interests. The law in such case assumes without inquiry that respondents acted to advance their own interests. A purchase by a trustee *per interpositam personam* carries fraud on the face of it.

Michoud *v.* Girod, 4 How. 503.

In addition to the relation of partners, one of the respondents, Levi Rooke, was by the partnership agreement the agent of the other partners. He could not take advantage of information acquired by him in that character, to purchase from his principal at an undervaluation.

Brooks *v.* Martin, 2 Wall. 70.
Coles *v.* Trecothick, 9 Ves. 234.
Hunter *v.* Atkyns, 3 Myl. & Keen, 113.
Teakel *v.* Bailey, 2 Brock, 51-54.
Maddeford *v.* Austwick, 1 Simons, 89.
Beeson *v.* Beeson, 9 Barr, 279.

The other respondents were aware of the agency of Levi Rooke, when they united with him in the purchase of complainant's interest, and must bear the burden which that relationship imposed.

There was ample evidence of actual fraud in the case, in the interposition of Thomas Beaver to make the purchase, the failure to furnish a balance-sheet, the letter of Levi Rooke, the procuring the assistance of the bookkeeper to effect the purchase, and the subsequent payment to him of $1000 for his services. All these facts show a concerted arrangement to purchase complainant's interest at the lowest possible price, by concealing from him its value.

G. F. Miller & Sons, for appellees.

None of the cases cited by appellant decide that a purchase by one partner from another is to be governed by the same principles as a purchase by a trustee from a *cestui que trust*, and even if those principles were applicable, yet where a trustee becomes a purchaser the conveyance is not void, but will only be set aside upon the application of the *cestui que trust* within a *reasonable time*.

Jackson *v.* Walsh, 14 Johns. 408.
Ashhurst *v.* Waterman, Sup. Ct. of Penna., in equity, opinion of STRONG, J., May 2, 1868, at Nisi Prius (published in pamphlet form).

Digitized by Google

Campbell *v.* Walker, 5 Vesey, 678.
Hawley *v.* Cramer, 4 Cowen, 718.
Prevost *v.* Gratz, 1 Peters' C. C. Rep. 368.
Clegg *v.* Edmundson, 3 Jur. N. S. 299.
Beckford *v.* Wade, 17 Vesey, 87.
Selsey *v.* Rhoads, 1 Bli. N. S. 1.

In the present case, the bill was not filed until six years, lacking one day, after the sale of the interests. Complainant had equal means with respondents of ascertaining the value of the business, and if he did not avail himself of them he cannot avoid the contract on the ground of want of knowledge.

Farnum *v.* Brooks, 9 Pick. 234.
Eichelberger *v.* Barnitz, 1 Yeates, 307.

In order to set aside an executed sale, there must be clear evidence of fraud.

Caldwell *v.* Boyd, 7 Sm. 325.
Davidson *v.* Little, 10 H. 251.
Graham *v.* Pancoast, 6 C. 89.
Nace *v.* Boyer, 6 C. 109.
Rockafellow *v.* Baker, 5 Wr. 321.

The master has found against the allegations of fraud, and his report is entitled to great weight.

Phillips' Appeal, 18 Sm. 130.

May 8. THE COURT. The appellant and Joseph W. Shriner, the appellant in Shriner's Appeal, argued with this case, were part owners of the Union Furnace. The said furnace was erected in 1853, and from that time down to the first of April, 1864, was operated and owned by firms of which Geddes and Shriner were members. On the first of April, 1864, a sale was made by Geddes and Shriner of their interest in said furnace to Thomas Beaver for the sum of $25,775.51. Shriner was paid $2000 extra, so that the whole amount of the purchase money was $27,775.51. Six years, lacking a few days, after this sale Geddes and Shriner respectively filed their bills in equity against their late co-partners, alleging, *inter alia*, that they had discovered since said sales that said furnace was in a prosperous condition on the first day of April, 1864, and making large profits; that it had made before that time about $100,000, the amount originally invested, which was profit; that the real estate and fixtures had greatly enhanced in value, all of which was unknown to and concealed from them. They also alleged that Thomas Beaver did not purchase for himself, but for the defendants, James S. Marsh, Peter Beaver, and Levi Rooke, which fact was unknown to said Geddes and Shriner at the time, and was studiously concealed from them; that they were led to believe, by the assertions of their co-partners, or some of them, that no profits had been realized or money made by the firm, and that the furnace was not worth the original investment and interest. They therefore prayed relief, the object of the bills being respectively to set aside the contract between the said Geddes and Shriner and Thomas Beaver, relative to the sale of the Union Furnace; and that the deeds executed to Thomas Beaver may be declared fraudulent and void as an absolute conveyance. The master found against the plaintiffs upon the question of fraud, and dismissed their bills. The Court below sustained the finding of the master, and dismissed the exceptions. An appeal to this Court was entered by the plaintiffs in each case. In Geddes' Appeal there are six assignments of error, which will be considered in their order.

The first, second, and third assignments are to the finding of the facts by the master. I have examined the voluminous testimony in the case with great care, and am unable to say that the master's finding of the facts is not fully sustained. If, as stated in the first assignment, the testimony was equally balanced, it cannot be said that his finding is necessarily erroneous. With a single witness on a side, and an assertion of a fact by this one, and a denial by the other, the master may, nevertheless, find the fact. He may believe the one witness and discredit the other. This occurs almost daily in trials by jury. Applying to each witness the tests which the law recognizes, the master, who was also examiner, may be able to say which speaks the truth, or which is mistaken. The mere manner of the witness may indicate this; but in such cases *we* have no such test, and must accept the finding of the master; with us it would be the merest guess.

The second assignment refers to a number of distinct questions of fact, the most important of which are the concealment from the plaintiffs that Thomas Beaver purchased for the defendants, partners in the firm with plaintiffs; and that plaintiff's interest in the furnace was purchased for several thousand dollars less than it was worth. In regard to the first, it is sufficient to say that the master in his report upon the exceptions finds the facts to be that it was concealed from the plaintiff that Beaver was buying for the other partners. Of this finding the plaintiff cannot complain. It is in his favor for whatever it is worth. The second ground of objection is not sustained by the evidence. The other matters referred to in this assignment are of minor importance. It was no fraud upon Geddes that Shriner received $2000, or any other sum more than he did, provided he (Geddes) received the value of his interest. A man has no legal right to complain that another has received a higher price for property of similar value.

The third assignment alleges error in ruling that the interposition of Thomas Beaver to purchase for defendants was not in itself such an undue concealment as avoided the transaction at the option of the complainants. It is not too much to say that very much of the atmosphere of fraud which has been ingeniously thrown around this case is due to the circumstances of this ad-

Digitized by Google

mitted concealment of the fact that Thomas Beaver was not buying for himself, but for the other partners of the firm. That such concealment was not a fraud, *per se*, as is assumed in this assignment of error, is easily demonstrated. Of what importance was it to the plaintiff who the purchaser was, provided he obtained his price, or the value of his interest? It is a very common thing in real estate, and perhaps other transactions, for the purchaser to conceal his name from the vendor, and to negotiate through or in the name of another party. The reasons for this are obvious, and such course of dealing has never been held to be fraudulent. It is true there might be a case in which such concealment might be some evidence of fraud. But it would only be so in its relation to other facts, as to which it formed a connecting link in a chain of evidence to establish a fraud where a fraud in fact had been committed. In this case we have the fact in proof that the relations between the plaintiff and his partners were not of the most amicable kind. This circumstance may have induced the latter to conceal their real purpose. It is said that if the plaintiff had known who the actual purchasers were, it would have put him on his guard, and perhaps induced him to demand a higher price for his interest. This, if true, raises no equity. The argument, to be worth anything, must go to the extent of supposing that the plaintiff would have used the information for the purpose of exacting a greater price than his interest was worth. For, if he got its value, how was he injured? It is possible the defendants had this in view in withholding the information from him. They had a right to buy upon as good terms as they could, provided they did no wrong to the plaintiff. It is difficult to see why the fact that Thomas Beaver desired to purchase the plaintiff's interest was not equally as significant as a purchase direct by the defendants. Mr. Beaver had only gone out of the firm the year before. He had sold out at a heavy sacrifice; he was reputed to be a wealthy and shrewd iron-master. That such a person desired to come back into the firm would seem quite as suggestive of rising values as that the other partners desired to buy.

The fourth assignment raises the really important question in this cause. Was there such a fraud in this transaction as would avoid the sale? Here the burden of the proof is upon the plaintiff. He alleges fraud, and must prove it. And the proof must be clear and satisfactory to induce a Court of Equity, after the expiration of nearly six years, to avoid a contract deliberately made, and which has been fully executed.

This furnace was established in 1853. It had made no money prior to 1863. During that year Thomas Beaver sold out his interest at a sacrifice of about one half. Some years before, the plaintiff had tried to sell to Peter Beaver, but without success. There is no class of real property more difficult to dispose of than an undivided interest in an iron furnace. The iron business is one in which fortunes are sometimes made rapidly and as suddenly disappear. It is eminently precarious, subject to frequent and violent fluctuations. At the close of ten years of dull times, the plaintiff had on hand as unsalable a species of property as could be found in the State. Yet at the time he sold the tide had turned. He knew this, and was advised not to sell, but very naturally reasoned that if he did not do so when the business was improving he could not sell at all. In 1863 the firm made some money, so that on January 1, 1864, there was a balance in favor of the furnace of $12,000. Up to April 1, 1864, there was made the further sum of $16,499.67. On that day the value of the Geddes and Shriner interests, as found by the master, was $33,833.37. This included interest, which had never been earned on the investment. The amount paid for these interests was $27,785. We cannot say that this was an inadequate price. We have no reason to suppose that any one else would have given more; there is no evidence that any other purchaser could have been obtained who would have given as much. That the business was prosperous, enabling the parties to make large profits and to pay for the shares out of the profit, is not to the purpose. We are not to judge this transaction by the light of subsequent events. It was consummated in the face of an uncertain future. The ebb and flow of the business tide in that future was concealed from human vision. Had the defendants been stranded amid its breakers, this bill probably would not have been filed. Given an adequate consideration, and this whole theory of fraud in this case crumbles. It is unnecessary to go over the allegations of concealment and misrepresentation in detail. In this absence of inadequacy of consideration they are not especially significant. Much importance was attached, however, to the letter of Levi Rooke of February 11, 1864, inasmuch as it is alleged that it grossly misrepresented the value of the property, and induced the plaintiff to sell. It is sufficient to say in regard to it that it does not profess to be full and accurate. It refers to the sickness of the bookkeeper, and his consequent inability to make out a balance sheet. It closes with a request to Mr. Geddes to come down and see for himself as soon as the bookkeeper got better. Surely if Mr. Geddes was deceived by this letter, it was his own fault. He was selling his own property; he had the fullest access to the books. Those books were his books; they belonged to the firm of which he was a member. No one ever denied him access to them, and it is not even alleged that they contain any false entries. It is not to

Digitized by Google

the purpose that he did not understand them. He could have obtained the services of an expert in case he failed to obtain the information from the bookkeeper. He had the means of information, and it was his duty to have availed himself thereof. He cannot charge any one else with the consequences, whatever they may be of his own neglect. The remark of Mr. Justice WOODWARD, in Rockafellow *v.* Baker (5 Wright, 319), is applicable here.* But there is neither fraud nor mistake in the legal sense of the terms, when the buyer of an article which he finds in market has a full opportunity to examine it, and when the means of information relative to facts and circumstances affecting the value of the commodity are equally accessible to both parties.

It is to be remembered that the parties are not before us upon a bill seeking specific performance. The contract was fully executed several years ago. We are now asked to undo all this and remit the parties to their position before the sale. A Court of Equity should move with cautious and reluctant steps on such a path as this, for it is a very narrow one. "Nothing but fraud or palpable mistake is ground for rescinding an executed contract." (5 Wright, 319; Graham *v.* Pancoast, 6 Casey, 97; Nace *v.* Boyer, Id. 109.) Mistake is not alleged. The plaintiff has shown no such clear fraud as would justify us at this late day in disturbing this transaction.

Decree affirmed, with costs to be paid by appellant, and appeal dismissed.

Opinion by PAXSON, J. WILLIAMS, J., absent.

* "Nothing but fraud or palpable mistake is ground for rescinding an executed contract."

Jan. '75, 110. **Shriner's Appeal.** Jan. 28.

In this cause, which was argued at the same time with Geddes's Appeal (with which case it was in all respects parallel), the following judgment was entered:—

May 8. THE COURT. What has been said in Geddes's Appeal, just decided, renders it unnecessary to discuss this case.

Decree affirmed, with costs to be paid by appellants, and appeal dismissed.

Opinion by PAXSON, J.

Common Pleas—Law.

C. P. No. 1. **Merrian v. Nash.** Nov. 4.

Practice—Execution—Errors and appeals—Matters within discretion of Court below—Time within which writ of error must issue to be a supersedeas.

Rule to set aside *fi. fa.*

The docket entries showed:—Sept. 23, 1876, judgment for want of an affidavit of defence; *Eo die, fi. fa.* exit; Sept. 25, rule to open judgment—proceedings to stay meantime; Oct. 14, rule discharged; Oct. 17, writ of error brought into office.

On October 18 the defendant obtained the present rule, on the ground that the writ of error was a *supersedeas.*

Hinckle showed cause. The refusal to open a judgment regularly entered is a matter solely within the discretion of the Court below, to which no writ of error lies.

Gordinier *v.* Billings, 1 WEEKLY NOTES, 422.
Hawkins *v.* Wightman, Id. 370.
Landis *v.* Maher, Id. 407.

If allowable, the writ of error in this case is not a *supersedeas,* because not issued "within three weeks from the day on which judgment was entered."

Act of 16 June, 1836, § 8, Purd. Dig. 605, pl. 17.
Bryan *v.* Comly, 2 Miles, 271.
McDonald *v.* Gifford, 6 Phila. Rep. 315.
1 Tr. & H. Pr. 688, and note (5).
Storage Co. *v.* Kaiser, 1 WEEKLY NOTES, 20.
Jones *v.* Calen, Id. 193.

Owens, for the rule, argued that until the rule to open judgment was disposed of, on October 14, the judgment was not *finally* entered; and as the writ of error was taken within twenty-one days from that date, the case is within the spirit if not the letter of the Act.

McDonald *v.* Gifford, 6 Phila. Rep. 315.
Roberts *v.* Springer, 1 Id. 172.

The objection that the writ of error will not lie can only be considered in the Appellate Court; the defendant should not now be concluded by a technical construction of the proviso limiting the time for taking a writ of error, particularly in view of the fact (stated by counsel) that the rule to open judgment was discharged in the absence of defendant's counsel in New York.

Rule discharged.

C. P. No. 2. **Osmer v. Souder.** Nov. 4.

Affidavit of defence—Holder for collection only—Allegation of set-off against original payees—Variance—Sufficiency of averment.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on promissory notes. The affidavit

Digitized by Google

set forth: (1) that plaintiffs are not the owners of said notes, but hold them simply for the purposes of this action, and that they have been transferred to them to avoid the defence which the defendant might have made in a suit by the original payees. (2) That deponent holds notes of Wm. McKnight & Sons, the original payees, to an amount greater than the notes in suit. (3) That the copy filed is, *inter alia*, of a note of J. C. McCurdy to the order of this deponent for $750.00, at three months from August 17, 1876, and that this deponent never made any such note.

Stutzbach, for the rule. As to the second point in the affidavit the defendant should have sworn how and when he came into possession of the notes he claims as a set-off.

Spears *v.* Sterrett, 5 Cas. 192.

[THE COURT. This is no doubt the law when the case comes for trial, but when a man swears in an affidavit of defence that he is the owner of notes, the law presumes he is so *bona fide.*]

The variation set forth in the third point of the affidavit is a clerical error, and plaintiff may amend.

Linnard *v.* Booz, 1 WEEKLY NOTES, 82.
Bold *v.* Harrison, Ibid. 154.

[THE COURT. Such an amendment would change the cause of action.]

The defendant should take a rule for the production of the original.

Kelly *v.* Livingston, 1 WEEKLY NOTES, 95.
Shaw *v.* Baildon, 1 Tr. & H. Pr. 383.

Rule discharged.

C. P. No. 2. **Stover v. Hotel Co.** Nov. 4.

Affidavit of defence—Set-off—Damages by negligent performance of duties by plaintiff.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a due bill given by defendants to plaintiff for services as manager of the Hotel Aubrey. The affidavit set forth "that plaintiff by his neglect and reckless management had entailed losses on the defendants to an amount larger than his claim." It then went on to charge specific losses of $9000 in the dining room, about $2000 in servants' wages, and about $1200 in servants' food; the number of servants being much larger in the months of May and June than in August after plaintiff had left, though the number of guests in the latter month was much larger than in either of the former months.

Daniels, for the rule, cited, as to unliquidated set-off—

Lehmaier *v.* Bo n, 1 WEEKLY NOTES, 444.

Pettit, contra.

Rule discharged.

[*Cf.* Callahan *v.* Mann, 1 WEEKLY NOTES, 104; Watson *v.* Galloway, Id. 107; Biswanger *v.* Stocker, 2 Id. 407.]

C. P. No. 2. **Gerson v. Binder.** Nov. 18.

Married woman—Pleading—Plea of coverture should be filed in person.

Rule to strike off pleas, and enter judgment.

Assumpsit on a promissory note, to which the defendant, by attorney, pleaded "coverture," and other pleas, in bar.

The plaintiff then took this rule to strike off the pleas.

Lynd, for the rule (with whom was *R. L. Ashhurst*).

Coverture is a dilatory plea, and should be pleaded in abatement within four days.

Even if the plea had been in time, it must be filed by defendant in person. A married woman cannot appear by attorney.

Keddeslin *v.* Meyer, 2 Miles, 295.

Shakespear, contra.

THE COURT. Coverture is not necessarily a plea in abatement merely. As to the filing by attorney, it was an inadvertence. Leave given to defendant to withdraw plea filed by attorney and plead *in propria persona.*

C. P. No. 2. **Snyder v. Kohler.** Nov. 18.

Mechanic's lien—Plea of "no lien" bad.

Rule to strike off pleas.

Sci. fa. sur mechanic's lien. Pleas: No lien; non assumpsit; set off; payment with leave, etc.

The plaintiff then took this rule to strike off the pleas of "no lien" and "non assumpsit."

Maloney (with whom was *Erdman*), for the rule, cited—

Lee *v.* Burke, 16 Sm. 336.

Calloway, contra.

Rule absolute, as to the plea of "no lien."

C. P. No. 2. Nov. 18.

England et al. v. Kelly.

Abatement of actions—Death of defendant after service and before judgment—Execution set aside and judgment opened—Practice.

Rule to set aside *fi. fa.* and open judgment.

This was an action of debt, in which there was service of the writ and judgment for want of an affidavit of defence. A *fi. fa.* was then issued and returned "*mortuus est.*"

Depositions were read, showing that the defendant died after the service of the writ and before judgment.

Peirce, for the rule.

Rule absolute.

[See Hagarty *v.* Thompson, 1 WEEKLY NOTES, 576.]

Digitized by Google

C. P. No. 3. **Ohman v. Winsmore.** Nov. 4.

Affidavit of defence law—Loan or advance of money—Act of March 11, 1836—*Affidavit of loan, requisities of—Where a loan of money is evidenced by an instrument of writing for the payment thereof, the Act of March* 11, 1836, *does not apply—Practice.*

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit for a loan of money. The plaintiff filed an affidavit of loan, under the Act of March 11, 1836, § 14 (Purd. Dig. 496, pl. 16). The affidavit of defence set forth that at the time of making such loan, the defendant gave plaintiff his promissory note, to plaintiff's order, for the full amount thereof; and suggested that the plaintiff's affidavit of loan was insufficient in that it omitted all mention of said note, and thereby failed to set forth fully "the terms of said loan" as required by the Act; further, that the plaintiff cannot, while holding a note for the indebtedness, proceed under the Act of 1836, *supra.*

J. A. Scanlan showed cause. The Act of 1836 was intended to apply only to parol contracts for the loan of money, not evidenced by any instrument of writing on which the plaintiff might take judgment under the affidavit of defence law of 28 March, 1835 (Purd. Dig. 495, pl. 13), to which the Act of 1836 is a supplement. The provisions of the latter Act must be strictly complied with, and the plaintiff's affidavit is defective in that it conceals a material part of the terms of the contract, to wit, the giving of the note. If this action were sustained, the defendant might be compelled to pay the indebtedness a second time to a *bona fide* holder of the note.

Geo. P. Rich, for the rule. The Act of 1836 applies, by its terms, "to contracts for the loan or advance of money, *whether the same be reduced to writing or not.*" The contract here is admitted to have been one of loan, and the note was taken as collateral security to the defendant's personal liability on the contract. In such case the plaintiff may sue either on the original contract or on the note.

Hays *v.* McClurg, 4 Watts, 452.

The affidavit does not aver that the note is outstanding in the hands of a *bona fide* holder.

THE COURT. The Act of March 11, 1836, applies only to loans or advances of money not evidenced by any instrument of writing under which judgment could be taken by filing a copy under the affidavit of defence law.

Rule discharged.

[As to requisites of an affidavit of loan under the Act of 1836, see Lloyd *v.* Contri, 2 WEEKLY NOTES, 170; Barr *v.* Ambler, Id. 262. See, also, Act of 9 April, 1868, § 1 (P. L. 780), cited and construed in Hossler *v.* Hartman, Id. 659.]

C. P. No. 3. **Kennedy v. Bozarth.** Nov. 11.

Mechanic's lien law—Omission in claim of owner's name, and of dates when materials were furnished and work done—Striking off defective claim—Practice.

Rule to strike off mechanic's lien.

The claim was filed against "Joseph S. Bozarth, contractor," without naming the owner or reputed owner, for materials furnished and work done "within six month last past," but the dates were not mentioned either in the claim or in the bill of particulars. The only reference in the claim to the work done was "Work and gas fitting . . . . for and about the erection," etc, and, in the bill of particulars, "and fitting job complete," no sum being specified therefor. The bill of particulars contained a list of materials furnished, without specifying the prices, and concluded, "To amount of estimate, $148.75."

P. K. Erdman, for the rule.

Rule absolute.

[As to what particularity is required in stating dates, etc., in a mechanic's claim, see Martin *v.* Jack, 2 WEEKLY NOTES, 232; McNeill *v.* O'Neill, Id. 530; Aman *v.* Brady, Id. 262; Tack *v.* Brady, Id. 426; Williams *v.* Carson, 1 Id. 107; Vandyke *v.* Carson, Id. 107; Green *v.* Brown, Id. 434.]

C. P. No. 4. **Conrad v. Rodgers.** Oct. 14.

Affidavit of defence—Allegation that defendant never ordered or purchased goods, and owes nothing—Evasive averments—Sufficiency—Motion for judgment on failure to file a supplemental affidavit ordered.—Practice.

Rule for judgment.

Assumpsit on a book account. Upon a previous rule for judgment for want of a sufficient affidavit of defence, the Court ordered a supplemental affidavit to be filed. This not having been done—

L. C. Massey now moved for judgment.

[ELCOCK, J. The question is now upon the sufficiency of the original affidavit.]

The affidavit set forth that defendant never ordered or purchased the goods mentioned in the copy filed, and owes nothing by reason of such alleged purchase by him; that if the same were ordered by any other person in his name, he has no knowledge thereof, and he has no personal knowledge of any such goods having been obtained for him or for his use.

Massey, for the rule, contended that the affidavit was evasive. The mere denial of personal knowledge is no defence; he may have had an authorized agent, and such fact is suggested by the peculiar wording of the affidavit, the copy filed making no allusion to the subject of an agency.

Digitized by Google

Rule discharged, ELCOCK, J., remarking that the Supreme Court have recently gone very far in allowing similar affidavits.

[*Cf.* Reznor *v.* Supplee (Supreme Court), 2 WEEKLY NOTES, 401; as to insufficiency of similar affidavits in Court below, see Hunsicker *v.* Arnold, 1 WEEKLY NOTES, 589; Reis *v.* Herman, Id. 84. As to practice (in the late District Court) in taking judgment on failure to file a supplemental affidavit ordered, see "District Court Practice" (3), 1 WEEKLY NOTES, 18; Gabel *v.* Thomas, Id. 51, 83; Seabold *v.* Duncan, Id. 83, 90.]

C. P. No. 4. **Tennery v. Dickerson.** Oct. 7.

Award of referee—Notice of filing award to counsel of record who had ceased to represent defendant—Exceptions allowed nunc pro tunc.

Rule to set aside execution and to show cause why defendant should not be permitted to file exceptions to the award of referee *nunc pro tunc.*

Assumpsit. The affidavit of defendant to support the rule set forth that on February 24, 1876, after the cause was at issue, the following agreement was entered into by the respective counsel:—

"It is agreed that all matters at variance between the above-named parties be submitted to Edward McCabe, Esq., whose decision is to be final and conclusive between them.

"JNO. M. ARUNDEL, *Atty. for Pl'ff.*
"J. A. OWENS, *pro Def't.*"

That in pursuance of this agreement the referee took testimony, and on July 7, 1876, filed his report; on July 12, 1876, judgment was entered upon the award, and execution subsequently issued; that prior to the entry of judgment no notice of the filing of the report was given to the defendant.

The plaintiff averred that he gave notice to the defendant's counsel of record, John A. Owens, Esq.; but at or prior to the filing of said award, Mr. Owens informed the plaintiff that he no longer represented defendant.

E. C. Shapley, for rule.

J. S. Tennery (P. P.), contra.

Rule absolute.

[*Cf.* Whitaker *v.* Van Arsdalen, 2 WEEKLY NOTES, 98.]

C. P. No. 4. Oct. 7.

Hackettstown National Bank v. Matthews.

Affidavit of defence—Promissory note—Sufficient allegation of fraud to put holder to proof of consideration.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit by holder against maker on three promissory notes. The affidavit set forth that the notes were drawn by defendant to the order of George W. Johnson and Reading Bell, under the following circumstances, viz.: the defendant originally gave an accommodation note to the Mill Creek Iron Co., through its President, Z. P. Boyer, to be used by him for the account of said Iron Co.; Boyer gave the note to said Johnson and Bell in order to have it discounted by the plaintiff bank, in which they were depositors and directors; no return of the proceeds was ever made to Boyer, who notified the defendant thereof. The latter then stopped payment of the note, and at maturity it was duly protested, but no suit was ever brought upon it; subsequently Bell fraudulently represented to the defendant that Boyer desired and requested him to give to him, Bell, other negotiable paper instead of the said accommodation note, and that "it would be all right;" and upon these representations the notes in suit were given to Johnson and Bell; also, that the bank was a holder for collection merely.

Vail, for the rule.

The fact that the notes were for accommodation is, of course, no defence. A plaintiff need not show how the note was obtained, nor that he is a *bona fide* holder, until it has been shown that the note was obtained by fraud or force from a previous holder, of which there is no sufficient allegation here. The knowledge of a director is not the knowledge of the bank.

Gray's Adm'r *v.* Bank, 5 Cas. 305.
Custer *v.* Bank, 9 Barr, 27.

G. W. Hart (with whom was *R. T. Matthews*), contra.

No consideration ever was given, and the notes were never in a stranger's hands until the plaintiff obtained them. The original accommodation note not having been discounted according to its purpose, and the notes in suit having been obtained by fraudulent misrepresentation, the onus is on plaintiff to prove consideration.

Rule discharged.

[See Falconer *v.* Witzman, 2 WEEKLY NOTES, 225; Bank *v.* Thomas, Id. 408; Lobb *v.* Welsh, Id. 96.]

Orphans' Court.

Sept. 26.

Malcolm MacEuen's Estate.

Equitable assignment of a fund—"Kind services," whether sufficient consideration.

Exceptions to adjudication, sur account of the executors of Malcolm MacEuen, deceased.

Doctor Thomas MacEuen, the father of the de-

Digitized by Google

cedent, died in March, 1873, leaving by his will one-half of his residuary estate to his executors in trust, to pay the income thereof, or so much as they, in a wise discretion, might think proper, to Malcolm or to his committee, in such sums as they might consider advisable. But this income was not to be liable to any of the debts, contracts, or engagements, or to any alienation, anticipation, or disposition of the said Malcolm by his own act or by act or operation of law.

Some time in 1844 Dr. MacEuen received as guardian of his son certain moneys coming from legacies left to Malcolm by his aunts. During his life Dr. MacEuen failed to file his account as guardian, but his executors filed one, and the auditor to whom the said account was referred found a balance due to Malcolm of four thousand dollars.

For some months prior to his death Malcolm boarded with a Mrs. Barton, who was subjected to considerable annoyance from his irregular habits. On September 27, 1873, he gave to Mrs. Barton an order upon the trustees of his father's estate directing them to pay to her "in consideration of her kind services" to him, two thousand dollars. Three months prior to this order he had made his will, by which he devised his entire estate to Adela and Lilah Newton.

On April 23, 1875, Malcolm MacEuen died, and the account of his executors was duly filed. At the audit of this account the order for two thousand dollars, duly signed by Malcolm, was presented and the Court admitted the claim, with interest thereon.

Exceptions to this ruling were filed by the devisees.

J. B. Thayer, for the exceptions.

This order was invalid: (1) Because "kindness" is not a sufficient consideration in law.

Addison on Contracts, page 6 (new edition).
Byles on Bills, 228.

(2) Because it never was presented for acceptance.

Byles on Bills, 175.

(3) Because an order for money not payable at any specified time must be presented within a reasonable time, and this order was not so presented. Such delay is negligence.

Dr. MacEuen's estate might have responded to this draft, not this estate of decedent's aunts.

A M. Barton, contra, cited—

Byles on Bills, *page 215.
Barday *v.* Wram, 7 Harris, 401.

C. A. V.

Nov. 11. THE COURT, after reviewing the facts said: When decedent executed this paper his father had been dead six months. He had doubtless read the will and must have known that under its provisions he took literally nothing save what the trustees from time to time chose to give him. And further, that the income was carefully guarded against his contracts or engagements.

But he also well knew that there was in the hands of these gentlemen, which came to them as executors of his father and late guardian, a considerable sum of money which was his own, and over which he had unfettered control That the same persons happened to be the trustees of his father's estate does not alter the case. They had in hand moneys belonging to him; and $2000 of that fund he saw fit to appropriate to Mrs Barton; nor is it material to such appropriation that the order was neither presented to nor accepted by these gentlemen. It was not until October 12, 1875, nearly eighteen months after the death of Malcolm MacEuen, that the report of the auditor was filed showing a balance in his favor from the estate of his late guardian to meet this demand.

Therefore it was, when the executors of Malcolm MacEuen filed their account showing assets, that the payment of this order was claimed.

Decedent, from September 27, 1873, to the day of his death, in April, 1875, never revoked or repudiated this order. There are no creditors asking to set it aside, but the only parties who complain are volunteers—the objects of his bounty—who take his estate subject to all outstanding obligations of their testator. We regard this order as an *equitable assignment* by Malcolm MacEuen of $2000 out of his individual estate to Mrs. Barton; and this although the trustees or debtors had never assented thereto. (See Story's Equity Jurisprudence, pl. 1044, and the cases there cited. Also Phœnix Iron Company *v.* The City, Legal Intelligencer, May 12, 1876; S. C., 2 WEEKLY NOTES, 596.)

And now, November, 4th, 1876, the exceptions filed are dismissed, and the adjudication of the Judge is affirmed.

Opinion by O'BRIEN, J.

Dissenting opinion by DWIGHT, J.: —

. . . . "It appeared in evidence that decedent had previously written and delivered to Mrs. Barton a paper similar to the above, but not containing the words, 'in consideration of her kind services to me.' This he asked for and destroyed. He then wrote out the above and delivered it to her, saying, 'these words will make it valid!'

"There is no evidence that any of the acts of care termed in the paper 'kind services' were performed at the decedent's request. On the contrary, there is nothing to show that they were other than gratuitous acts of good-will, the subsequent appreciation of which by the decedent, led him to make and deliver the written paper already quoted. The evidence, therefore, is in harmony with decedent's description of what Mrs. Barton did. She rendered 'kind services,'

Digitized by Google

by which may be understood voluntary offices, prompted by benevolent or charitable feelings. The word 'gratuitous' characterizes them best, a word which imports the absence of an intention to charge or be compensated.

"If the paper on which the claim is founded is to be construed strictly, it is at best an order upon the trustees, whose assent is essential. Without this there could be nothing upon which the order could feed. The decedent had no property in the income of the trust fund until it was paid to him; and it may be doubted whether, in view of the clause against anticipation and the clause investing them with discretion, they would have been justified in honoring the order, the consideration for which they had not previously sanctioned. Be this as it may, it is in evidence that they had at one time notified Mrs. Barton that they would not pay her anything on decedent's account, except the sum which they had agreed to pay for his board. But if they had assented, the claim clearly would have no standing as a demand against a fund which comes not from the trust estate, but, as already stated, from another source.

"It may be said, however, that the paper is ambiguous, because the trustees were the executors of Dr. MacEuen and received, intermixed with the assets of his estate, the funds which he had in his hand as decedent's guardian. Should this position be granted, and the paper be construed as an order upon the decedent's estate, the case would come under the ruling stated in Lampleigh *v.* Braithwaite (Hobart, 105), and firmly incorporated in the law. 'A mere voluntary courtesy will not uphold an assumpsit, but a courtesy owned by a previous request will.' The expression 'voluntary courtesy' is equivalent to decedent's item 'kind services.' No request having been proved, a subsequent promise to pay could not be enforced. If, therefore, it should be conceded that the order was a promise to pay, there could not be a recovery upon it, because the services were gratuitous.

"It is unnecessary to decide which of the two constructions above adverted to is right. Adopting either, the same conclusion is reached: that the exceptions should be sustained."

[See same estate, 2 WEEKLY NOTES, 307.]

Nov. 4.

John Given's Estate.

Decedents' estates—Executors and administrators—Petition for review after settlement of account and distribution—Act of Oct. 13, 1840—Review granted only to correct errors apparent on face of proceedings, or from new matter arising since decree—New claim on bond given by decedent as surety, is not ground for review—Refunding of assets by distributee—Orphans' Court practice.

Sur petition for review.

The petition of William Rutherford, executor, set forth that on February 6, 1874, he filed his account, which was referred to an auditor, whose report was subsequently confirmed; that the balance in the hands of petitioner was awarded, under the will of testator, to his widow for life, or during widowhood; that under the Act of May 17, 1871, the said balance had been paid over to the widow, she entering security to protect the interests of the persons entitled in remainder. That since the confirmation of the auditor's report and decree thereon, it has appeared that decedent, on April 30, 1867, became surety for Ferdinand Geisler, as guardian of the Morgan minors; that said guardian has filed an account, by which a balance is due one of said minors, who is now of full age, and he has been ordered by the Court to pay over the same; that a rule for an attachment has been granted and returned unexecuted, whereby a claim is now made against the estate of the testator, upon his bond as surety. The petitioner therefore prayed the Court to grant such relief as equity and justice may require, in accordance with the Act of October 13, 1840. (Purd. Dig. 1109, § 49.)

C. P. MacCalla, for petitioner.

November 11. THE COURT. The object of the Act of October 13, 1840, is to correct errors in the account of an executor, administrator, or guardian, apparent either upon its face, or from new matter which has arisen since the decree. And the errors must be specifically set forth in the petition for a review. It is not alleged that any errors in the account of the executor existed at the time of, or have been discovered since its final confirmation. But, it is set forth as a ground of review, that the testator in his lifetime became surety for a guardian who is now in default, and cannot be served with the process of the Court, and thereby a claim has been, or will be, made against the estate of testator, upon the bond given by him. These facts do not present a case contemplated by the Act of Assembly. The purpose of a review is to correct an *error*, not to determine the validity of additional claims against the estate. And in this instance, even if all the requirements of the law were supplied, a review could not be granted, as it also appears that the entire estate has been distributed. It follows, therefore, that upon a verdict and judgment against the executor, in a suit upon the bond, he must call upon the distributee to refund.

The petition is refused.

Opinion by HANNA, J., in full.

Digitized by Google

Weekly Notes of Cases.

Vol. III.] *THURSDAY, DEC. 7, 1876.* [No. 10.

Supreme Court.

July, '70, 205. **Pratt v. Patterson.** Feb. 15.

Evidence—Competency of witnesses—Act of 15 *April,* 1869—*Actions by or against administrators — Notes of testimony in prior case, when admissible in subsequent suit, where witness himself incompetent—Trial—Nonsuit—Practice.*

Notes of the testimony of a plaintiff witness taken in a former discontinued action are admissible on the trial of a second suit for the same subject matter, notwithstanding that, by the death of the defendant before the second trial, and the substitution of his executors, the plaintiff himself was rendered incompetent as a witness.

In an action between A. and B., both parties testified; that suit having been discontinued, a new action was commenced between the same parties for the same subject matter. The defendant died before the second trial, and his executors were substituted. On the trial the plaintiff offered in evidence the notes of his testimony taken on the former trial:

Held (reversing the judgment of the Court below), that such notes of testimony were admissible.

Evans *v.* Reed, 2 Weekly Notes, 175, and Sheetz *v.* Norris, Id. 637, followed.

Certificate from *Nisi Prius.*

Assumpsit by Pratt against Patterson to recover commissions on a sale of real estate for the defendant. Plea, the general issue. Before trial the defendant died and his executors were substituted on the record.

The evidence for the plaintiff amounted to this: The defendant's testator, Patterson, being the owner of certain property in the city of Philadelphia, employed the plaintiff, a real estate broker, to sell it for him, the price to be $140,000, and the commission on sale to be one per cent. The plaintiff secured a purchaser, one Harding, who instructed him to offer to Patterson first, $135,000 and then, $137,000, and finally, if these offers were refused, to take it at Patterson's price. Harding, wishing not to appear in the transaction, required that the articles of sale should be signed by one Natt, a clerk in his employ. These articles, so signed, and delivered to the plaintiff for Patterson's signature, stipulated that the price should be $140,000, and that Patterson should pay the plaintiff the one per cent. commission. The plaintiff called on Patterson and made the lower offers as instructed by Harding, both of which were rejected. He then produced the agreement to purchase at $140,000. Patterson refused to sign, but said that when the purchaser was ready to pay the money, he would make the sale, and that the clause relating to the plaintiff's commission was "all right." He also inquired who Natt was, and was told by the plaintiff that he was a responsible party—a merchant in Philadelphia. He appeared very angry that the plaintiff should have made lower offers, when he (the plaintiff) held an agreement to purchase at the original price.

The plaintiff offered to prove by one Alexander that $500 on account of the purchase-money was tendered to Patterson, and what the latter said about this transaction when the tender was made, and that he treated the witness roughly and turned him away, saying that Pratt had lied to him. The defendants objected, and the evidence was excluded under exception to the plaintiff.

The plaintiff offered himself as a witness, and being excluded, under exception, then offered the notes of his testimony in a former action between the parties in the lifetime of Patterson, which suit was about the same subject-matter, and in which Patterson was also examined. This also was objected to and ruled out, under exception.

The plaintiff then offered to put in evidence a copy of a letter from him to one Townsend (then acting as Patterson's counsel) who had testified that he had searched for the original and could not find it. The defendants objected because no notice to produce the original had been given to the defendants or their counsel.

Objection sustained. Exception. (Third assignment of error.)

The plaintiff having closed his evidence, the Court (Williams, J.) entered judgment of nonsuit, and afterwards dismissed a motion to take off the same; whereupon the plaintiff took this writ of error, assigning for error the rejection of his various offers and the refusal to take off the non-suit.

E. S. Miller and *Isaac Hazlehurst,* for the plaintiff in error.

The offer to prove a tender was certainly evidence tending to satisfy the jury that the purchaser was a responsible man.

Conceding that the plaintiff was not a competent witness after Patterson's death, yet the notes of his testimony in a previous trial when both were living and both were sworn, should have been admitted. Evans' Adm'x *v.* Reed (2 Weekly Notes, 175) rules this very point. If a witness has given a deposition in the cause and subsequently becomes disqualified, the deposition may be read.

1 Greenleaf, Ev. § 168.

The letter to Townsend was not addressed to

Digitized by Google

Patterson, and there was no evidence that it ever went to him. The plaintiff was not bound, therefore, to give defendants notice to produce the original.

Lastly, as to the judgment of non-suit. The plaintiff was guilty of no bad faith in offering Patterson, a lower price than Harding was willing to give. A broker may have secrets from both parties to transactions. The name of the buyer may be reserved, and if this be so, it is not unlawful to put forward the name of one, whom a buyer has chosen to represent him.

Thomas Hart, Jr., contra.

The plaintiff himself was clearly incompetent, and so were the notes of his testimony. Evans *v.* Reed, *supra*, relied on by plaintiff in error, does not support his argument, for in that case the plaintiff was dead. The authority from Greenleaf cited by plaintiff in error was overruled in Chess *v.* Chess (17 S. & R. 409).

Townsend was the defendant's counsel when the letter referred to was written. It could only have been on the idea of a correspondence between parties, that a letter not to the defendant could have been admitted. If, therefore, Townsend and the defendant were not the same as regards this letter, it was not admissible. If they were the same, due notice to produce the original should have been given.

It is a fraud in a broker to act for both parties, concealing his agency for one from the other.

Story on Agency, § 31.
Farnsworth *v.* Hemmer, 1 Allen, 494.
Everheart *v.* Searle, 21 Sm. 256.

Faithful service is a condition precedent to the right of a servant to recover wages.

Singer *v.* McCormick, 4 W. & S. 265.

May 8. THE COURT. The plaintiff brought suit to recover commissions as a real estate broker. In a former suit between him and the testator, about the same subject-matter, each party had testified and the testimony had been reduced to writing. The verdict in that case was set aside and the suit discontinued. This suit was afterwards brought between the same parties. Before the trial the defendant died and his executors were substituted. On the trial, the notes of the plaintiff's testimony taken in the former suit were offered in evidence and rejected by the Court. This is assigned for error.

The competency of this kind of evidence under similar circumstances received a careful consideration in Evans' Adm'x *v.* Reed (2 WEEKLY NOTES OF CASES, 175). That case differed in this: there the notes of the testimony of the deceased party were held admissible in the same suit in which they were taken; here the testimony is that of a surviving party offered in a subsequent suit, involving the same subject-matter, against the executors of the deceased party. There, it was said, "If the deposition of a party be duly and regularly taken so as to be admissible in evidence in a pending case, it is very clear that it would be admissible in a subsequent suit between the administrators of the parties involving the same subject-matter." Here it is a subsequent suit tried after the death of one of the parties, and involving the same subject-matter. The very case assumed there, substantially exists here. In each case the testimony was not only admissible when taken, but had actually been given in evidence.

It must not be overlooked that the Act of 15th April, 1869, is an enlarging not a restraining act. It makes no witness nor evidence incompetent that was competent before its passage. (Sheetz *v.* Norris, not yet reported.) [2 WEEKLY NOTES, 637.]

The first section of the Act of 28th March, 1814 (Pur. Dig. 625, pl. 24) declares "any deposition taken or to be taken in any cause, which by the rules of law may be read in evidence on the trial of the cause in which it is or may be taken, shall be allowed to be read in evidence in any subsequent cause wherein the same matter shall be in dispute, between the said parties or persons, their heirs, executors, administrators, or assigns." The third section of the Act of 15th April, 1869, authorizes the testimony of all witnesses made competent by that act to be taken by deposition or commission issued, as the case may require. In Evans' Adm'x *v.* Reed, *supra*, the notes of testimony were considered substantially as a deposition duly taken. Hence, as it was there held, evidence competent under the Act of 1869, when taken, is admissible under the Act of 1814.

This evidence was taken on due notice with ample opportunity for cross-examination. It was not testimony that could have been fabricated after the death of the party whose interest might be injuriously affected thereby. When taken the parties stood on an equal footing. Each had the right to perpetuate his own testimony. Each availed himself of that right. All statutes which provide for the perpetuation of evidence are in furtherance of justice and a due administration of the law. They should receive a liberal construction. This is not the case of a deposition of a person taken when he was not interested, but becomes so before it is offered in evidence. Here he was no more interested when his testimony was offered, than when it was first taken. His interest has remained unchanged. The second assignment is, therefore, sustained.

The offer to put the plaintiff on the stand to testify in regard to matters which occurred in the lifetime of the defendant rests on a different basis, and there was no error in rejecting the witness.

The third assignment has no merit. If Town-

Digitized by Google

send, as agent for the defendant, received and held the letter, notice to produce the original was necessary before a copy was admissible in evidence. If he was not such agent, the defendant could not be affected by the letter; inasmuch as he had no knowledge of the contents.

The time when the tender was made, and what the defendant said material to the issue are not stated in the offer covered by the fourth assignment. It should be shown affirmatively that the plaintiff was injured by the rejection of the evidence. We are unable to see any such effect. We would not disturb the judgment of nonsuit on the evidence before the Court; but by reason of the rejection of the notes of testimony the judgment must be reversed.

Judgment reversed and a *venire facias de novo* awarded.

Opinion by MERCUR, J. WILLIAMS, J., absent.

Jan. '76, 226. **Davis's Appeal.** June 9.

Contested Election of Edwin R. Wheelock.

Election Law—Act of 30th of January, 1874—Absence of list of taxables at poll—Effect of technical irregularities.

The absence from the poll of the "copy of the list of resident taxables," required by the Act of 30 Jan. 1874, to be furnished to the election officers on the morning of the election, is not, in the absence of proof that votes of unqualified electors were received, such an irregularity as will warrant the rejection of all the votes cast.

Per WETMORE, P. J. (affirmed PER CURIAM). "When the application of technical rules and a strict construction of the acts of the officers in preparing the election papers and conducting an election would tend to defeat the will of the people and change the result of an election for an important office, they should not be applied, and all reasonable intendments should be made in favor of the legality of their proceedings.

"When, however, it is alleged that there is actual fraud in the election, ... the duty of the Court is equally plain, and every legal facility should be afforded to purge the poll; and when the acts of the officers are so fraudulent and irregular that the result cannot be ascertained, then the entire poll is rejected. . . . . To disfranchise all the voters of a township, the facts should show a case free from legal doubt."

Certiorari to the Quarter Sessions of Warren County.

This was an appeal by John F. Davis and others from a decree of the Court below, quashing a petition presented by them, contesting the election of Edwin R. Wheelock as County Commissioner of Warren County.

The petition of the appellants, twenty-six qualified electors of Warren County, set forth that at a general election held in said county on Nov. 2, 1875, Edwin R. Wheelock was certified and returned by the election officers as elected to the office of County Commissioner, he having received 1904 votes, and his opponent, Darius Mead, 1854 votes; that the said election was undue and illegal, and that Darius Mead was elected to said office at said election, and not the said Edwin R. Wheelock, and in support thereof averred that in the election district of Pine Grove the election was not held at the house of John Russell, the place fixed by law and designated in the sheriff's proclamation for holding elections in that district, but at the school-house in the village of Russellsburg, a distance of forty rods from the house of John Russell; and that in that district 127 votes were polled and counted for Wheelock, and 90 votes for Mead; that in the election district of Freehold there was no copy of the corrected assessment or registry of voters present at said election, whereby the names of the resident taxables and voters of said district could be ascertained; that in this district there were 208 votes illegally and fraudulently received by the election officers from persons whose names were not on any list of resident taxables or registry of voters present at the election, and who did not make any proof of their right to vote as required by law of persons claiming the right to vote whose names do not appear on the registry of voters at such election; that of the votes so illegally and fraudulently received, Wheelock received 168 and Mead 40 votes.

That by reason of such undue, illegal, and fraudulent manner of conducting the election at Pine Grove and Freehold, the votes of those districts should have been rejected by the election officers, making Mead's total 1724 and Wheelock's 1609 votes.

The respondent obtained a rule to show cause why the petition should not be quashed on the ground that the facts stated in said petition were insufficient in law to justify the setting aside of the entire poll, or in any way to change the result as returned by the election board, there being no allegation that any person voted at said election who was not duly registered as required by law, or that any person was illegally prevented from voting, or that there was any fraud or mistake in the manner of holding said election; and that the alleged illegality in the district of Pine Grove was not sufficient of itself to change the result of the election.

The Court, WETMORE, P. J., made the rule absolute, and delivered the following opinion:—

"The question presented by the petition is, whether the fact that no copy or list of the resident taxables and voters was present at the election board on the day of the election, makes the election void, and requires us to set aside the entire poll.

The first and second sections of the Act of the

Digitized by Google

30th of January, 1874, direct the mode of completing the list of taxables, and describe the duties of the Assessors and County Commissioners in connection therewith. The third section of the same Act requires the County Commissioners to make a full and correct copy of the resident taxables in each election district, and to furnish the same, together with the necessary election blanks, to the officers of the election in such election district, on or before seven o'clock of the morning of the election. Whether it was the fault or neglect of the County Commissioners in not furnishing the officers of the election with the corrected list of taxables as required; or whether they performed this duty and furnished the list, and an officer, or officers, of the election neglected or fraudulently failed to produce the same at the election; or whether they were lost, stolen, or destroyed, we do not know, and the petition gives us no information.

It is a general rule that when a person is required to do an act, the not doing of which would make him guilty of criminal neglect of duty, it shall be intended that he has duly performed it. (Broom's Legal Maxims, 913.) We therefore presume, in the absence of evidence to the contrary, that the election was duly held at the time and place fixed by law, and by the proper officers, who were duly qualified, and that the persons voting were legal voters in the election district.

An election is the embodiment of the popular will, the expression of the sovereign power of the people. When the application of technical rules and a strict construction of the acts of the officers in preparing the election papers, and conducting an election would tend to defeat the will of the people and change the result of an election for an important office, they should not be applied, and all reasonable intendments should be made in favor of the legality of their proceedings. When, however, it is alleged that there is actual fraud in the election, or that the ballot-box has been tampered with, or illegal votes received, or the careless or fraudulent acts of the officers have mixed and confused the ballots, the duty of the Court is equally plain, and every legal facility should be afforded to purge the poll; and when the acts of the officers are so fraudulent and irregular that the *result cannot be ascertained*, then the entire poll is rejected. These are substantially the conclusions of the Judges in the Contested Election Cases in Philadelphia in 1845, 1850, and 1858, as reported in 2d Parsons and 1st and 2d Brewster's Reports.

The State Constitution, ART. VIII., Section 1, gives to every citizen possessing the qualifications prescribed the right to vote, and the 7th Section of the same Article provides that no elector shall be deprived of the privilege of voting by reason of his name not being registered.

To disfranchise all the voters of a township, as we are asked to do in this petition, the facts on which we are required to act should show a case free from legal doubt. If we, by our decision, should permit the carelessness or even the fraud of officers whose duty it is to furnish a list of voters at the election, to defeat the election and deprive the people of the county of the officer who was elected by a majority of their votes, we would thus make the people suffer for an act in which they did not participate, and which they did not sanction. In so doing, instead of punishing an officer for the violation of the election law, we practically punish the voters of the county by defeating their choice of a county officer as declared at the election. A decision of this kind would be fraught with danger, by inviting unscrupulous or unprincipled persons, on the eve of an important election, to secrete or destroy the list of voters or other important papers in a township in which the majority may determine the result in the county. Rules applicable to contested elections, like other legal rules, must be uniform, and the results and consequences of decisions therefore determine their correctness.

But few cases of contested elections have received a construction in our Supreme Court. In Melvin's Case (18 P. F. Smith, 333), THOMPSON, C. J., referring to the powers and duties of the Court to strike out the vote of an election district, says: 'This ought not to be done when a legal election as to *time* and *place* is held, although fraudulent votes have been received. The remedy in such case is to purge the polls by striking out the fraudulent votes if possible.' In the contested elections of 1867, for Clerk of the Orphans' Court and other officers in Philadelphia, it appeared from the evidence that in one case the minority inspector was overawed, and the list of assessed voters taken from him, and sat on all day by the Judge, and the requirements of the law in receiving the ballots were to a great extent disregarded. There was nothing to show that the voters not on the list were qualified according to law, and a large number of such votes were received. Still the entire poll was not rejected, and each contestant was allowed to prove his legal vote, to be counted for and credited to him, in the final computation. (1 Brewster's Reports, 176, et seq.)

The irregularity in the election district of Pine Grove is not deemed material in our conclusions, as its correction would not change the result."

The appellants took this appeal, and assigned as error the judgment of the Court below quashing the petition.

R. Brown (with him *C. Dinsmoor*), for the appellants.

It is established law, that the vote of a whole election district may be stricken out, upon showing a disregard of conformity to law in conducting

Digitized by Google

the election. (Melvin's Case, 18 Sm. 333.) The direction in the Act of 1874, that no man shall be permitted to vote at an election whose name is not on the registry list, unless he proves his right to do so, in the manner prescribed by a subsequent section, is imperative and not merely directory: the fact that a penalty is imposed on the election officers, for receiving votes except in the manner therein directed, establishes its mandatory character, it being a settled rule, in the construction of statutes, that a prohibition accompanied by a penalty is never to be regarded as merely directory.

Contested Election Cases of 1868, 2 Brewster, 52.
Beander *v.* City, 26 Leg. Int. 294

No penalty having been imposed upon the Commissioners for neglecting to furnish the registry list to the election officers, there was no criminal neglect of duty on their part, and consequently no presumption of its performance.

Johnson (with him *Lindsey* and *Clark & Noyes*), for appellees.

That the registry list was not present at the election, and that all the voters did not furnish the proof required of non-registered voters, is insufficient, in the absence of any allegation that the votes of persons, not legal voters, were accepted by the election officers, to invalidate the election. The contention of the appellants, that the absence of the list puts all voters upon the footing of non-registered voters, would, if correct, disfranchise every voter in the district, as non-registered voters are required to prove their right to vote by affidavits of themselves and some other *qualified* voter of the district. An entire poll will only be rejected when through fraud or gross negligence it is impossible to ascertain what the legal vote was.

Contested Elections of 1868, *supra*.
Melvin's Case, *supra*.

Oct. 10. THE COURT. We discover no error in this case. The grounds sustaining the election of Edwin R. Wheelock are sufficiently stated in the opinion of the Court below. Proceedings affirmed. PER CURIAM.

Oct. & Nov. '75, 269. Oct. 6.

In re Contested Election of C. B. Welti.

Contested elections—Petition, requisites of, to confer jurisdiction—Act of April 19, 1874, § 18—*Amendment, when too late—Practice.*

To give the Court jurisdiction in cases of contested elections, under the Act of April 19, 1874 (P. L. 213), the statutory requisites must be strictly complied with.

The said Act provides, *inter alia*, that the petition shall be signed by twenty-five *qualified electors, who voted at the election contested*, and must be presented within thirty days after the election. A petition having been signed by twenty-five "citizens and residents of the Tenth Ward of the City of Allegheny," omitting to state that they were "qualified electors who voted at the election contested:"

Held, that the omission was a fatal defect, and the Court had no jurisdiction.

Held, further, that thirty days having elapsed since the election, it was too late to amend the petition.

Certiorari to the Quarter Sessions of Allegheny County

On March 17, 1875, a petition headed "The petition of the undersigned, citizens and residents of the Tenth Ward of the City of Allegheny, over twenty-five in number," was presented in the Quarter Sessions of Allegheny County. It set forth that at an election for a Select Councilman, held in the said ward on February 16, 1875, there were two candidates, C. B. Welti and S. Watson; that many persons, minors, unnaturalized foreigners, etc., voted illegally at the said election, and various irregular acts, described at length, were committed; and that by these means Welti was returned as elected; and prayed the Court to grant a rule on Welti to show cause why Watson should not be declared the lawfully elected Select Councilman at the said election. The Court ordered this petition to be filed, adjudging it to be sufficient, granted the rule to show cause prayed for, fixed April 16 for a hearing, and directed due notice of the filing of the petition and granting of the rule to be served on Welti.

On the day fixed for the hearing, Welti moved the Court to quash the petition, filing, *inter alia*, the following exception thereto: "That the petition does not show that the petitioners are qualified electors of said ward who voted at said election of February 16, 1875."

On June 5, a petition was filed, signed by twenty-five qualified electors of the ward, who voted at this election, asking leave to amend the former petition, by inserting in the heading, after the words "citizens and residents of said ward," the words "qualified electors who voted at said election."

On June 12, the Court quashed the petition, sustaining the above-mentioned exception, and refusing the amendment asked for, on the ground that after thirty days from the election they had no power so to amend, as the words "qualified electors, who voted at said election" were, under the Act of April 19, 1874, § 18 (P. L. 213), a prerequisite to confer jurisdiction upon them. The petitioners thereupon took this writ of certiorari, assigning for error the above mentioned action of the Court.

A. M. Watson, for appellants.

The amendment asked for was merely formal and wholly within the power of the Court.

Digitized by Google

Kneass' Case, 2 Pars. 553.
Fisher v. Rutherford, 1 Bald. 193.
Bailey v. Musgrave, 2 S. & R. 139.
Mann v. Cassidy, 1 Brewster, 32.

M. W. Acheson (with him *J. F. Slagle*), contra.

The power to amend judicial proceedings, except under the Acts of Assembly especially authorizing them, is discretionary, and the refusal of the Court to allow such an amendment is not the subject of review.

Mishler v. Com'th, 12 Sm. 62.
Diehl v. Ins Co., 8 Id. 452.
Election Cases, 15 Id. 35.

The jurisdiction of the Court of Quarter Sessions in election cases is statutory, and a compliance with the provisions of the statute must appear upon the face of the proceedings. Now the Act of 1874 expressly provides that a petition such as this must be signed by twenty-five qualified electors who voted at the election to be contested. A petition is therefore insufficient, which does not set forth this prerequsite to jurisdiction.

In re Contested Election, 32 Leg. Int. 126; S. C., 1 WEEKLY NOTES, 326.
Election Cases, 15 Sm. 35–46.

October 16. THE COURT. It is sufficient for this case to say that the application to amend does not set forth a mere defect in form, and that the Court had jurisdiction in fact under the original petition. Clearly jurisdiction cannot be conferred after the expiration of the time fixed by law for the contest. It does not appear in the petition for the amendment that the original petitioners were qualified electors who had voted at the election. It is therefore unnecessary to decide whether a petition presented by the requisite number of qualified electors who had voted at the election, giving jurisdiction in fact within the proper time, may be amended in its form merely, by setting out the fact.

PER CURIAM. Proceedings affirmed. WILLIAMS, J., absent.

[See Barber's Appeal, 1 WEEKLY NOTES, 307.]

May, '76, 35. **Mattern's Appeal.** May 17.

Errors and Appeals—Appeal from a decree other than final—Orphans' Court.

An order of the Orphans' Court making absolute a rule for an attachment for the payment of money by an administrator *d. b. n. c. t. a.*, pending an appeal in the Orphans' Court from a decision of the Register of Wills, revoking the letters of administration *c. t. a.*, is not such a final decree from which an appeal will lie to the Supreme Court.

Appeal from the Orphans' Court of Huntingdon County.

This was, in the Court below, a rule to show cause why an attachment should not issue. The facts were as follows: On May 4, 1875, letters of administration *d. b. n. c. t. a.* on the estate of Leah Stroup were granted to J. W. Mattern, the executor appointed by the will having died, and the husband of the decedent having filed a renunciation in favor of Mattern. The undistributed residue of the estate, $371.70, accordingly passed into the latter's hands. On October 23, 1875, these letters were revoked by the Register of Wills, on the application of several of Mrs. Stroup's children. Mattern appealed from this decree of the Register to the Orphans' Court. On November 15, 1875, while the appeal was still pending, the children and legatees of Mrs. Stroup presented a petition in that Court, setting forth the above facts, alleging that Mattern had obtained Mr. Stroup's renunciation by misrepresentation, that he illegally refused to pay over certain moneys in his hands, and praying that he might be compelled to pay over to the petitioner the money received by him. On the presentation of this petition the Court granted a rule to show cause why an attachment should not issue to compel payment of money, returnable in five days. On November 20, 1875, Mattern filed an answer to the petition, denying the alleged misrepresentation, asserting that letters of administration had been duly and legally granted to him, security duly entered, and claiming a right to abstain from the responsibility of making distribution until he should file an account in fulfilment of his duty as executor. On the back of his answer the Court made the following indorsement: "November 20, 1875. Rule absolute unless within five days John Mattern pay the amount of bid into Court." Mattern took this appeal, assigning for error this action of the Court.

Petriken and *Mattern*, for appellant.

A citation, returnable in not less than ten days, should have been issued on this petition, not a rule returnable in five days.

Act March 29, 1832, § 57, Purd. Dig. 1106.
Woolley's Estate, 6 Barr, 352.
Okeson's Appeal, 2 Grant, 304.

Mattern should first have been ordered to file an account, and only on his refusal could an attachment rightly issue.

Witman's Appeal, 4 Cas. 376.

The decree is ambiguous and uncertain. What is meant by paying the "amount of *bid*" does not appear, as there was no bid in the case.

R. M. Speer, contra, presented no paper-book, but argued that this appeal must be quashed, as the appeal from the Register was still pending in the Orphans' Court, and the granting this rule to show cause was not such a final decree from which an appeal could be taken.

May 22. THE COURT. There being no final decree in this case, the appeal is quashed at the costs of the appellant.

PER CURIAM. WILLIAMS, J., absent.

Digitized by Google

Common Pleas—Law.

C. P. No. 1. Sept. 22.

Shakespear v. The Schooner "Maggie Cain."

Attachment of vessels—Act of 13 *June*, 1836—*Judgment and execution against master and owners—Practice.*

Rule to set aside judgment and execution.

This was a proceeding under the Act of 13 June, 1836, entitled "An act relating to the attachment of vessels" (Purd. Dig. 94). The libel was filed in 1871 by William M. Shakespear against the new schooner called, or intended to be called, the "Maggie Cain," and William Fisher and Son, owners, or reputed owners, and Andrew Scull, master, to recover the value of lumber furnished in the building of said schooner. A writ of attachment was issued and served on the respondents, and the vessel was seized thereunder. An answer was filed by Andrew Scull, "intervening for his own interest as master and part owner, and on behalf of the other owners of the vessel," setting forth that William Fisher and Son were not the owners, but merely the builders of the vessel; that she was owned by the said Andrew Scull and twelve others who had acquired title before her completion, and that the lumber was not furnished for her construction. Subsequently, Andrew Scull, with four sureties, executed the bond provided for by the tenth section of said Act, and the vessel was released from the attachment. Libellant then filed a replication to the answer, and a trial was had in the late District Court for the city and county of Philadelphia, which resulted in a verdict for plaintiff for $3373.01. Upon this verdict the Court entered the following judgment and decree:—

"And now March 16, 1872, it appearing to the Court that the demand of the libellant has been duly found by the verdict of the jury, judgment is entered upon the said verdict of the jury, and upon the point reserved at the trial; and it is further ordered, adjudged, and decreed that the said William M. Shakespear, the libellant, do recover of the said respondents and the said Andrew Scull and his sureties in the bond filed in this cause the sum of $3373.01, with interest thereon from the twenty-third day of November A. D. 1871, together with his reasonable costs and charges by him in and about his said suit in that behalf expended." This judgment was affirmed by the Supreme Court of Pennsylvania (Scull *v.* Shakespear, 25 Sm. 297), and afterwards by the Supreme Court of the United States. A remittitur from the Supreme Court to the Court of Common Pleas No. 1, being filed certifying the affirmance of the judgment, plaintiff caused a writ of *fieri facias* to be issued thereon, and levied upon the personal property of William Fisher & Son, and of Andrew Scull, including, *inter alia*, the schooner Maggie Cain, which had returned to port. Upon the affidavit of Andrew Scull setting forth the above facts, the present rule was granted to show cause why the judgment and execution should not be set aside. Pending this rule seven-eighths of the vessel were claimed by co-owners with Andrew Scull, and bond given under the Interpleader Act. As the remaining one-eighth, which was admitted to belong to Andrew Scull, was still subject to the levy, the Court ordered the vessel to be released upon security being given that if the present rule should be discharged the vessel should be returned within sixty days thereafter.

C. M. Husbands, for the rule.

This was a proceeding *in rem*. If no bond had been entered, the only way of enforcing the judgment provided by the Act was by the sale of the vessel (see section 14, Purd. Dig. 96, pl. 18), and there could have been no personal judgment against Andrew Scull. The bond filed was substituted for the vessel, and the plaintiff should therefore have proceeded on the bond and not by a writ of *fieri facias* against the property of Andrew Scull.

2 Troubat & Haly's Practice, 584, citing—
Rhinedollar *v.* Selu, D. C.

The decree of the Court in this case was not that libellant should have execution against respondents, but that he "recover of respondents and of the said Andrew Scull and his sureties in the bond filed." But such recovery could be had only by a suit on the bond.

This case is analogous to that of a mechanic's lien where security has been entered under the Act of August 1, 1868 (Purd. Dig. 1037, pl. 62), and the property released. In such case all remedy against the property is gone and the claimant must proceed on the bond.

Hoffman *v.* Haines, 8 Phila. Rep. 248.
Sepel *v.* Wierman, Id. 26.

Even if the judgment in this case be conclusive, the Court have power to set aside the execution.

Arthur M. Burton, contra.

The writ of attachment provided by the Act of 13 June, 1836 (*supra*), contains a clause of summons against the master and owners. It was intended to supply the place of a writ of attachment and the monition used by the Admiralty Courts.

Report of Commissioners to revise Civil Code, p. 719, citing—
Act 27 March, 1784, Laws of Pa., Carey & Bioren's Ed. vol. 2, p. 475.
Act 9 Feb. 1793, Laws of Pa., Carey & Bioren's Ed. vol. 4, p. 206.
Hall's Admiralty Practice, pp. 132, 133.

In obedience to the summons Andrew Scull

Digitized by Google

appeared and made answer, and a trial was had upon the merits. The suit was therefore *in personam* as well as *in rem*, and the judgment was properly rendered against the respondents and can be enforced by execution against their property.

1 Conkling's Adm. Prac. Ed. 1848. Tit. "Monition," p. 486.
2 Id. Tit. "Final Process," p. 773.
2 Parson's Mar. Law. Ch. iii. Sec. vi. p. 691.
Newell *v.* Morton, 3 Wall. 26.
Steamboat Burns, 9 Id. 237.
Cooper *v.* Reynolds, 10 Id. 308.
Duflett *v.* Creighton, 2 Troubat & Haly, 838.
Childs *v.* Digby, 12 H. 23.

The 13th section of the Act of 13 June, 1836 (Purd. Dig. 96, pl. 17), gives the Court power to pronounce the same final decree and enforce the same by like process as a Court of Admiralty might do. Upon a final decree in a Court of Admiralty in such a case, the Court can issue a writ of execution in the nature of a *fieri facias*.

Admiralty Rules of U. S. Courts, Rule 21.

The entry of the bond in this case is not analogous to the entry of a bond for the release of a mechanic's lien. A mechanic's lien is not served upon the defendant, nor does he appear. After a *sci. fa.* and service on defendant, no bond can be entered.

Hood *v.* Building Ass'n, 9 Phila. 105.

The judgment entered by the District Court was a general judgment against respondents, as well as a special decree that he recover of the principal and sureties in the bond. It has been affirmed by the Supreme Courts of Pennsylvania and of the United States, and this Court has now no power to set it aside.

Noonan *v.* Bradley, 12 Wall. 129.
Catlin *v.* Robinson, 2 W. 379.
Mathers *v.* Patterson, 9 C. 485.
Horner *v.* Hower, 3 Wr. 126.
Steamer Dictator *v.* Heath, 6 Sm. 290.

Henry Flanders, in reply.

The practice of our Courts under the Act of 13 June, 1836, is analogous to the practice of Courts of Admiralty, which have always held that where a stipulation is entered into for the release of a vessel all remedy against the vessel is gone, and she cannot again be seized by process of the Court in the same suit.

The Kalamazoo, 9 Eng. L. & E. Rep. 557.
The Wild Ranger, Lushington's Ad. Rep. vol. 2, p. 84.
The Union, 4 Blatchford's C. C. Rep. 90.
The White Squall, Id. 103.

C. A. V.

Nov. 25. THE COURT. This was originally an attachment under the Act of 13 June, 1836, against the new schooner called, or intended to be called, the "Maggie Cain," and the defendants as owners or reputed owners and master. The vessel was released on the defendants' giving bond under the provisions of the Act, and the case proceeded to a judgment or decree against the defendants and the sureties in the bond, for the sum of $3373.01, with interest and costs.

The defendants now move to set aside the judgment and decree on the ground that after bond had been given and the vessel released, the plaintiff should have brought an action on the bond, and should not have pursued the attachment to a decree or judgment, and that it is now the duty of the plaintiff to proceed on the bond.

That an action on the bond could have been maintained we do not doubt, and perhaps it may be deemed the better mode of proceeding in a case of this character, but we have to deal with this matter as we find it, and to set aside this judgment and execution might be bringing into question not only the decision of the District Court, which entered the judgment, but also those of the Supreme Court of Pennsylvania and the Supreme Court of the United States, both of which have affirmed it.

Though it has been decided that a proceeding under this Act is not a proceeding in Admiralty (Roach *v.* Chapman, 22 Howard, 129; Scull *v.* Shakespear, 25 P. F. Sm. 297), yet the Act provides that "upon the return of any such writ such further proceedings may be had for the recovery of the debts aforesaid as are usually had in Courts of Admiralty, and for the recovering of mariners' wages and other debts actually contracted upon the high seas." That it was competent for the Legislature to fasten upon a statutable remedy of this character the mode of procedure in Courts of Admiralty cannot be questioned. In admiralty the decree is not only against the defendants in the proceeding, but also against the stipulators upon whose intervention the property or persons of the defendants were released; and one of the rules of the Court of Admiralty is, "In all cases of a final decree for the payment of money, the libellant shall have a writ of execution in the nature of a *fieri facias*, commanding the marshal or his deputies to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendants or stipulators."

The proceedings in this case having been carried on after the manner of proceedings in admiralty, and a judgment rendered in conformity therewith, which has been affirmed by the highest tribunals in the land, and this Court having become the legal successor of the Court in which the decree or judgment was originally entered, for the purpose of carrying this judgment into effect by execution, we find no reason for interfering with the judgment as it has come to us by transfer to this Court.

We limit this decision to the particular case which is before us, for, as has already been intimated, there may be a proceeding on the bond

Digitized by Google

directed to be given by the Act where the vessel is discharged from the attachment, which would be equally effective in giving a remedy to a creditor, and which would be more in conformity with the usual modes of procedure in the Courts of Pennsylvania.

Rule discharged.

Opinion by PEIRCE, J., in full.

C. P. No. 3. Nov. 25.

Stœver v. Stœver, defendant, and the Tradesmen's Saving Fund Association, garnishee.

Attachment execution against stock—Act of June 16, 1836—Form of fi. fa. against stock in corporation—Practice, where the stock has been assigned to corporation as collateral security.

Rule to set aside *fi. fa.*

Attachment execution against stock of the defendant in the corporation, garnishee, held by it under an assignment thereof as collateral security for a loan. This fact being admitted in the answer, judgment was obtained against the garnishee and execution awarded for the sale of the stock, subject to all liens and rights of said garnishees.

The *fi. fa.* commanded the sheriff to levy upon "the goods and chattels, lands, and tenements of the Tradesmen's Saving Fund and Loan Association, garnishees of Henry Stœver, to wit, seven shares in the seventh series and six shares in the eighth series of the capital stock of the said association in the hands of the said association in the name of the said H. Stœver."

Fell and *Moore*, for the rule. The *fi. fa.* is in direct violation of § 38 of the Act of June 16, 1836 (Purd. Dig. 640, pl. 36), which provides that the *fi. fa.* in such case, shall issue against "the original defendant."

Rich, contra. This form of *fi. fa.* has been used for twenty years.

Rule absolute.

C. P. No. 3. **Young v. Lindsay.** Oct. 14.

Opening judgment confessed by attorney against defendant's interest—Neglect of counsel—Practice.

Rule to open judgment.

In this case, the attorney who had previously conducted the case for defendant appeared in open court, when the case was called for trial, and confessed judgment against his client. The depositions of defendant, taken under this rule, showed a defence on the merits, and that defendant had received notice from his former attorney saying he would move for a new trial.

A. Thompson, for the rule.

C. Stein, contra. In Pennsylvania an attorney has plenary power in conducting a suit.

Stackhouse *v.* O'Hara's Ex'rs, 2 Har. 89.
Lynch *v.* Com'th, 16 S. & R. 368.

The remedy is against the attorney.

C. A. V.

October 21. Rule absolute.

[See Sherman *v.* Brenner, 1 WEEKLY NOTES, 193; Mooney *v.* Carlin, Id. 92; Shoemaker *v.* Boal, Id. 154; Levin *v.* Graham, 388; Mock *v.* Edwards, 2 Id. 247, 535.]

C. P. No. 3. Nov. 4 and 25.

Tolman v. Smythe.

Partnership—Joint liability of partners—Contribution—Right to contribution, as between late partners, does not exist until actual payment by one—Promissory note—Holder for collection only.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note by holder against maker. The affidavit of defence set forth that plaintiff was a holder for collection only, the real owner of the note in suit being one Reed; that the note had been given to Reed by defendant in part payment for Reed's interest in the "Herald Publishing Company;" that at the time of giving the note "Reed was to be responsible for the result of a libel suit then pending in the Court of Common Pleas No. 4;" that a verdict and judgment in said suit were afterwards recovered against said company, for one-third of which Reed was really responsible, but that defendant would be compelled to pay the whole amount thereof; and that one-third of said judgment was greater than the amount of the note in suit.

A supplemental affidavit, being ordered, set forth that Reed was a former partner of defendant, and was liable as *such partner* under the judgment in the said libel suit; that Reed was insolvent, and the defendant had been threatened with an execution for the whole amount of the said judgment.

H. Budd, Jr., for the rule. (1) If the defendant, by his affidavits, claims contribution as between partners, the right to contribution does not exist until actual payment. Mere liability is not sufficient. *Non constat* that the whole sum will not be levied against Reed. (2) There is no express promise to indemnify averred, the affidavit merely stating that Reed "was to be responsible," etc. Moreover there can be no contribution between tort feasors. He cited—

Maxwell *v.* Jamison, 2 B. & Ald. 51.
Cummings *v.* Hackley, 8 Johns. 202.
Merryweather *v.* Nixon, 8 T. R. 186.

Digitized by Google

Arnold v. Clifford, 2 Sumner, 238.

J. C. Redheffer, contra.

THE COURT gave judgment on the first ground of plaintiff's argument.

Rule absolute.

C. P. No. 3. **Sanborn v. Petry.** Nov. 25.

Opening judgment against garnishee in attachment execution—What will excuse failure to appear—Practice.

Rule to open judgment.

Attachment execution against Odelheim, defendant, and Petry, garnishee. The writ was duly served on the garnishee, and judgment was taken against him for want of an appearance, and execution issued. From the deposition of the garnishee taken in support of this rule, it appeared that he had no property of defendant in his hands at the time of the service of the writ; that he was a foreigner and did not know the meaning of the word garnishee; that he met plaintiff and told him he had no effects of the defendant in his possession; that plaintiff replied "all right," and, relying on such statement, deponent gave himself no further anxiety about the matter until the execution was levied.

Bayley, for the rule.

Jennison, contra. The effect of the garnishee entering no appearance is equivalent to an admission of assets of defendant in his hands.

Rule absolute.

C. P. No. 3. **Taylor v. North.** Nov. 25.

Warranty—Representation—Warranty as to quality—Goods ordered at a distance without opportunity of inspection—Vendor and purchaser—Affidavit of defence—Particularity.

Rule for judgment for want of a sufficient affidavit and supplemental affidavit of defence.

Upon a former hearing of this case (reported *ante*, p. 77, *q. v.*) the Court ordered a supplemental affidavit, which, having been filed, set forth that the wood work for which the notes in suit were given was ordered by defendant at New York to be thereafter shipped from Williamsport, Penna., to Brooklyn, N. Y., upon a verbal agreement by the plaintiff that the same was to be of first quality and thoroughly seasoned; that upon delivery of the goods, defendant discovered, after he had given the notes, that they were of inferior quality and not thoroughly seasoned, in consequence of which the defendant's houses, in the erection of which the material was used, were depreciated in value and sold for a less price than would have been obtained had the goods been as ordered and agreed on. The defendant claimed to set off his damage as follows: "The whole amount of material purchased amounted to $15,000 to $20,000, and the damage sustained was at least $3000."

Lister, for the rule. The supplemental affidavit is not more specific than the original. The defendant does not set forth a special warranty, nor say when the goods were delivered, nor that he refused to accept them, or objected to the quality; and the damages are lumped at a gross sum without explanation.

Lockwood, contra. A special warranty need not be proved when the contract was executory for future delivery of goods which the purchaser had no opportunity to inspect.

Rule discharged.

[The rulings on this point are not uniform. See Nagle v. Potter, *ante*, 26; Dodd v. Kirk, 2 WEEKLY NOTES, 260; Shoemaker v. Paynter, Id. 111; Iron Co. v. Fiegel, Id. 154; Robertson v. Schwening, 1 Id. 94; Cunningham v. Welsh, Id. 315; Fox v. Paynter, Id. 373; Broderick v. McHenry, 446; Kollock v. Know an, Id. 514; and other cases referred to in Index to Vols. I. and II., tit. "Vendor and Purchaser."]

C. P. No. 3. **Pollock v. Association.** Oct. 28.

Affidavit of defence law—A suggestion of defence should be specific.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a book account.

A suggestion, sworn to by defendant, was filed, wherein he stated that he was instructed and believed that the plaintiff was not entitled to have judgment.

W. H. Redheffer, for the rule. The defendant should have stated why the plaintiff is not entitled to judgment.

Harrington, contra. The suggestion means simply that the copy filed is not sufficient to warrant judgment for want of an affidavit of defence

THE COURT granted the defendant a week in which to make his suggestion more specific.

C. P. No. 3. Oct. 28.

American Suit Manufacturing Company v. Benjamin Blair, trading under the name of his wife, M. Blair.

Affidavit of defence—Feme sole trader—Statements sufficiently specific.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on book account.

The copy of book entries filed was headed as follows:—

"M. Blair to American Suit Manufacturing Co., Dr.'.

The affidavit of defence alleged, *inter alia*, that the goods were sold and delivered to M. Blair, defendant's wife, who carried on business as a

Digitized by Google

feme sole trader under the Act of April 3, 1872, having fully complied with its provisions; that the goods were purchased by her as such *feme sole* to use in her business, and the debt is her own, contracted by her for the purposes of the said business. A supplemental affidavit of defence alleged that she carried on the business entirely on her own account, with funds or capital furnished neither directly nor indirectly by her husband, but which were her own separate moneys.

Tim, for the rule. The affidavits do not state whether the wife used her own separate earnings or moneys in commencing the said business as a *feme sole* trader, and whether she did so continuously to the present.

Rich, contra.

Rule discharged.

C. P. No. 3. **Taylor v. Foulkrod.** Oct. 28.

Scire facias sur mortgage—Default in payment of interest—Discontinued suit which was pending at the time the interest became due.

Rule for judgment for want of a sufficient affidavit of defence.

Scire facias sur mortgage, containing a clause that in default of payment of interest the whole amount should become due. The affidavit of defence alleged that a suit had been brought on the same mortgage to No. 626, June Term, 1875, in Common Pleas No. 1, had been put at issue and ordered for trial, but subsequently was discontinued. There had been no default in the payment of interest since this discontinuance, and the present suit was upon a default in the payment of interest which had occurred during the pendency of the former suit.

Dedrick, for the rule.

E. R Worrall, contra.

Rule absolute.

C. P. No. 4. Nov. 18.

Schiller Reading and Benevolent Association v Yost, Klauss, et al.

Affidavit of defence—Promissory note—Forgery—Joint endorser.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note by holder against maker and endorsers.

The affidavit of Johann Klauss, one of the defendants, set forth that the note was drawn as follows: "Six months after date I promise to pay to the order of myself and Johann Klauss and Joseph Schuler one hundred $\frac{}{100}$ dollars, with lawful interest, without defalcation, value received, payable at —. (Signed) JOSEPH YOST. (Endorsed) JOSEPH YOST, JOHN KLAUSS, JOSEPH SCHULER"; and averred that the deponent had never received any consideration for the said note from the association, plaintiff; that the plaintiff was not holder of the said note for value in the ordinary course of business, having, as deponent believed, received the said promissory note from the maker thereof, from the deponent, or from Joseph Schuler; further, "that at the time the deponent signed the said note he did so with the express understanding that the note would be endorsed by Joseph Schuler before deponent could be held liable as a joint endorser of said note"; that deponent was informed and believed that the name of said Schuler was a forgery; that said Schuler denied that he ever signed the said note as one of the joint endorsers thereof; also, that the notice of protest of the note in suit received by deponent did not name the plaintiffs, who sued as an incorporated society, as the holder of said note, but one Pfaff, trustee of the same; and further averred that deponent was not severally liable, being only a joint and not a several indorser.

Emlen, for the rule.

Staake, contra.

Rule discharged.

C. P. No. 4. **Blanco v. Bosch et al.** Nov. 25.

Capias—Act of 12 *July*, 1842—*Act of June* 13, 1836—*There can be no arrest for debt arising ex contractu without the warrant of a Judge, founded upon an affidavit, bringing the case within the Act of* 12 *July*, 1842, § 3.

Rule to set aside special *capias*.

In this case a summons case had been issued October 14th, 1876, which was returned "*nihil habet.*" On November 11th the plaintiff filed the following affidavit:—

Benturo Blanco, the above-named plaintiff, being duly sworn according to law, doth depose and say that the defendants are justly indebted to him in the sum of $140.25 for services as cook, and that they, the said defendants, are about to quit the commonwealth without leaving sufficient real or personal estate therein to satisfy said demand, as he, the said plaintiff, verily believes. (Sworn, etc.) BENTURO BLANCO.

Upon which affidavit a special *capias* was issued by virtue of which one of the defendants was arrested. These proceedings were had in pursuance of the provision of the Act of 13th June, 1836, § 24 (Purd. Dig. 47, pl. 40).

Charles H. Russell (with whom was *J. G. Brincklé*), for the rule.

The Act of July 12, 1842, § 1 (Purd. Dig. 49, pl. 51), has abolished imprisonment for debt in all cases, except those specially provided for by warrant of arrest.

Berger *v.* Small, 3 Wr. 315.

Kelly *v.* Henderson, 1 Barr, 495.

Digitized by Google

As to sufficiency of affidavit, see—
Bromley v. Joseph, 3 Whar. 10.
[No counsel appeared, contra.]

C. A. V.

Nov. 27. THE COURT. It is very strange that any one who has ever read the Act of 12th July, 1842, abolishing imprisonment for debt in Pennsylvania (except in the enumerated cases for which special proceedings are provided before a Judge), should suppose the old writs of *capias* to be still in force as a remedy for the recovery of debts founded upon contract. They were so completely cut up by the roots and prohibited by the Act of 1842, which was a statute distinctly marking not only a legal reform, but a great social change, that it may well be wondered why the ghosts of these decapitated tyrants should be permitted at this time of day to stalk about the courts, and to frighten debtors by the exhibition of their harmless terrors. Nevertheless, Benturo Blanco, by the aid of his attorney, a prothonotary's clerk, and a sheriff's officer, has been enabled in the present case to dig up one of these ancient but long buried instruments of torture, and to apply it so vigorously to the body of his adversary as to compel him to come for relief to the bar of this Court.

This has been done under the supposition that, although imprisonment for debt has been abolished in this State, yet the 24th section of the Act of June 13th, 1836, which authorized a special *capias* against a defendant after suit commenced by summons, on the plaintiff's making affidavit that the defendant was about to quit the Commonwealth without leaving sufficient estate therein to satisfy the plaintiff's demand, has survived the radical change which overthrew the old order of things, and is still in force. A more unfounded pretence or a more absurd claim was never put forward. The 24th section of the Act of 13th June, 1836, was a part of the system then in force for the commencement of personal actions, a system which permitted a plaintiff at his election to commence any personal action either by a summons or a *capias*. All the provisions of the Act of 1836 upon this subject, so far as they relate to arrests upon writs of *capias* in actions for the recovery of debts founded upon contract, were forever swept out of existence by the Act of 1842. This is so plainly written upon the face of the Act that he who runs may read, and all plaintiffs, attorneys, clerks, and sheriff's officers would do well to take notice of it, if they would avoid becoming defendants themselves. The personal liberty of the debtor is no longer at the mercy of his creditor, and no man can now be lawfully arrested in Pennsylvania for debt without the warrant of a Judge founded upon an affidavit which brings the debtor within the meshes of the 3d section of the Act of 1842.

Rule absolute.

Opinion by THAYER, P. J.

U. S. District Court—Admiralty.

Hart et al. v. Schooner Enterprise.

Jurisdiction in admiralty—Ships and shipping—Maritime contracts—Lien on vessel of crew's wages—Contract by charterer—What are maritime services.

Hearing on libel and answer.

Suit for seamen's wages. The libel alleged, that, the vessel being at the port of Philadelphia and bound on a voyage thence to ports on Chesapeake Bay and elsewhere and return, the master, by himself or his agent, hired the libellants to serve as seamen during the said voyage; that no shipping articles were signed, and that libellants had duly performed the voyage and were justly entitled to their wages, etc.

The answer of the Master set forth that before the alleged hiring the vessel had been duly chartered by the owners, and that the charterer agreed to pay for its use and all expenses of the voyage, including the wages of respondent; that the charterer was on board from the beginning of the voyage all the time, and had full control over the vessel; respondent, as navigator, merely having authority to dismiss any of the crew who misbehaved; that libellants had not been hired by the owners nor by their agent, but by the charterer; that they knew that the vessel was chartered and were notified that they must look for their wages to the charterer and not to the respondent; that the vessel, moreover, was not chartered for any maritime adventure or voyage, but that libellants were employed as laborers, to go on the vessel through the Delaware Canal, to obtain a cargo of oysters, and not to transport them to any maritime port, but to convey them to Jones Creek on Delaware Bay, and there plant them, and that the vessel had been so engaged in the business of planting oysters.

Rich and *Driver*, for libellants.

Flanders, contra, argued that the vessel was not liable because no one but the Master could create a lien, and the contract in this case was made by libellants with the charterer, and that the Court had no jurisdiction because the services were not maritime.

THE COURT (CADWALADER, J.) was of opinion that the vessel was charged with the debt, and that the services performed were maritime services.

Decree for libellants, with costs.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, DEC.* 14, 1876. [No. 11.

Supreme Court.

Oct. & Nov. '76, 145. Oct. 4.

Federal Ins. Co. v. Robinson.

Usury—Usurious interest—Whether recoverable when paid under process of law—Act of May 22, 1858, § 2, *interpreted—Execution.*

Although it is a rule of law that usurious interest, even if voluntarily paid, can be recovered, yet if it is paid upon process of execution without collusion, it cannot be recovered back in a new action. The remedy of the defendant was an application to the Court to open the judgment.

Error to the Common Pleas, No. 1, of Allegheny County.

Case by Eccles Robinson against the Federal Insurance Company, to recover $360 usurious interest.

In July, 1873, Robinson borrowed of the company, defendant, $4140, giving as security for the repayment thereof his judgment bond conditioned for the payment in two years of $4500, at six per cent. interest payable semi-annually. This transaction was in effect a usurious loan of $4500 at ten per cent. interest, the company withholding $360, the difference between $4140 and $4500, this being the extra four per cent. upon the $4500 for two years. Robinson failing to pay the second instalment of interest, judgment was entered on the bond, and a *fi. fa.* was issued in execution. A return of *nulla bona* having been made to this *fi. fa.*, an attachment execution was issued, Jas. P. Speer, John P. Speer, and five others being summoned as garnishees. Robinson had no notice of this latter proceeding. Judgment was recovered against the garnishees, and the amount thereof was paid to Jas. P. Speer, to whom the Insurance Co. had assigned the claim. This action was brought to recover the $360 usurious interest retained by the Insurance Co., when the loan was made.

The defendants presented, *inter alia*, the following point: (1) The usurious interest must have been paid voluntarily to entitle the plaintiff to recover. *Answer.* As this point, under the evidence, is intended to mean that because the judgment bond given by the plaintiff was paid by compulsion or process of law, the plaintiff cannot recover, we are compelled to refuse it. The fact that a party who has entered into a usurious contract with another, does not pay it voluntarily, but is compelled to do so by legal process, will not prevent his recovering back the usurious interest if suit is brought within the time limited by law.

Verdict for the plaintiff for $370.80, the amount of the claim with interest from July, 1873, and judgment thereon. The defendant took this writ, assigning for error, *inter alia*, the answer to his first point.

S. C. Schoyer, for the plaintiff in error.

It is necessary, in order to recover in a case like this, that the plaintiff "should have *voluntarily* paid the whole debt or sum loaned, together with interest exceeding the lawful rate."

Act of May 22, 1858, § 9 (P. L. 622).

W. H. McGary, contra.

Usury is prohibited by the law as a public evil, and when it is taken against the statutory prohibition, the taker is to be held as one wrongfully in possession of his neighbor's property. This principle of the law is not affected by the Act of 1858, but only the extent of its application.

Lucas *v.* Bank, 28 Sm. 232.
Campbell *v.* Sloan, 12 Id. 481.

Oct. 16. THE COURT. While it is well settled as a general principle that money voluntarily paid upon a claim of right cannot be recovered back, an exception has been recognized in the case of usury so paid. The reason of this exception is stated to be, that it is money obtained by oppression, and by taking advantage of the distresses of others in violation of a law made for their protection. It is not, therefore, a voluntary payment, for the parties are not *in pari delicto.* (Thomas *v.* Shoemaker, 6 W. & S. 183.) The Act of Assembly of May 22, 1858 (P. L. 622), has not changed this rule, but has put a new period of limitation to an action to reclaim the usury, by providing that "in all cases where any borrower or debtor shall heretofore or hereafter, have voluntarily paid the whole debt or sum loaned, together with the interest exceeding the lawful rate, no action to recover back any such excess shall be maintained in any court of this Commonwealth, unless the same shall have been commenced within six months from and after the time of such payment." It is evident that the Act, by the use of the word "voluntarily," did not intend to limit the action to cases of voluntary payment, though it may, perhaps, be argued that the limitation is only applicable to such cases, and not to a payment by duress or unlawful coercion of any kind.

There is another principle, however, which we think is applicable to this case, and ought to rule it. Money collected or paid upon lawful process of execution, cannot be recovered back, though not justly or lawfully due by the defendant in the execution to the plaintiff. The authorities for this

Digitized by Google

position are many and clear. (1 Selwyn's N. P. 82; 1 Archbold N. P. 267; Rapalje *v.* Emory, 2 Dall. 51, 231; Herring *v.* Adams, 5 W. & S. 459; Mann's Appeal, 1 Barr, 29; Boas *v.* Updegrove, 5 Ibid. 516.) In the case of Rapalje *v.* Emory (*supra*), the money was recovered and collected of a garnishee in Foreign Attachment in the Island of St. Eustathius. It was held that the defendant in the attachment could not recover it of the plaintiff though he had no notice of the proceeding. The reason is a very obvious one. An execution is the end of the law. To permit money so collected or paid to be reclaimed in a new suit, would lead to indefinite and endless litigation. If such suit could be maintained, then another might be brought to recover the money paid on the judgment and execution in it, and so on *ad infinitum*. Without saying that a defendant would be precluded from a recovery of usury voluntarily paid on a judgment entered on bond and warrant of attorney, given for the original loan, we think the rule must be different where the payment is made upon process of execution, and where there is no allegation of actual collusion to evade the statute. The remedy of the defendant is an application to the Court to open the judgment. The duty of the garnishee was to notify him of the attachment, and if he failed in this duty, the defendant must look to him for redress of the injury he has suffered by his neglect.

Judgment reversed.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

[*Cf.* Miners' Trust Co. Bank *v.* Roseberry, *ante*, 13.]

Oct. & Nov. '76, 146. Oct. 10.

Commonwealth, ex. rel. Attorney General, v. Kilgore.

Constitutional law—Interpretation of section 26 of the schedule to the new constitution—Right of officers elected prior to new constitution to hold until end of term.

Section 26 of the Schedule to the new Constitution of Pennsylvania provided that "all persons in office at the time of the adoption of the constitution *and* at the first election under it, shall hold their respective offices until the term for which they have been elected or appointed shall expire, and until their successors shall be duly qualified, unless otherwise provided in this Constitution." A. was elected Treasurer of Allegheny County in October, 1871, his term of office to begin on the first Monday of March, 1872, and to end on the first Monday of March, 1874. He was re-elected in October, 1873:

Held, that on January 1, 1874, when the new Constitution went into effect, he was not in office *as of his second term*, and therefore could not hold his office until the expiration of that term, under said section of the Schedule.

Error to the Common Pleas, No. 1, of Allegheny County.

This was a *quo warranto* issued by the Court below on March 6th, 1876, in the name of the Commonwealth, *ex. rel.* Hon. George Lear, Attorney General, against Samuel Kilgore, commanding him to show by what authority he claimed to exercise the office of Treasurer of Allegheny County.

The defendant filed an answer, alleging that in October, 1871, he was elected County Treasurer for a term of two years, to begin on the first Monday of March, 1872; that in October, 1873, he was re-elected for another term of two years, to begin on the first Monday of March, 1874; that by virtue of these elections he was entitled to hold the office until his successor should be duly qualified, which event had not occurred, whereby, under the Constitution and laws of the Commonwealth, he was entitled to hold the office until the first Monday of January, 1877.

The Commonwealth filed a replication, alleging that at the general election held in November, 1875, James G. Murray was elected County Treasurer; that he was duly commissioned and qualified to hold the office for the term of three years, beginning on the first Monday of January, 1876, and that the defendant's term of office had expired; and denying that the defendant was entitled to continue in office until the first Monday of January, 1877.

The defendant thereupon filed a rejoinder, alleging that the election of November, 1875, was unauthorized by law and therefore void, and further, that Murray was ineligible to the office of County Treasurer in November, 1875, because he held the office of County Commissioner.

To this rejoinder the Commonwealth filed a general demurrer.

The demurrer was overruled and judgment was entered for the defendant, the Court filing no opinion, but stating that they believed Murray was ineligible to election to the office, and for this reason gave judgment against the Commonwealth. The Commonwealth took this writ, assigning for error the judgment of the Court.

George Lear, Attorney General (with him *G. Shiras, Jr.*, and *M. W. Acheson*), for the Commonwealth.

Kilgore's second term had not begun on January 1, 1874, when the new Constitution went into effect, and was therefore not protected by section 26 of the Schedule, which only provides that those persons in office at the time of the adoption of the Constitution *and* at the first election under it, shall hold their offices until the term for which they were elected expires, and until their successor is duly qualified. After the first Monday in March, 1874, when his first term

Digitized by Google

expired, he could only claim office until his successor should be duly qualified.

The question of Murray's eligibility is exclusively a public one and cannot be raised by the defendant.

Com'th v. Cluley, 6 Sm. 270.
Clark v. Com'th, 5 Cas. 129.

Moreover, as Murray is not a party to this proceeding, the validity of his election and commission cannot here be inquired into.

McKim v. Somers, 1 P. & W. 297.

Such election cannot be impeached except in the regularly prescribed statutory mode.

Comt'h v. Garrigues, 4 Cas. 9.
Com'th v. Baxter, 11 Id. 263.
Com'th v. Leech, 8 Wr. 332.

G P. Hamilton (with him *A. M. Brown*), contra.

Kilgore was in office at the time of the adoption of the Constitution, and at the first election under it, and is therefore entitled to hold his office until the term for which he was elected has expired, and until his successor is duly qualified.

Murray was the appropriate party to prosecute this writ, and his interest clearly appears in the pleadings; the question of his eligibility was therefore clearly before the Court.

Com'th v. Cluley, 6 Sm. 270.
Com'th v. P. G. & N. R. R. Co., 8 Har. 518.
Murphy v. Farmers' Bank, Id. 415.
Com'th v. Allegheny Bridge Co., 8 Id. 185.

Oct. 23. THE COURT. The position of the counsel of Samuel Kilgore is, that he was in office as the Treasurer of Allegheny County at the time of the adoption of the new Constitution, and at the first election under it, and was, therefore, under the 26th section of the Schedule, continued in office from the first Monday of March, 1874, for two years, ending March, 1876, and thereafter until his successor should be duly qualified. This would continue his tenure of the office until the first Monday of January, 1877. To test the correctness of this position, we must examine the facts, before we can apply the provision of the Schedule. Kilgore was first elected at the general election of 1871, and according to the law relating to Allegheny County his term of two years began on the first Monday of March, 1872, and consequently expired at the same time in 1874. He was therefore in office at the time of the adoption of the new Constitution under his election in 1871, and not under the election of 1873. But the new Constitution took effect, according to the Schedule, on the first day of January, 1874, before his second term began, and by the 2d section of the 14th article, County Treasurers, as *county officers*, "shall be elected at the general elections and hold their offices for the term of three years, beginning on the first Monday of January next after their election, and until their successors shall be duly qualified; all vacancies, not otherwise provided for, shall be filled in such manner as may be provided by law." The term of Kilgore having expired on the first Monday of March, 1874, after the Constitution took effect, it is evident the office became open to the operation of the new Constitution, before the first general election under it in 1874, when an election to fill the office under the new Constitution could be held, unless we read the word "and" *or*, in the 26th section of the Schedule. The words of that section are these: "All persons in office in this Commonwealth, at the time of the adoption of this Constitution *and* at the first election under it, shall hold their respective offices until the term for which they have been elected or appointed shall expire, and until their successors shall be duly qualified, unless otherwise provided in this Constitution." That *and* may be read *or* when it is evident that the intent requires it, is admitted; but that it ought not to be so read in this instance is manifest. No necessary intent requires it. The Constitution is the primordial act of the people whose sovereign will must take effect when it can, while the Schedule is not intended to supersede or supplant it, but to adapt it to the new order of things. But for the Schedule, the new order would take effect on the instant of adoption, and all officers under the old order must give way. The Schedule bridges over the intervening chasm between the two orders, so as to make easy the passage from one to the other. If a term of office be not existing when the new Constitution is capable of filling it, it is the right of the people and their sovereign will, as ordained in the new frame of government, to fill it under that new frame. But if the term of office is existing at the time of adoption, and continues until after the first election, so that it cannot be filled at that election, without injustice to the officer, and probably without prejudice to the public interest, it is reasonable that the term should be continued until it would have expired by efflux of its time. Hence the Schedule so provides. But, if the term expire before the first election, the office becomes open to the operation of the new Constitution; because it is then in the power of the people to fill it without prejudice, and the rights of the people and their will, as expressed in the 2d section of the 14th Article must be enforced. These are, that the County Treasurer shall be elected at the general election, that his term shall begin on the first Monday of January next after the election, and that it shall continue for a period of three years, instead of beginning in the following March and continuing only two years. There is no reason, therefore, for changing the express language of the 26th section of the Schedule, which, as it now stands, enforces the rights and executes the will of the people, and thereby gives the new Constitution

Digitized by Google

its proper, early, and symmetrical effect. The County Treasurer is but one of the numerous class of county officers enumerated in the first section of the 14th Article, while the second section was intended to produce uniformity, so far as possible, by putting them all on the same footing.

It was urged that Kilgore was elected in 1873; and therefore would have been in office at the first election under the new Constitution in 1874. But he was not in office under the election of 1873, on the first day of January, 1874, when the Schedule put the Constitution into effect, and therefore he did not fall within the terms of the 26th section of the Schedule. He was then in office under a former election, and in order to support his claim to hold the office under the election of 1873, we must say that one not in office at the adoption of the Constitution shall *afterwards take office* in order to be *in office*, at the time of the first election. But this we have seen is unreasonable, and without necessity, and postpones the operation of the Constitution, contrary to the expressed will of the people, that it shall take effect on the first Monday of January, 1874, and their express provision that this operation shall be postponed only when there is a term of office existing at the time of adoption, and also at the time of the first election. The postponement of the operation of the new frame of government, in this respect, would, by the defendant's interpretation, defer the right of the people to fill the office under this frame, until the first Monday of January, 1877. The election of 1873 was not under the new Constitution, and consequently gave no right to the office contrary to its intent. Its adoption subsequently swept away all right to office, unless saved by the Schedule. In such a case, there can be no appeal to equitable considerations, not provided for in the Schedule. The sovereign will of the people expressed in a primordial act cannot be stayed by a mere election under a former frame of government, unless it has been their pleasure to permit it by a temporary provision to save it. Then, on what ground of reason or intention shall we change the language of the Schedule, by reading *and, or*. "And" harmonizes the Constitution and the Schedule, and gives effect to the rights of the people. "Or" postpones their operation and robs the people of their right.

By a misconception of the effect of the Schedule no election took place in 1874, and a vacancy thereby occurred. But the omission to elect cannot change the meaning of the Constitution. Under the Act of 15th of May, 1874, § 1, the vacancy could have been filled by the Governor, until another general election, and if not filled, it is worthy of consideration whether the true intent of the Schedule would not have continued one in office at the adoption of the Constitution until an election in 1875 should take place to fill the office. Such an interpretation would be in aid of the Constitution and not hostile to it. But of this we give no opinion.

The election of James G. Murray being the first that took place under the new Constitution, we perceive nothing to prevent his contesting the illegal term of Mr. Kilgore, with the consent and intervention of the Attorney General, who himself sued out this writ of *quo warranto*.

If Mr. Murray was ineligible at the time of his election to hold the office when elected, the remedy is not by suffering one illegally in office to continue in it. When Murray's right to it shall be contested by the Commonwealth, through her proper officers, it will be in time to inquire into his ineligibility. Judgment of ouster must be given against this defendant.

And now, October 23d, 1876, it is ordered and adjudged by the Court that the judgment of the Court of Common Pleas be reversed and set aside, and that the defendant, Samuel Kilgore, be ousted and altogether excluded from the office of Treasurer of the county of Allegheny, and that the Commonwealth do recover from the said defendant the costs in this behalf expended and incurred.

Opinion by AGNEW, C. J. WILLIAMS, J., absent.

Oct. & Nov. '76, 42. Oct. 10.

Herron, Trustee, v. Graham et al.

Mechanic's liens—Not discharged by taking in satisfaction a time note from the contractor.

The taking of a note, payable at a future day, in satisfaction of a claim for materials furnished to the contractor in the erection of a building, does not discharge the material man's lien on the building.

Error to the Common Pleas No. 1 of Allegheny County.

Scire facias sur mechanic's lien brought by J. Graham and J. Lyon, trading as Graham & Lyon, against W. A. Herron (trustee of Jane Wilson and guardian of Mary S. Wilson), owner, and G. McGonnigle, contractor, to recover $258.15, the value of materials furnished on May 15, 1873, with interest from November 17, 1873.

The facts of the case are briefly as follows: Herron entered into a contract with McGonnigle for the erection of a frame house in the nineteenth ward of Pittsburg. McGonnigle bought the necessary lumber from Graham & Lyon, and gave them his note for $200 in payment. On June 5, 1873, Herron, being satisfied on reasonable inquiry that there were no outstanding

Digitized by Google

accounts between McGonnigle and material men, paid him the balance due on the contract. McGonnigle soon afterwards failed, and on November 17, 1873, Graham & Lyon filed the mechanic's lien on which this suit was brought.

At the trial Parker, the plaintiffs' bookkeeper, and McGonnigle both testified that the plaintiffs received the note conditionally on account, and not to be an absolute payment unless met at maturity. Parker likewise testified that Graham & Lyon had the note discounted in the usual way, and had to pay it at maturity.

The defendant presented the following point: If the jury believe that Graham & Lyon, the plaintiffs, accepted the note, payable at a future day, of George McGonnigle, the contractor, without the knowledge of defendant, Herron, for $200, for and on account of the materials furnished for the buildings for which a lien is filed, and that Graham & Lyon had said note discounted and received the money therefor; the act of taking and selling said note released the buildings of defendant from liability to a lien for the materials furnished, and for which the note was given, unless it was understood or agreed differently between the parties. *Refused.*

Verdict for plaintiffs for $148.30, and judgment thereon. Herron took this writ, assigning for error the refusal of the Court to charge as requested.

W. F. Austin, for plaintiff in error.

If the relation of principal and surety exists between contractor and owner, as held in Hill *v.* Witmer (2 Phila. Rep. 72), then in this case the owner was discharged by the material man giving time to the contractor, and furthermore discounting the note, thus putting it out of the owner's power to protect himself against his insolvent contractor, as the material man could not surrender the discounted note during the time it had to run.

Zane *v.* Kennedy, 23 Sm. 182.

Thos. C. Lazear, contra.

The taking of a note, payable at a future day, for a debt due by the contractor for materials furnished in the erection of a building, does not discharge the lien of the material man upon the property of the owner.

Shaw *v.* Church, 3 Wr. 226.
Kinsley *v.* Buchanan, 5 Watts, 118.
Jones *v.* Shawhan, 4 W. & S. 257.
Johns *v.* Bolton, 2 Jones, 339.

October 16. THE COURT. The taking of the note in this case was not in satisfaction of the debt protected by the mechanic's claim, and being without consideration was to be viewed only as a collateral security, which did not suspend the remedy on the mechanic's claim. The note was accepted as satisfaction only when paid. The lien of the claim therefore remained, as the original and real security of the debt, and could be enforced at any time, there being no agreement to supersede it.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

May, '75, 64 & 112. May 2.

Edward Burd Grubb et al. v. Alfred Bates Grubb.

Partition—Act of 27 April, 1864—Allowance of counsel fees—Nature of fees contemplated by the Act—Errors and appeals—Order of Common Pleas in the nature of a definitive judgment—When appeal not a proper mode of review—Distinctions between appeal, writ of error, and certiorari—Practice.

The provision in the Act of 27 April, 1864, for the allowance of counsel fees in actions of partition has reference only to fees for such professional services as are indispensable for conducting the formal proceedings, such as searches, formal motions, the preparation of papers, and conveyancing; and not to counsel fees in the ordinary sense for services in the litigation of contested causes.

An order of the Common Pleas for the payment of such counsel fees is in the nature of a definitive judgment, which may be reviewed by the Supreme Court, but a writ of error and not an appeal is the proper form for such review.

In an action of partition, in which after a long litigation there had been a judgment *quod partitic fiat*, the Court of Common Pleas appointed an auditor to report what would be a proper allowance to plaintiffs for their counsel fee, to be taxed on all the parties to the suit, under the Act of 27 April, 1864. The auditor reported that $2500 should be allowed, and his report was confirmed by the Court. Defendant appealed and removed the record to the Supreme Court by certiorari. Plaintiffs also appealed:

Held, that the Act contemplated only the necessary fees for conducting the formal proceedings, and not for services rendered in adversary litigation.

Held further, that a writ of error and not an appeal was the proper form in which to review the action of the Common Pleas, and the appeal must therefore be dismissed, but—

Held further, that the certiorari having brought up the record, and the amount allowed being of itself conclusive proof that the true meaning of the Act had been misapprehended, the decree of the Common Pleas confirming the auditor's report would be reversed.

Per WOODWARD, J: "In a proper case, where the equity of the party who seeks relief is clearly made out, where no adversary rights can be impaired, and where it affords the only means of averting an injustice, all the effect of a writ of error may be given to a certiorari."

Certiorari and Appeals from the Common Pleas of Lancaster County.

These were separate appeals by both parties, plaintiffs and defendant, in an action of partition from a decree of the Court confirming the report of an auditor appointed to determine a proper fee for plaintiffs' counsel, to be taxed under the Act of 27 April, 1864. (Purd. Dig. 1118, pl. 34.)

Digitized by Google

The action was commenced in 1870, between E Burd Grubb, Henry B. Grubb, Charles R. Grubb, and Euphemia P. Grubb, the said Charles R. and Euphemia P. Grubb, acting by their guardian Euphemia B. Grubb, plaintiffs, and Alfred Bates Grubb, defendant.

A judgment *quod partitio fiat* was entered, which, upon appeal, in 1873, was affirmed. (Grubb *v.* Grubb *et al.*, 24 Sm. 25.) Subsequently, an allotment of the property was made. The Court, upon application of plaintiffs, then appointed an auditor to determine the proper sum to be allowed to plaintiffs for their counsel fees, to be paid by all the parties in proportion to their interests. Before the auditor, plaintiffs claimed $6000 for such counsel fees, which claim was resisted by defendants. The auditor found, that the defendant had denied and strenuously resisted the plaintiffs' right to have partition; that the defendant, in his opposition, was stimulated by the fear (which, it would seem from the opinion of the Supreme Court, was groundless) that partition would prejudice his interest in a mining right connected with the property, and that plaintiff did not simply contend for his right to have partition, but accepted the suggestion of defendant and attempted to obtain a ruling that defendant's mining right should be excluded from the proceedings. The auditor further reported that the event of the suit proved that the plaintiff had a right to demand partition in the form he adopted; that the litigation that resulted was the litigation of defendant, who needlessly objected to this form and resisted this right, and that in view of the great value of the property involved, the distinguished counsel employed and their responsibility, the sum of $2500 should be taxed in the case as a proper fee for plaintiffs' counsel. The auditor also stated in his report that he did not think the sum claimed ($6000) too much for the services rendered, but that parts of these services were rendered in a collateral matter for the exclusive benefit of plaintiffs, and the remaining sum of $3500 should therefore be paid by plaintiffs alone.

To this report exceptions were taken by the defendant, that the fee awarded by the auditor to the plaintiffs' counsel was exorbitant and not warranted by law; and that it should not have been greater than would compensate the attorneys for services rendered in the proceedings had there been no contest. Plaintiffs excepted to the report upon the ground that the auditor did not allow the full amount of their claim.

The exceptions were dismissed and the report confirmed by the Court below, PATTERSON, J., dissenting.

Defendants appealed, and at the same time removed the record to the Supreme Court by a writ of certiorari, assigning for error the dismissal of their exceptions and the confirmation of the auditor's report. Plaintiffs also appealed, assigning for error the refusal of the Court to tax as a reasonable allowance to the plaintiffs for counsel fees, the entire sum which the auditor reported as being reasonable and proper for all the services rendered in the case, viz., the sum of $6000.

S. H. Reynolds and *A. Slaymaker* (*Wayne MacVeagh* with them), for appellant Alfred Bates Grubb, defendant below. Statutes are to be construed with reference to the common law, for it is not to be presumed that the Legislature intended to make any innovation further than the case absolutely required.

1 Kent's Com. 464.
Cadbury *v.* Duval, 10 Barr, 270.
Borland *v.* Nicholls, 2 Jones, 42.

At common law, as a rule, the expenses of litigation were never recoverable by the successful party, even though the demand or defence by reason of which they were incurred proved to be entirely groundless, and this rule has been strictly adhered to in Pennsylvania.

Good *v.* Mylin, 8 Barr, 51.
Alexander *v.* Herr, 1 J. 537.
Terry's Exr. *v.* Drabenstadt, 18 Sm. 400.
Stopp *v.* Smith, 21 Sm. 285.
Porter *v.* English, 1 Phila. 85.

In the greater number of instances, the action of partition was used merely as a means for the accomplishment of that which the law always regards with favor, viz.: the relief of persons holding as tenants in common from the embarrassments incident to a divided dominion, and as the proceedings in such cases were beneficial to all alike, and the services of counsel in conducting the formal proceedings might be considered as rendered to all equally, it was unjust that the expense of procuring these services should be borne exclusively by one or more of the parties. As a remedy for this injustice, the Act of 1864 was eminently proper, but to give it any effect further than is requisite for that purpose, would be to run counter to the uniform practice of the common law as well as the well-defined policy of the jurisprudence of Pennsylvania on the subject.

In the present case the auditor expressly allowed fees, not only for the ordinary services of counsel in procuring the partition, but also for services rendered in the litigation, between plaintiff and defendant. This was contrary to the ruling in—

Snyder's Appeal, 4 Sm. 67.

H. M. North and *J. L. Reynolds* (*C. B. Penrose* with them), for appellants Edward Burd Grubb *et al.*, plaintiffs below, argued that had the Legislature intended by the Act of 1864 merely to allow a fee for effecting the conveyance, nothing would have been easier than to have said so, and in that case the provision that it should

Digitized by Google

be taxed by the Court would have probably been unnecessary. But the statute expressly provides for the allowance of counsel fees "in *all* cases of partition." What right have we, in the teeth of such language, to introduce any such qualification as was contended for by the defendant. To do so would, in the words of a very distinguished jurist in a recent case, be "simply a repeal of a statute written in the plainest words found in the English language," and to assert "that the legislature did not see what was directly before their eyes and must have been seen," viz., that some partitions were contested while others were not; and that they used the word "all," intending to include one class and to exclude the other.

The fact that at common law counsel-fees could not be recovered is of no weight. It will not do to argue against the meaning of the Act because of the prior existence of the very defect in the common law which it was the object of the Act to remedy.

In Snyder's Appeal (4 Sm. 67), cited by the other side, only one out of seven allotments was ordered to be sold, and it was attempted, in the settlement of the proceeds of this sale, to have plaintiffs' counsel fees deducted. This was refused because such fees belonged to the whole partition and not to this sale merely. That case is, therefore, not analogous to the present case.

The auditor found that the sum of $6000 was a reasonable compensation for the services rendered by plaintiffs' counsel in the whole case. He should, therefore, have allowed that sum.

Oct. 16. THE COURT. The original action between these parties was partition, which resulted in the allotment of the premises involved in it to the defendant. An application was then made for the allowance of the fees of the counsel for the plaintiffs for professional services in the action. An auditor was appointed on this application, and on the 31st of March, 1875, he made a report fixing the sum for counsel fees, to be taxed as costs in the case, at $2500. On the 4th of September, 1875, the report was confirmed by the Common Pleas. The plaintiffs appealed on the ground that the allowance was inadequate, the claim on their behalf having been $6000; and the defendants appealed on the ground that the allowance was excessive, claiming that "the auditor should only have allowed such fee out of the estate as would compensate the attorneys for services rendered in the conduct of the proceedings had there been no contest."

The proceeding complained of was under the terms of the Act of the 27th of April, 1864, in these words: "The costs in all cases of partition in the Common Pleas or Orphans' Court of this Commonwealth, with a reasonable allowance to the plaintiffs or petitioners, for counsel fees, to be taxed by the Court, or under its direction, shall be paid by all the parties in proportion to their several interests." There is no room for doubt as to what the Legislature intended by this enactment. While in the ordinary course of practice, a partition was for the benefit of all the owners of the property divided, before the Act the entire burden of the compensation of counsel for conducting the formal proceeding was thrown upon the plaintiff in the Common Pleas, or the petitioner in the Orphans' Court. In every case professional aid was indispensable, and the purpose of the statute was to divide the cost of the employment of that aid amongst the parties equally benefited by the result of the proceedings. But it was indispensable aid only that was contemplated—such usual and accustomed services as the exigencies of each case should render necessary. The compensation of counsel for services in the trial of contested causes was not the end in view. It would be a novel and anomalous feature in our legal system to have such compensation "taxed by the Court." It is a settled rule that a successful party cannot be allowed compensation even by a jury, in the extremest cases, for such expenses. (Good *v.* Mylin, 8 Barr, 51; Stopp *v.* Smith, 21 Sm. 285.) The act had relation to costs capable of calculation and ascertainment, and not to such fees as counsel and client are accustomed of themselves to adjust. In its very title, indeed, it was stated to be "relative to costs in cases of partition." The services for the performance of which the statute was meant to provide were searches, formal motions, the preparation of papers, and conveyancing—in a word for such professional duties as would properly enter into the bill of costs of an attorney under the English practice. Counsel fees in the ordinary sense—such as are paid to a barrister for a trial in court—were not in contemplation. The distinction is as well settled as any other in the law, and is as well recognized and understood here as if the profession were divided into classes as it is in England. "Fees of attorneys are considerations allowed them as a recompense for their labor." (1 Lil. Abr. 598.) "Action on the case lies for an attorney for his fees against him that retained him in his cause, and attorneys are not to be dismissed by their clients till their fees are paid." (1 Lil. Ent. 142.) But a counsel can maintain no action for his fees, which are given not as a salary or hire but as a mere gratuity, which a barrister cannot demand without doing wrong to his reputation. (Davis, 23.) It was said by Bailey, J., in Morris *v.* Hunt (1 Chitty's R. 551), that "the reason why counsel can maintain no action for their fees is, because their compensation is not made to depend on the event of the cause, and, for the purpose of promoting the honor and integrity of the bar, it is expected that all their fees should be paid when their briefs are delivered." It is true that the rule

Digitized by Google

is different in Pennsylvania, and that suit for counsel fees may be here maintained. But the authorities quoted exhibit common law distinctions that are well recognized, and serve aptly to illustrate the legislative intent in the passage of the Act of 1864. In proceedings in partition a common benefit is secured to all the parties. The natural and obvious object of the statute was to enforce a contribution from each proportioned to his share of the common service rendered to them all. Each of the parties would thus pay for the aid he had received. If counsel fees for conducting an expensive contest against him were to be allowed, he would be paying for hostility and attack, and not for aid. It would be straining the law to give it such a scope. Legislative enactments are to be expounded as near to the use and reason of the prior law as may be, when this can be done without violation of its obvious meaning, for, say the cases, it is not to be presumed the Legislature intended to make any innovation on the common law further than the case absolutely required. (Cadbury *v.* Duval, 10 Barr, 265.) Manifestly, this statute was not designed to shoulder upon defendants in partition the expenses incurred by a plaintiff in adversary litigation.

That this construction is accurate would seem clear from the language of the present Chief Justice in Snyder's Appeal (4 P. F. Sm., 65). He said: "The design of the law was to place parties upon an equality as to the expenses of effecting partition among them. Owing to minority, coverture, and other causes, the proceeding in partition may be indispensable; and yet the plaintiff, no matter how small his interest, was compelled to pay attorney's fees for conducting them to a conclusion as beneficial to others as to himself. The law was intended to remedy this injustice, but it was not designed to pay the fees of mere litigation, so that a litigant should saddle the cost of his litigation on others."

Some embarrassment arises out of the mode in which this record has been brought up. It is doubtful whether the auditor's report, which it is assumed sets forth the grounds on which the order of the Court was made, is legitimately the subject of review. Looking into the report, it is clear that the auditor allowed to the plaintiff's counsel fees in what he called "the litigation of the defendant"—that is, in the trial of the issues created by the interposition of a defence to the demand made by the plaintiff for partition. Such allowance is clearly beyond the scope of the statute and a departure from the construction given to it in Snyder's Appeal. It is not necessary, however, to decide whether the opinion and reasons of the auditor can be reached or not. The record shows the allowance of counsel fees amounting to $2500. Apart from any grounds for the auditor's decision disclosed by his report, the amount of the sum allowed affords adequate and conclusive proof in itself that the true meaning of the Act of 1864 was misapprehended. A case warranting the payment of so significant a sum for the services of counsel in conducting the mere formal proceedings in an action of partition, can hardly be conceived. At least clear affirmative evidence of facts to justify it would be required. There is no such evidence here.

Upon the argument, objection was made on the part of the plaintiffs to the jurisdiction of this Court. That the subject-matter of the controversy is open to review in a proper form, is regarded as free from doubt. The Common Pleas made an order in the nature of a definitive judgment for the payment of the fees of the counsel for the plaintiffs. To the extent of his interest in the land, the defendant was a party affected, and so far as it was erroneous he was a party aggrieved by the entry of this order. A writ of error lies in all cases in which a court of record has given a final judgment, or made an award in the nature of a judgment. (Commonwealth *v.* Judges of Common Pleas, 3 Binn. 273.) In this state, practice having made costs so far a matter of record as to enable the Court to judge whether the items in the bill are such as the law allows, a writ of error will lie upon an execution for them; and the Supreme Court will inquire into the legality of the charges, though they will not take cognizance of an exception which depends on matter of fact. (Barnet *v.* Ihrie, 1 Rawle, 44.) A multitude of authorities, such as Horner *v.* Harrington (6 Watts, 331), McMasters *v.* Rupp (10 Harris, 298), and King *v.* Boyles, (7 Casey, 424), prove that when a legal principle has been involved, a judgment for costs entered by the Common Pleas, whatever the particular form of the proceeding may have been, has been held to be properly the subject of review.

Whether an appeal is the proper form for this review is a graver question. The sixth section of the Act of the 11th of March, 1809, does not give the option to a party of entering an appeal or taking out a writ of error, as the error below is on the record or *dehors* the record; but the law means that causes shall be removed according to the course of proceedings in the respective courts, an appeal from the Orphans' and Registers' Court and a writ of error to the Common Pleas and Quarter Sessions. (McClemmons *v.* Graham, 3 Binn. 88; Commonwealth *v.* Haas, 7 P. F. Sm. 443.) An appeal is the proper form of review of equitable remedies. (Springer *v.* Springer, 7 Wr. 518; Aurentz *v.* Porter, 12 Wr. 335.) Clear, therefore, as the rights of the defendant are believed to be, his appeal, as such, cannot be sustained. It is not the form in which the action of the Common Pleas can be reviewed, and it can only be dismissed.

Digitized by Google

But while the plaintiffs trusted simply to their appeal, a *certiorari* was issued on behalf of the defendant. This writ brings up the record. In a proper case, where the equity of the party who seeks relief is clearly made out, where no adversary rights can be impaired, and where it affords the only means of averting an injustice, all the effect of a writ of error may be given to a *certiorari*. Thus, in Cooke *v.* Reinhart (1 Rawle, 317), while it was held that a writ of error, and not a *certiorari*, was the proper remedy for the correction of errors in the Common Pleas in a case brought into that court on a *certiorari* to remove the proceedings of two aldermen or justices of the peace under the Act of the 6th of April, 1802, yet after the lapse of two terms, this Court refused to quash a *certiorari* improvidently issued, and after argument reversed the judgment. Both parties appealed in this case, and its merits have been fully disclosed. Treating the *certiorari* as a writ of error, all embarrassment would be removed, for the report of the auditor would be brought directly into view. And this would be done if the justice of the case could be reached in no other way. A general dismissal now, to be followed by a fresh proceeding hereafter, would involve cost, inconvenience, and delay that would be wasted in securing an end that may be at once attained. But such a course is not necessary, for the *certiorari* has brought up the record showing the nature of the application made on behalf of the plaintiffs, and the judgment in pursuance of it that was entered. As has been already stated, the amount of the judgment is evidence that all due and reasonable discretion was transcended by the Common Pleas, and it is a familiar principle that the possession of discretionary power does not justify its improvident and excessive use.

Both appeals are dismissed; and upon the *certiorari* issued on behalf of the defendant, it is ordered and adjudged that the judgment of the Court of Common Pleas of the 4th of September, 1875, fixing the counsel fees of plaintiffs to be taxed as costs at $2500, be reversed at the costs of the plaintiffs, and that a *procedendo* be awarded.

Opinion by WOODWARD, J. WILLIAMS, J., absent.

Jan. '75, 8. **Lahey v. Heenan, Adm'r.** Feb. 23.

Errors and Appeals—Error must clearly appear—Evidence—Acts of 15 *April*, 1869, *and Act of* 9 *April*, 1870—*Actions by Administrators—Facts occurring after the death of party in interest—Competency of administrator who is also heir-at-law.*

In a suit against an administrator, the fact that he is personally interested in the result of the suit, does not disqualify him as a witness as to matters occurring after the death of the party whose estate he represents.

The plaintiff in error must show clear and substantial error to obtain a reversal. In a confused case, where error does not clearly appear, the proceedings and rulings in the Court below will be presumed to have been correct.

Error to the District Court for the City and County of Philadelphia.

Assumpsit by Thomas Heenan, administrator of the estate of Dennis Heenan, deceased, against Thomas Lahey, to recover the balance of the purchase money of a house alleged to have been sold by Dennis Heenan to defendant. The defence set up was that the conveyance of the house was intended as security for a debt of Dennis Heenan, and was in the nature of a mortgage; and furthermore, that there was a well seventeen feet deep in the cellar of the house, and that a ground-rent which was represented to be payable in currency was in fact payable in silver. On the trial (before LYND, J.), plaintiff, Thomas Heenan, was called as a witness, and being sworn on his *voir dire* testified that he was the son and administrator of Dennis Heenan, who died intestate. Thereupon defendant objected to the admission of this witness to testify. Objection overruled; exception. The witness then testified to certain conversations between himself and defendant, and to certain facts relating to the purchase of the house. The dates of these conversations were not given, but the subsequent testimony in the cause seemed to indicate that they were after Dennis Heenan's death, and that the facts related by witness were not testified to as of his own knowledge, but as having been spoken of in these conversations. At the conclusion of plaintiff's testimony, defendant was sworn as a witness, and his counsel asked him a number of questions as to matters occurring after the death of Dennis Heenan. All of these questions were overruled, and exceptions taken. Defendant was then asked the question, "At the time of Dennis Heenan's death, did you owe anything on this property to him or his estate?" Objected to—question overruled—exception. On cross-examination the witness was asked by plaintiff's counsel whether he received ten shares of building association stock from Mr. Heenan, and he answered that he had. On re-examination his counsel offered to ask him how he received the stock, for what purpose, and upon what conditions; this for the purpose of showing that the stock was a part of the original transaction, and the conditions upon which it was received, and that Heenan received the benefit of it. Question overruled—exception.

Verdict and judgment for plaintiff for $729.75. Defendant took this writ, assigning for error the admission of plaintiff as a witness and the overruling of defendant's offers of proof.

Digitized by Google

Lucas Hirst, for plaintiff in error.

The Act of 15th April, 1869, expressly enacts that it shall not apply to actions by and against executors and administrators. Thomas Heenan was the heir-at-law of decedent, and therefore directly interested in the result. His testimony related to matters occurring before as well as to those occurring after Dennis Heenan's death. He was therefore incompetent as a witness.

Cawley v. Wilson, 7 Phila. 676.
Breneman's Est., 15 Sm. 298.
Sheetz v. Hanbest, 31 Leg. Int. 100.

[SHARSWOOD, J. As to facts occurring after the decease of Dennis Heenan the plaintiff was a competent witness, while as to facts occurring before that time he was not. Your objection was general. Were you not bound to object specifically to that part of his testimony which was incompetent?]

He was incompetent to testify at all, being directly interested in the result. No case decides that an administrator who is also personally interested may testify. The Act of 9th April, 1870, was not intended to apply to such a case.

The question asked defendant by plaintiff's counsel in regard to the building association stock made the defendant a general witness, and his counsel had the right to ask him to explain his answer and show how and why he had received the stock.

John O'Byrne, contra.

Thomas Heenan's testimony related to matters occurring after the death of Dennis Heenan, and as to these he was clearly competent.

Act 9th April, 1870, Purd. Dig. 625, pl. 20.

March 13. THE COURT. This is a confused case, rendering it difficult to say whether error was committed or not. The objection to the competency of Thomas Heenan was general. He was clearly competent under the acts of 27th of March, 1865, and 9th of April, 1870, to testify as to matters occurring after the death of Dennis Heenan. No special objection was made to any of the subjects of his testimony. On the other hand, Lahey the defendant was incompetent to testify against the administrator as to matters occurring in the lifetime of Dennis Heenan. He fell, in this respect, directly within the exception to the Act of 1869, as to actions against executors or administrators. Now, so far as we can discover in this confused bill of exceptions, it seems to have been the effort of the Court below to maintain these boundaries in the testimony admitted and rejected. These remarks dispose of most of the assignments of error. A part of the testimony of Thomas Heenan might seem in the plaintiff's examination to refer to matters occurring in Dennis Heenan's lifetime, but the testimony of the defendant and his wife, when compared with it, shows that the conversations spoken of by Thomas Heenan occurred after Dennis's death, and that he was testifying to those matters, not as facts known to himself anterior to Dennis's death, but as referred to in these conversations. A number of the statements must be so understood, though seemingly stated generally. It is the business of a plaintiff in error to make the error clearly appear before he can ask for a reversal. The presumptions are in favor of the proceedings in the Court below. Keeping in mind the evident effort of the Court as evidenced by the whole tenor of the bill to maintain the boundaries of testimony before referred to, it is manifest that the 3d, 5th, 6th, 7th, 10th, 11th, 12th, and 13th assignments on their face relate to matters occurring in the lifetime of Dennis Heenan, and were not competent to be proved by defendant. Though not so apparent, the 4th and 8th stand in fact in the same condition. Thus, the question to Lahey whether "you owed anything on the property *at* the death of Dennis," necessarily involved matters occurring in his lifetime, for the instant of death was the point of time referred to. The 9th assignment so much relied on is groundless. The defendant had testified in chief in his own behalf, and Mr. O'Byrne's question was on a cross-examination, and related to the same subject, which must be understood to refer to matters stated in conversation subsequent to Dennis's death. It could not be made a ground of opening the door to a general examination upon matters prior to his death. On the whole, we discover no real error in this record.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

[See Kiser v. Vanleer, 2 WEEKLY NOTES, 561.]

Common Pleas—Law.

C. P. of Beaver Co.

Commonwealth ex. rel. District Attorney, etc., v. Marshall et al.

Mandamus—County commissioners—Duty to erect public county buildings—When new erection is recommended by two successive Grand Juries, and approved by Quarter Sessions, commissioners are bound to proceed—Discretion of commissioners does not extend to judging of necessity of buildings so recommended—Statutes, construction of—Act of April 15, 1834, § 10—*Particular words—"It shall be lawful," construed to be imperative.*

Sur demurrer to return to alternative mandamus.

The petition of the relator, James H. McCreery, District Attorney of the county of Beaver,

Digitized by Google

filed December 19, 1874, set forth that on March 19, 1874, the Grand Jury of said county, in pursuance of the Act of Assembly in such cases provided,* made a presentment in writing to the Court of Quarter Sessions of said county that the existing court-house of the county and the adjacent public offices were inadequate for the needs of the county and the safety of the public records, and they therefore recommended that the county commissioners should erect a new court-house and offices; which presentment was, by order of Court, filed and published in the newspapers of said county; that, at the following June Term, the next successive Grand Jury made a presentment endorsing and approving the former presentment and recommendation; that the said Court of Quarter Sessions on July 15, 1874, made an order approving the said recommendations, and directing that the said presentments and approval of the Court be certified to the county commissioners for their action thereon, which was accordingly done; that the commissioners, in violation of their duty, had neglected and refused to erect a new court-house; and *prayed* a writ of alternative mandamus, etc.

The return of the county commissioners admitted the truth of the allegations in the petition, and averred, as cause why a mandamus should not issue, (1) that the action of said Grand Juries was not in pursuance of any request or notice by the respondents, nor of any proposal by the latter to erect a new court-house. (2) That the respondents as county commissioners had, in pursuance of their legal duty, decided that the public necessities do not now require the erection of a new court-house. (3) That the question of such erection is one resting in their sound discretion, they having the right to adopt or reject the recommendations of the Grand Juries; and that they had exercised their discretion by declining to adopt the same. (4) That the action of the juries, while it made it lawful for respondents to adopt their recommendations, did not affect the respondents' right to decide when they would do so. (5) That the respondents had omitted no duty, and that the relator was not authorized to sue out this writ of mandamus.

Demurrer to return, and prayer for peremptory mandamus.

Samuel B. Wilson, *E. B. Daugerty* and *John J. Wickham* (with whom was *Jas. H. McCreery*, District Attorney), for the Commonwealth.

Wilson & Moore, for respondents, contra.

B. B. Chamberlain and *W. S. Morlan* were also heard, contra, on behalf of citizens of New Brighton, Beaver Co.

Jan. Term, 1875. THE COURT. The relator having filed a general demurrer to the return of the respondents, in which issue has been joined, the case is to be considered and determined upon the statements of fact contained in the petition and return. We cannot go outside of these, nor consider any allegations of facts not found therein; and as to the averments contained in these, they must be taken as true.

(The Court here reviewed the facts.)

We are called upon to determine whether this return is sufficient in law, whether the averments contained therein show a sufficient legal reason for the non-performance of the alleged duty. If on examination they are found not to contain any sufficient reason or excuse, when tested by the principles of law applicable to the case, it will be our duty to award the writ.

The first reason urged is, that the action of the Grand Jury and the approval of that action by the Court of Quarter Sessions, was voluntary on their part, not based upon any proposal for the erection of a new court-house, submitted by the respondents, as the commissioners of the county, for the consideration and action of said Juries and Court, nor was it at the request of said respondents. It does not appear in the case as presented, at whose instance the action was taken. As is conceded by both parties, the action was based upon the 10th section of the Act of April 15, 1834.

The reason assigned suggests the inquiries, Was any notice or request from the county commissioners necessary to authorize and empower the Grand Juries to act in the premises? Must the action of the Grand Juries and Court of Quarter Sessions be dependent upon the prior action of the commissioners? When county commissioners, in their official capacity, undertake to do any act, the mode of doing which is regulated by a statute, they, like all other municipal officers, must proceed in the manner prescribed, and it is clear that the respondents could not have proceeded with the erection of a new court-house in this instance, without having first

* Act of April 15, 1834, § 10 (Purd. Dig. 296, pl. 15): "It shall be lawful for the commissioners of any county, having first obtained the approbation of two successive Grand Juries and of the Court of Quarter Sessions of such county, to cause to be erected, at the seat of justice thereof, when occasion shall require, such building or buildings as may be necessary for the accommodation of the Courts and of the several officers of the county, and for the reception and safe keeping of the records and other papers in charge of such officers; and, also, such other building or buildings as may be necessary and proper for the purposes of a county jail and workhouse, and, if need be, to purchase ground for the erection of such buildings."

Section 11 made it the duty of the commissioners to maintain the public buildings in repair; and provided that "it shall be lawful for them, when necessary, having first obtained the approbation of the Grand Jury and of the Court of Quarter Sessions of the county, to alter, add to, or enlarge such public buildings."

Digitized by Google

obtained the approval of two successive Grand Juries, and the Court of Quarter Sessions. Such undertakings are out of the ordinary routine of their official duties, and involve a large outlay of money, and the purpose of the statute in requiring the approbation of the Juries and Court was to impose a restraint upon any improvident and reckless expenditure of public funds. Hence such approbation is made a pre-requisite to their expenditure of public money for such a purpose, and any such expenditure without the preliminary sanction would be improper and unlawful.

But while the county commissioners can only move in strict accordance with the plain directions of the statute, we think there is nothing in that statute, when properly considered, that prohibits the Grand Jury from making a recommendation giving the required sanction to the erection, without being first requested to do so by the commissioners. To so hold would be declaring the commissioners invested with a power that might be arbitrarily exercised to the serious detriment of the public interests. If such were the construction given to this section of the Act of Assembly, then no matter how great the necessity, how urgent the demand for the erection of a court-house, jail, or other public buildings, the indifference or unreasonable obstinacy of these public officers, could prevent the erection, by simply neglecting or refusing to apply to the Grand Jury and the Court for their necessary preliminary action, and the public would be powerless to remedy the evil, for no power would then exist anywhere to spur these officers to action. The same would be true as to any needed alterations, additions, or enlargements of any of the public buildings, as provided for in the 11th section of the same Act, for in this respect the terms of the two sections are identical. If we refer to the 26th section of the "Act relative to county and township rates and levies," approved the same day as the one under consideration, we find the same Legislature, in prescribing the powers and duties of the overseers of the poor, use the same language—declaring that "it shall be lawful for the overseers of the poor of any township, *having first obtained the approbation* of any two justices of the peace of the county to lay a rate," etc. It cannot certainly be contended, that by merely neglecting or refusing to apply for the required sanction of the justices, the overseers can evade their duty, and deprive the parties interested—the paupers of the township—of the support which the law has provided; and that in case the requisite approval of the justices was certified to such overseers, they might say they had not requested it, and therefore would not act, and that no power existed in the courts or anywhere else to compel a discharge of their duty.

Again, in the 35th section of the same act, the Legislature, to provide a mode of enforcing payment of township rates and levies, confers upon the collector of the township the requisite authority, by declaring that "it shall be lawful for the collector thereof, having first obtained a warrant under the hand and seal of a Justice of the Peace of the county, to levy," etc., language identical with that used in this case; but no one will say that if the required warrant is presented to the collector, although it be not at his instance or request, he is not in duty bound to proceed and enforce payment of the taxes, and if he neglected or refused to do so, and the township loses its revenue in consequence, he would clearly be liable for his non-performance of duty. But it is unnecessary to pursue the consideration of this question further. It was not the intention of the Legislature to make the action of the Grand Juries and the Court of Quarter Sessions dependent upon the previous action of the Commissioners in submitting a proposal for or requesting their consideration or action.

The action of the Grand Juries and Court in this case was sufficient to completely vest in the Commissioners the authority to proceed with the erection (Appeal of the Commissioners of Northampton Co., 7 P. F. Smith, 452), and if, in consequence of such action and authority, a corresponding duty was imposed, the respondents should proceed.

This brings us to the consideration of the reasons for non-compliance with this mandate of the writ assigned in the 2d, 3d, and 4th clauses of the respondent's return. We will consider these together, for they present but one question, or, properly speaking, they each, in somewhat varied language, raise the same question. This is the important question in the case, and relates to the discretion of the commissioners. In many matters pertaining to their office, county commissioners are a deliberative or quasi judicial body, and may exercise a discretion, as in determining the rates of taxation, the necessity of county bridges, the kind and character of such bridges, and of public buildings that they may be authorized to erect, and numerous other matters as to which they are required to act; but as regards many other matters their duties are ministerial only, as in publishing annual statements, making annual and tri-annual returns to the Secretary of the Commonwealth, their duties in relation to the census under the Acts of January and March, 1821, in relation to elections, rebuilding county bridges, etc. If, as alleged in this part of their answer, the commissioners are a deliberative body possessing, as to this particular matter and as this case now stands, a discretionary power by virtue of which they may determine whether they will erect a new court-house or not, then the answer is sufficient in law.

Digitized by Google

If they have this discretionary power and have, as they state, in the exercise of it decided not to erect at this time, a peremptory writ should not be issued, for in so doing the Court would be assuming to exercise a discretion that properly belongs to the respondents; and, in such case, to coerce them to act in a manner different from what they have decided, would be improper and illegal. When public interests are involved, or individual rights require it, the writ may issue to require public officers or individuals to proceed and exercise a discretion that rests in them, but never (unless, possibly, to prevent some great wrong) to exercise it in a particular way. The pertinent inquiry, therefore, is do the respondents possess such discretionary powers as they claim to exercise in this case? The answer must depend upon the 10th section of the Act of April 15th, 1834, as already quoted. We are not aware that the precise question has ever been considered, or a construction of this section been given by any of our courts. As we have already seen, the action of the Grand Juries and Court of Quarter Sessions conferred on the commissioners full power and authority to do the act required. Was it the intention of the Legislature, by the use of the language found in this section of the Act, to confer on the commissioners, in a case like this, a mere permissive power and authority, leaving it optional with them whether they will exercise that power or not? They are public officers. It is the public interests that are involved, and it clearly becomes their duty to act "if occasion shall require," if those interests are to be subserved by such action. But who are to determine "when occasion shall require," when the public interests are to be subserved by the erection of public buildings? The Legislature, as we conceive, intended that the determination of this should devolve upon the Grand Juries and the Court. If they do not determine as to the necessity and propriety of the erection of public buildings, we are at a loss to perceive what their duties are in this regard under this statute, or what purpose is subserved by their actions at all. There is no other question on which they can pass. They have nothing to do with the kind or character of the new erection, its size, plan, or cost. As to all these matters, the statute is silent, and hence they must still rest in the sound discretion of the commissioners, and even though a peremptory writ do issue in a case of this kind, it would not and could not direct in regard to these, but simply require that the respondents proceed with the erection. Grand Jurors, coming as they do from the body of the county, and in a sense representing every section of it and knowing the views and sentiments of the people, their wants and wishes in this respect, are peculiarly fitted to consider and determine as to the necessity and propriety of the erection of new public buildings; and, as was said by Justice SHARSWOOD, in delivering the opinion of the Supreme Court in the cases of the "Commissioners of Northampton County," before referred to, the law has wisely provided that the concurrence—not of any two, but of two successive grand juries should be obtained. Thus, when one grand jury has recommended the measure, it is notice to the citizens of the county, in order that if they see fit they may appear and remonstrate at the next term of the Court, or by public meetings, through the press or otherwise agitate and discuss the policy of the proposition. If they can succeed in persuading either the Grand Jury or Court to withhold their approbation, the proceeding will terminate, the recommendation of the preceding Grand Jury goes for nothing, and the project must be again initiated *de novo*. This provision of the statute, that there must be the concurrent action of two Grand Juries and their sanction to any undertaking of the kind, was certainly not intended as a mere vain and useless requirement; but if, as we believe, it assigned to them, in connection with the Court, the determination of the necessity and propriety of erecting new public buildings, we then observe the utility and importance of the provision; and if we are correct in our interpretation of it, it would seem to follow that there could be no discretionary power vested in the commissioners on this subject.

It was claimed, upon the argument, however, that the words of this section, "It shall be lawful," conferring upon the commissioners the authority (they having first obtained the approbation of the successive Grand Juries and the Court) to erect public buildings, are permissive or directory merely, and not mandatory; and must be considered as still leaving a discretion in them after the action of the Grand Juries giving their sanction, and the approval thereof by the Court, which discretion the respondents may now exercise in this case. These words, although permissive in form, when used in statutes, are to be construed as discretionary or mandatory according as the circumstances in each case show the intention of the Legislature to be. Many instances and authorities might be cited where such language used in statutes has been held to impose a duty and did not confer a discretion. "When a statute confers upon a corporation a power to be exercised for the public good, the exercise of the power is not discretionary, but imperative, and the words 'power' and 'authority,' in such case may be construed 'duty' and 'obligation.'" (Comm'rs of Ann Arundel Co. *v.* Duckett, 20 Md. 468.) "Whenever it is provided that a corporation or an officer 'may' act in a certain way, or '*it shall be lawful*' for them to

Digitized by Google

act in a certain way, it may be insisted on as a duty for them to act so, if the matter is devolved on a public officer and relates to the public or third persons." (WOODBURY, J., delivering the opinion of the Supreme Court of the United States in Mason *v.* Fearson, 9 Howard, 238.) To the same effect is the case of Mayor, etc., of N. Y. *v.* Furze (3 Hill, 612, approved in 9 N. Y. 168 and 16 N. Y. 162). The Supreme Court of the United States, in the case of The Supervisors *v.* The U. S. (4 Wallace, 425), hold that when a power or authority is given by statute to public officers in permissive language, as that "*they may if deemed advisable,*" do a certain act, such as levy a tax for a special purpose, the language will be regarded as peremptory; and declare that the conclusion to be derived from all the authorities is, that where by statute a power is given to public officers in language permissive in form, if public interests or individual rights call for its exercise, it must be considered as peremptory—what they are empowered to do for the public or a third person, the law requires shall be done. In all such cases the intent of the Legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty. In Com'th *v.* Councils of Pittsburgh (10 Casey, 513), our own Supreme Court say, "In a statute the word '*may*' means '*must*' or '*shall*,' in cases where the public interests and rights are concerned, and when the public or third persons have a claim *de jure* that the power should be exercised;" and hold, that the words "*shall have power*" used in the Act of July 7, 1853, are peremptory, not only granting a power, but imposing a corresponding duty. The same principle is recognized in Com'th *v.* Gable (7 S. & R. 425), and other cases.

To ascertain with what intent the Legislature used these words in this section, we may properly consider how they used the same language in other sections in the same Act. In the 6th section of the Act providing a mode for the collection of judgments against a county or township, it is declared "*it shall be lawful* for the Court in which such judgment is obtained . . . . to issue a writ commanding the commissioners to cause the amount thereon to be paid . . . . out of any money unappropriated of such county . . . . and to enforce obedience to such writ by attachment." Is this language merely permissive? Will it for a moment be contended that after a party has obtained a valid judgment, the Court is invested with a discretion to either grant or refuse execution thereof in the mode prescribed, and that the issuing of the writ in such a case is not demandable as of right, and to be granted by the Court as a duty? We think no Court would so hold. The 86th section provides for filling vacancies in the township offices by declaring "*it shall be lawful* for the Court of Quarter Sessions to appoint suitable persons to fill such offices." It would be unreasonable to hold that this section did not impose a duty upon the Court of Quarter Sessions, but merely devolved a discretion, and that the Court might appoint or not. The Court have a discretion as to whom they will appoint, but not as to the act of appointment itself.

If we turn to the act relating to county and township rates and levies, before referred to, we find the same language used in the 25th section to authorize the supervisors of townships to levy a rate for opening and repairing roads and bridges; in the 26th section to authorize overseers of the poor to levy a rate for the support of the poor, and in the 35th section to authorize and empower the township collector to collect taxes of delinquents by distress and sale of their goods and chattels. In each and all these cases it was clearly the intention to *require* of these officers, as an official duty, the performance of the acts mentioned, and not merely to permit the performance thereof. And the same may be said of the use of the same language in the 37th section authorizing a Judge to make an order staying proceedings for collection of taxes, in cases where an appeal has been taken from the assessment thereof, and in the 40th section, authorizing supervisors and overseers to pay out public money in their hands.

Finding this language used in the 10th section, to confer authority upon the commissioners to erect public buildings, used so often to confer authority on other public officers to do acts, where it was undoubtedly the intention to *require* the performance of those acts as a duty, we may reasonably conclude such was the intention here also, and it adds additional weight to this interpretation when we consider that the language was used in so many instances for a similar purpose, not only by the same Legislature, but that it is the language of the commissioners appointed by the resolution of March 31, 1830, to revise the civil code of the State, by whom these acts were drafted in pursuance of a general plan, and that therefore the language was used for the same purpose under similar circumstances, and should receive the same interpretation.

We therefore conclude, that, under the facts of this case, there was not only an authority conferred upon the commissioners, but that a duty was imposed, and hence, if the performance of that duty was sought in behalf of the public, and by any one having a legal right to ask its performance, it is incumbent on the respondents to perform it.

This brings up the only remaining question raised by the return—whether the relator here can invoke the aid of the writ. This point was not insisted upon in the argument for respond-

Digitized by Google

ents, and we think could not be successfully urged. If he has not this right as an individual, and that might be questioned, his official position undoubtedly gave him the right to ask the aid of the Court. He is the proper officer to institute proceedings to compel the performance of public duties by public officers, and it is not necessary that he should show any special damage by reason of the neglect of the commissioners. Bobbet *v.* the State (10 Kansas, 12th Am. Law Register, 124.) Upon the whole case we are of opinion that the relator is entitled to have a peremptory writ.

Peremptory mandamus awarded.

[The case was not taken up to the Supreme Court.]

C. P. No. 1. **Rex v Piatt.** Oct. 14.

Witness—Privilege from arrest—Nature and extent of.

Rule to set aside service of a summons, on the ground that defendant was served while attending a trial in which he was a witness.

Depositions on the part of defendant showed that he was a resident of Tunkhannock, Pennsylvania, and had been notified and required to appear as a witness in a case depending in Huntingdon County, New Jersey, on Friday, Sept. 8; that he left home on Thursday, went to Huntingdon and remained there until Friday afternoon, when the Court adjourned until Monday, Sept. 11, the case for which he was notified not having been reached; that he left Huntingdon on Friday afternoon and came to Philadelphia; he had no special business in the latter place, but thought it probable he might see the Centennial, and while there was served on Saturday with the writ in question. He left Philadelphia in the first train for Huntingdon after service of the writ, in order to be in time for the trial.

Harrington, for the rule. A witness is privileged from arrest or service while attending a cause on trial. In the present case the trial was postponed from Friday until Monday, and while the defendant was waiting for it, he was served.

[BIDDLE, J. He was neither going nor returning.]

But he had left home for the trial and was still remaining for it.

1 T. & H. Prac. 254, and cases there cited.

Maxwell, contra.

A witness is not protected from process in this State when subpœnaed for a cause in another; especially is this so when he again returns to his own State. If the defendant had returned home he would not have been exempt. There is no evidence that the witness was ever subpœnaed.

Hardenbrook's Case, 8 Abbott, 416.

Ex parte D. McNeill, 6 Mass. 264.

The defendant voluntarily left the place of trial and came to Philadelphia in order to visit the Centennial.

Rule discharged.

[See Torry *v.* Bast, *ante*, 63; Steinmetz *v.* Wade, and *In re* Anfrye, below.]

C. P. No. 4. **Steinmetz v. Wade.** Dec. 8.

Privilege from arrest—Party to action—Arrest while in attendance on a suit—Capias—Summary relief.

Motion to quash *capias*.

N. H. Sharpless (with whom was *C. Swain*), for the defendant, applied for summary relief and stated the following case:—

The defendant, Wade, a non-resident, is the libellant in a divorce case (Wade *v.* Wade), pending in the Court of Common Pleas, No. 2, and came to Philadelphia to attend a meeting before the Examiner; after his arrival he was arrested on a *capias* issued out of the Court of Common Pleas, No. 1, at the suit of Steinmetz, who, it was charged in the divorce suit, had committed adultery with libellant's wife, the respondent in said divorce suit. This *capias* was, on motion, quashed by the Court of Common Pleas, No. 1.

Wade was afterwards arrested on a charge of libel, and bound to appear before Magistrate List on December 8, at 1 o'clock. On the same day, at 10 o'clock, he attended a meeting before the Examiner in the divorce case, and afterwards appeared before the magistrate. As he was leaving the magistrate's office, he was again arrested on a *capias* issued at the suit of said Steinmetz out of this Court, Common Pleas, No. 4.

Wade's counsel insisted on his being brought immediately before the Court, and thereupon claimed that not only had a gross contempt of Common Pleas, No. 2, been committed by arresting the libellant while attending his divorce suit therein, but also that the process of this Court (No. 4) had been abused.

Speakman, for the plaintiff, did not deny any of the statements of the defendant's counsel, but claimed that the defendant was not within the protection afforded to *witnesses* in attendance upon a Court.

[THAYER, P. J. The privilege from arrest applies equally to *parties*. It is a clear wrong, but the facts should appear by affidavit.]

THE COURT directed the defendant to state the facts in an affidavit, and thereupon quashed the *capias* and discharged the defendant, ordering the record to be made up to show a rule granted returnable *instanter*, and, after hearing counsel, *capias* quashed.

[See Rex *v.* Piatt, *supra*; Torry *v.* Bast, *ante*, 63.]

Digitized by Google

C. P. No. 4. **In re Anfrye.** Dec. 9.

Privilege from arrest—Attaché of Foreign Legation, acting as Centennial Commissioner.

Rule to show cause why *capias* should not be quashed.

Captain Raoul Anfrye, Military Attaché of the French Legation at Washington, and Commissioner of France to the Centennial Exhibition, was arrested on December 8th under a *capias* issued by the prothonotary of the Court of Common Pleas of Philadelphia County, on the affidavit of A. L. Smith, a member of the Centennial Guard, on a charge of malicious prosecution.

J. W. Goheen, for the rule, read the affidavit of Captain Anfrye, setting forth that he is Military Attaché of the French Legation at Washington; also a telegram addressed to John K. Valentine, United States District Attorney, dated Washington, December 8th, 1876, signed by Hamilton Fish, Secretary of State, recognizing and affirming the said official position of Capt. Anfrye, and requesting that the immunities assured to members of a Foreign Legation by the Act of Congress of April 30th, 1790, and the treaty of 1853, should be respected.

C. F. Stilz, for the plaintiff, said that the writ had been issued in ignorance of the defendant's official position as a member of the French Legation at Washington; and made no objection to the writ being quashed.

THE COURT (THAYER, P. J.). On the strength of Capt. Anfrye's affidavit that his diplomatic functions are not suspended, and Secretary Fish's telegram to that effect, the writ is quashed.

Rule absolute.

Orphans' Court.

Adolph's Estate. Oct. 18.

Orphans' Court practice—Selection by Clerk of Orphans' Court of newspaper for advertising sales in partition—Act of 18th March, 1875, P. L. 29—Rule of Court.

Sur exceptions to adjudication.

At the audit of the account of the administrator of this estate, it appeared that a sale of real estate had taken place under proceedings in partition. The proprietors of the *Day*, a newspaper published in Philadelphia, presented a charge of $42.50 for advertising the sale according to the rule of Court, made under the authority of the Act of March 18, 1875. The rule provides: "In all cases of public sales of real estate under the order of Court, twenty days' notice prior to the day of sale shall be given by advertisement, once a week for three weeks in the *Legal Intelligencer*, and in two daily newspapers of the city of Philadelphia, one of which shall be selected by the Clerk, and the other by the petitioner."

In this case the Clerk had selected the *Day*. Before the auditing Judge the claim was contested, but the Court allowed it.

Exceptions to this ruling on behalf of the guardian of the children of Alfred W. Adolph, the decedent, were filed.

G. W. Thorn, for the exceptant.

Under the statute, the Court cannot delegate its discretion to the Clerk.

Act of March 18th, 1875, P. L. 1875, page 29.

Patterson, contra. C. A. V.

Nov. 11. THE COURT dismissed the exceptions, saying: "When the petition for the sale is prepared, if counsel will append the form of advertisement, we will order that that shall be the form, and that it shall be advertised in the paper the party may select, and also in the paper chosen by the Clerk."

Chambers's Estate. Oct. 19.

Appeal from probate of will—Practice—Right of legatees to a day in court.

Appeal from decision of Register, admitting a will to probate and granting letters of administration.

Joseph Chambers died August 21, 1874, leaving as next of kin a daughter, Margaret, married to one James Clark. In October, 1874, the Register of Wills granted letters of administration to James Clark; but on November 17, 1874, in answer to a citation granted on the petition of Clark, a paper purporting to be a will was presented to the Register, and he thereupon granted letters testamentary to John Craig and Thomas Lindsay, the executors named therein. From this grant of letters testamentary this appeal was at once taken by the administrator.

The witnesses to the will could not be found. The will was dated April 8, 1874. Its genuineness seems not to have been contested until September, 1876, at the audit of the executors' account by the Court, when several papers, due-bills and receipts, were presented, signed by the decedent, all relating to business transactions with John Craig, one of the said executors. It was found that the liabilities evidenced by the unredeemed due-bills would consume the entire estate.

It was in evidence that the testator had often spoken of the disposition he meant to make of his estate, and the will was in exact accordance with what he had said. He left all his property to his daughter, his only child, except a gold watch, which he directed should be given to a nephew.

The testimony as to the genuineness of the signature to the will was conflicting.

W. H. Browne, for appellant.

J. B. Colahan, for the executors. C. A. V.

November 4. THE COURT. The legatees should have their day in Court. A citation, therefore, should issue to them to show cause why these letters should not be revoked. The proceedings must be stayed until this is done.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] THURSDAY, DEC. 21, 1876. [No. 12.

Supreme Court.

Jan. '74. Jan. 10.

Hammett v. Hammett's Exrs. et al.

Husband and wife—Post-nuptial agreement—Marriage settlement—Decedent's estate—Jurisdiction—When a court of equity has jurisdiction of claim against decedent's estate—Orphans' Court.

A post-nuptial settlement made by a wife in favor of her husband, unless preserved by some statutory provision or special equitable considerations, may be avoided in equity after the death of the husband.

A. married B., and a few hours after their marriage, required her to sign in her maiden name a paper by which she relinquished her right of dower in his estate, and agreed to accept in lieu such provision as her husband might make for her. Some time afterwards, at her husband's request, B. signed and separately acknowledged a second agreement reciting that the first had been lost, and declaring it to have been a contract whereby B., in consideration of her contemplated marriage and of an annuity of $1200, had relinquished all her rights in A.'s estate. This second agreement sought to confirm the first by appointing a trustee for B. A. died, and his widow elected to take against his will, under the intestate laws. The executors of A. set up the second agreement as a bar to her claim, whereupon B. filed a bill in equity for the cancellation of the second agreement, and of the first if found.

Held (affirming the judgment of the *Nisi Prius*), that the two agreements being clearly post-nuptial were null and void, and the widow was entitled to distribution under the intestate laws.

Held, further, that a court of equity had jurisdiction, that of the Orphans' Court in such case not being exclusive.

Dundas's Appeal (23 Smith, 474) and Linsebigler v. Gourley (6 Smith, 172) distinguished.

Certificate from the Nisi Prius.

The bill, filed by Robenia Hammett against the executors of Barnabas Hammett, deceased, and James H. Campbell, trustee under a certain agreement, averred: (1) That on February 22, 1868, the plaintiff was married to the said Barnabas Hammett; that several hours after her marriage she was induced to sign, in her maiden name, some paper, the contents of which she did not understand, by which some of the defendants maintained that she had agreed to relinquish her right of dower in her husband's estate, and to accept in lieu thereof a sum or bequest in her favor of which she was not informed. (2) That on November 29, 1869, she was induced to sign another paper, styled "Agreement between Barnabas Hammett and Robenia E. Hardie, now Robenia Hammett, and James H. Campbell," which purported to recite the paper executed on the day of her marriage to have been a contract whereby Barnabas Hammett, in consideration of the release by the plaintiff of all her right, interest, and dower, distributive share or otherwise, in his real and personal estate, and of her contemplated marriage with him, had agreed that the plaintiff should receive in lieu thereof, out of his estate, upon his death, and thereafter annually during her life the sum of $1200, and that she, in consideration of the said covenant and agreement on his part, and of her contemplated marriage with him, had released and forever quit-claimed to him, his heirs, executors, administrators and assigns, all her right, title, interest, claim, and demand of dower, distributive share or otherwise, upon or to his real and personal estate, in full satisfaction and bar thereof, except the said annuity; that this second paper also purported to recite the loss of the previous alleged agreement of February 22, 1868; and that by this latter agreement the plaintiff was supposed to confirm by a trustee, the said Campbell, the alleged lost agreement as recited, and to release her dower and distributive share of and in the real and personal estate of her husband and to accept in lieu thereof an annuity of $1200. (3) That Barnabas Hammett died in January 22, 1873, leaving a will, under which the plaintiff declined to take; that she had elected to take her interest in his estate under the intestate laws; but that the defendants had set up against her the agreement of November 29, 1869, as a marriage settlement, and claimed that she was barred from maintaining any such demand against the estate.

The bill prayed that the agreements might be declared void and be surrendered for cancellation. A prayer that the executors might be ordered to pay over to the plaintiff the interest in the estate which belonged to her under her election was subsequently withdrawn.

The answer of the executors alleged that they had no knowledge of the facts attending the release of dower except by the recitals in the agreement of November 29, 1869, which was executed and separately acknowledged by the plaintiff, and therefore demanded proof of the averments of the bill.

The answer of Campbell, trustee, averred that at the time of the execution of the second agreement he was informed and believed that its contents were fully known to the plaintiff, and therefore he had agreed to act as trustee and had joined in the execution of the agreement.

The case was referred to Hon. James Thompson as Master, who found, *inter alia*, the following

Digitized by Google

facts: The maiden name of the plaintiff was Robenia Hardie. It appears that she became acquainted with Barnabas Hammett, the testator, a number of years ago, in the city of Philadelphia, and an intimacy sprang up between them which resulted in their living and cohabiting together. Before marriage, the plaintiff had six children to Mr. Hammett. On the 22d of February, 1868, Miss Hardie and Mr. Hammett were legally joined in marriage by the Rev. James Neill, of the Methodist Episcopal Church, who was a partner in business with Mr. Hammett, and who officiated in performing the marriage ceremony. Other children were subsequently born.

The marriage of Mr. Hammett with Miss Hardie took place about 9 o'clock A.M. on the 22d of February, 1868, in his house on Broad Street. After it was performed, Mr. Neill, who was about leaving, was requested by Mr. Hammett to return in the afternoon, which he did, as he says, between four and five o'clock P. M. When he returned, and in the absence of Mrs. Hammett, Mr. Hammett said he wished him to make a writing between him, Hammett, and his wife. He then took pen and paper, and Mr. Hammett dictated what he should write. "I told him," says Mr. Neill, "that no paper was valid without a consideration." This paper having been called for (and the answer of counsel for respondent being that they have it not), the witness, Mr. Neill, was offered to prove its contents, and proceeded, under objection, to state that it was in substance as follows: "For a valuable consideration to me in hand paid, the receipt of which I hereby acknowledge, I hereby relinquish my right of dower, and agree to accept in lieu thereof such provision as Mr. Barnabas Hammett may make for my support, it being understood that he is to provide for the expenses of the house as long as the children remain under my care." This paper was, by the express directions of Mr. Hammett, signed by his wife in her maiden name.

The Master finds that this agreement was made after the marriage of Robenia Hardie with Barnabas Hammett; that it is substantially given by the witness who wrote it, and that it was the only agreement between the parties prior to that of November 29, 1869; that it was post-nuptial, and that no ante-nuptial settlement, or agreement for any settlement, ever existed between the parties; that after the paper was signed by Mrs. Hammett in her maiden name, Mr. Hammett took possession of it without affixing his signature to it, and it has not been seen by Mr. Neill, nor any of the respondents representing Mr. Hammett since, but was afterwards, in the agreement of the 29th of November, 1869, alleged to have been lost.

The Master further finds that this paper was wholly without consideration passing at the time, and without even a promissory consideration. The furnishing maintenance for the children was only what the law bound him to do, and so as to his wife. No sum was fixed to be paid at any time, by the agreement, as a consideration for the relinquishment by Mrs. Hammett of her marital rights. It was signed without consultation with anybody by her, and at the command of her husband, and without information given her of the state of her husband's property, or what she was relinquishing. There was no acknowledgment of the instrument in question. He finds that her signature was obtained by coercive control, from the testimony of the only witness present, and who, in the opinion of the Master, is entirely reliable. He testifies that after he had finished writing the instrument, Mr. Hammett told him to call in Mrs. Hammett, that he did so, and when she came in and was told what she was wanted for, and the paper was read, she asked how she was to sign it. Mr. Hammett answered in a peremptory manner, and told her to sign her maiden name. The witness says she signed without saying a word, that she appeared to do it mechanically. "Her manner appeared to be prompt obedience." There is no doubt about the fact that this writing was executed by his wife at the command of Mr. Hammett, after the marriage of Mr. and Mrs. Hammett, and they lived together afterwards with all their children, until the death of Mr. Hammett, on the 22d day of January, 1873.

As to the agreement of the date of the 29th of November, 1869, stated to be "between Barnabas Hammett and Robenia E. Hardie, now Robenia Hammet, and James H. Campbell," as it is headed, the Master finds material mis-statements and misrepresentations in the alleged facts set forth in the preamble to it, under the "*whereas*" in the same, viz.: He finds that (1) No contract was executed antecedently to it between Barnabas Hammett and Robenia E. Hardie, whereby, in consideration of the release of dower and distributive share, or otherwise, by the latter, she was to receive in lieu thereof out of the estate of the former, after his death, the sum of $1200 annually, being the interest of $20,000. As already shown, no such contract was ever entered into between them. (2) The contract of 22d of February, 1868, was not made in contemplation of marriage, but some hours after the marriage of the parties to it had been actually solemnized. (3) The declaration in said agreement or writing that the contents of the "said lost contract" are correctly set forth in the preamble to it, is not true, as is fully shown in the testimony of James Neill.

In the last clause of the said agreement, the recital that James H. Campbell was acting as

Digitized by Google

trustee in said contract in confirming the "contract and the covenants, agreements, and release therein above recited" is untrue, both in law and fact. Mrs. Hammett, being a married woman, had no power by her own choice to appoint a trustee to contract for her. Mr. Campbell proves incontestably that Mrs. Hammett never spoke to, or in any way consulted him on the subject; that he acted at the request of Mr. Hammett alone, and on his representation that Mrs. Hammett knew all about it. The Master also finds that so far as the agreement between Mr. Hammett and his wife, dated the 29th of November, 1869, seeks to confirm a previous agreement, alleged to have been entered into between them, as recited, it is void, for the reason that the same is misrecited in all the material allegations in it. That no such instrument as that recited existed, and consequently was incapable of confirmation. That the instrument proved was itself void, being without consideration, and not legally executed by either of the parties to it.

So far as the said agreement of 29th of November, 1869, purports to be a new and independent contract of release by Mrs. Hammett of her dower and distributive share in and to the personal and real estate of her said husband, Barnabas Hammett, the Master finds: That the contract was framed by the procurement and at the sole dictation of Hammett; that it was prepared by counsel at his instance alone, and not in the presence of his wife, or at her request; that Mr. Crawford, who wrote the agreement, left blanks in it, which were afterwards filled by Mr. Campbell, who was Mr. Hammett's general counsel, and were filled by direction of Mr. Hammett alone, including the proposed annuity of $1200, in the absence of Mrs. Hammett; that a few days after the filling of the blanks, Mr. Campbell was called upon to go to the Alderman's office to execute the instrument, and he did so; that after a day or two the paper was put into Mr. Campbell's custody by Mr. Hammett, for safe keeping, and so remained exclusively until after Mr. Hammett's death, three years and nearly two months. The Master finds that the paper was not read to Mrs. Hammett by the counsel who drew it, nor was she informed of its contents by him, nor by the counsel for Mr. Hammett, who filled up the blanks, nor was it read to her at the alderman's office, as is proved by the witnesses present on the occasion and by Mr. Campbell and the alderman himself; the latter testifying that he did not recollect reading it to her, that it was not customary to read papers to parties who called to have them acknowledged, unless requested to read them; nor was she seen to read or look over it in the alderman's office. It lay on the table three-fourths folded, leaving open to view the end of it to which the signatures were to be appended. Not any of the witnesses to the instrument were made acquainted with its purport or contents at the time of attesting it. The Master does not infer from the manner in which the paper lay on the table partly folded at the time of execution, that there was in that circumstance any intentional concealment of its contents. The place where it was executed was in the office or counting room of Mr. Hammett, the witnesses coming there, as well as the alderman, for the purpose, and Mrs. Hammett being brought there by Mr. Hammett in a carriage.

There is no positive testimony that the agreement was not read to or by Mrs. Hammett before signing. That is a negative not easily proved, and, in the opinion of the Master, Mrs. Hammett was not a competent witness to testify to that fact, and what she did say on that point is excluded from consideration by the Master. But he holds, that as all who had anything to do with the writing, either as scrivener, counsel, trustee, or subscribing witnesses and alderman, prove that it was not read to her to their knowledge, that this, taken together with its intended effect and operation upon her interests, being a release of all her marital rights in her husband's estate for an utterly inadequate consideration, raises a conclusive presumption, in the absence of rebutting proof, that it was not read to her before signing. This view alone comports with the idea of sufficient contracting natural capacity on the part of Mrs. Hammett, a fact not denied to her by anybody; but shows rather a deficient sense of moral honesty on the part of her husband. The Master thinks himself bound to find that Mrs. Hammett executed the paper in question in ignorance of its contents as affecting her interests.

It appears that about this time, and up to his death, Mr. Hammett estimated his property and estate at between one and two millions of dollars, and it has been estimated by witnesses on this hearing at from seven to nine hundred thousand dollars at the time of his death, near three hundred thousand of which was personal property. Supposing him worth anything like either of these sums at the date of the contract, is it reasonable to suppose that Mrs. Hammett, possessed as she was of ordinary capacity, would have relinquished all that for the pittance stipulated to be paid her in the shape of an annuity of $1200 per annum for life? It cannot be. If she was not kept in ignorance of her rights and the extent of her husband's property, there is but one way of accounting for her signing a relinquishment of her marital rights for the trifling sum mentioned, namely, that it was done under coercion by her husband, and this would be equally fatal to the validity of the agreement of the 29th November, 1869. It requires the utmost good faith and the fullest information, with a disclosure of every

Digitized by Google

essential fact necessary to intelligent action, to constitute such contracts between husband and wife valid and binding in equity, being utterly void at law. The Master finds, therefore, that in view of the pecuniary circumstances of Mr. Hammett, the settlement upon his wife was totally inadequate as a suitable provision for her, her condition being regarded, or as a consideration for a relinquishment of her interest to dower and distributive share in his personal estate, and that, for this reason, as well as for the misrepresentations and mis-statements contained in the agreement of the 29th November, 1869, it is void in equity as it unquestionably is at law, from want of capacity on the part of complainant to contract, being a *feme covert* at the time.

On these facts the Master reported the law as follows:—

It is an elementary principle that marriage suspends the capacity of the wife to contract, living the husband. From time to time the generality of the rule has received limitations in this Commonwealth, to meet the demands of a change of policy on this subject, but the rule remains as firmly seated as ever where not modified by statute. The effect of it is, to render void contracts of married women within it, and is the logical sequence of the principle which holds that she is wholly without capacity to contract independently of her husband. It is not *qua* the individual that this results, but because as such she is destitute of the absolute essential to contract, namely, the power to contract. The rule is the necessary result of the relation, otherwise infinite confusion would ensue, from an equality of power in both husband and wife to contract during the existence of the marriage relation. The philosophy of the common law was too conservative to sanction such an incongruous state of affairs as this would present. It is beyond doubt, therefore, that contracts of married women are void unless preserved by some statutory provision. (McQueen on Husband and Wife, 66 Law Lib. 271, 273, 281, *et seq.*; Reeves Dom. Rel. p. 45 *et seq.*; Gléden *v.* Strupler, 2 P. F. S. 400; Caldwell *v.* Walters, 6 Har. 79; Bruner's Appeal, 11 Wr. 67; Kreiser's Appeal, 19 P. F. S. 194.) Equity follows the law in this particular, unless equitable considerations in the given case appear to modify the rule. For instance, where a post-nuptial settlement altogether fair and equitable has been executed, and the gift to the wife has passed to her (for post-nuptial settlements, strictly speaking, are mere gifts between husband and wife, Schouler Dom. Rel. 276), she might in that case in equity be required to perform it; in other words, a chancellor would refuse to restore her to her rights relinquished in the settlement, after the death of the husband. It will depend much, therefore, upon the nature and value of the interest which has been parted with by the wife as a consideration for what she has received by way of settlement, whether or not she ought to be entitled to relief. (Cord on Married Women, sec. 35 *et seq.*) The authorities, as also the reason of the thing, seem to teach that without an actual execution of a post-nuptial settlement by an irrevocable effectual transfer of the property settled, the wife will not be bound if she does not choose, and is never bound by a mere promissory consideration. I have not been able to find a single case in which a wife has been decreed to perform a post-nuptial executory contract at the instance of the representatives of her husband. The wife, by relinquishing the provisions in the settlement, without having received any benefit under it, leaves her husband's estate in *statu quo*, and is remitted by virtue of her marital rights to the same condition It is only on equitable grounds her contract may be efficient to bind her, and then it is by way of estoppel. But she will not be estopped unless elements of an equitable estoppel appear, which will result in injury to some one interested if she be not estopped. Nor will a post-nuptial contract operate as an election unless under possible special circumstances. Election can take place only when the right of choice is coeval with the right of dominion, and that must be after the death of the husband. With us, a year after the death of the husband is allowed the widow to elect between a testamentary provision and her rights under the intestate laws. (Act of 1852, sec. 35.)

These are positions all applicable to the case under consideration. Mrs. Hammett, immediately after the death of her husband, and on consulting counsel, relinquished her right of executorship and every other interest under the will of her husband, and notified the executors that she repudiated and refused to be bound by the alleged executory post-nuptial contracts with her husband. She was not estopped to do so by any element of equitable estoppel, such as having taken a benefit under the agreement, or subjected the estate to injury. (For the elements of es oppel, see 1 Barr, 531.) There must be an injury of which some one can complain. (Ib., and 17 S. & R. 383, and many recent cases to the same effect.) The legatees under the will of Mr. Hammett cannot complain, they are mere volunteers and not purchasers for value. Nor is she estopped on the principle of election, for she was as incapable of electing at the date of the alleged settlement, as she was of contracting. The agreement never was intended to operate in that direction, and if it had been, no Court could sustain it in its total inadequacy of consideration. I regard this, as an answer to the claim of plaintiff, as wholly inadmissible. Kreiser's Appeal (19 P. F. S. 194)

Digitized by Google

settles all these points in favor of the plaintiff thus far. (See also Frank *v.* Frank, 3 Mylne & Craig, page 178–181.) According to the principles stated in the outset of this report, the alleged contracts relied on by respondent, having no equitable considerations to sustain them, are mere naked contracts, and do not bind the plaintiff, she having chosen to repudiate them.

But even if the foregoing positions be not tenable, how does the present contract stand on the facts reported as found? Briefly, they are, that the first alleged contract was made after the marriage of the parties, without any consideration passing to the plaintiff for the relinquishment of her marital rights, or even promised her. The agreement was actually never signed by the parties purporting to contract. It was signed by plaintiff by direction of her husband in her maiden name, he not signing at all so far as can be ascertained now, and it never was acknowledged by her before a magistrate.

A relinquishment by the plaintiff of all her interest in an estate of many hundreds of thousands of dollars, perhaps extending to more than a million of real and personal property, for I have no doubt that the word "dower" was thought to cover all her interest in the estate, for a promise to make an indefinite provision for her in his will was a mere mockery, a farce!—worth nothing either in law or equity. But it was not even binding on the husband, for it is not shown that he ever signed it. Of course it could not be binding on his wife. After this defective execution of the paper, Mr. Hammett took possession of it, and it has not been seen since; but he has made it the predicate of a new post-nuptial contract dated the 29th November, 1869, in which its contents purport to be recited, but which are shown to be mis-recited in every essential particular by the writer of it.

These misrepresentations are pointed out in the "facts found," and being in essential particulars, so far as confirmation is concerned, render the attempted confirmation entirely nugatory, and this whether the misrepresentations proceeded from fraud or mistake. A false paper, assuming to be a contract, binds nobody but the party getting it up. All the testimony shows that the paper of the 29th November, 1869, was drawn up in blank at the dictation of Mr. Hammett alone, and, in the absence of his wife, and the blanks afterwards filled up at his sole dictation. It was a gross misrepresentation to represent the first contract as an ante-nuptial agreement; it was not; and it was no less untrue to recite that it contained a stipulation for the payment of an annual sum of $1200 for life as a consideration for the release of dower by his wife. Even this pittance, equal to about $3.50 a day, to meet all the requirements of living, clothing and expenses in sickness and in health, was falsely recited, as the uncontradicted testimony of its writer shows. As confirmatory of the alleged lost paper, this last paper is, in the Master's opinion, utterly void.

But the paper of the 29th Nov. 1869, is relied on as an independent contract of settlement. To preserve it from the effect of being post-nuptial and not binding, there is a recital in it that there was a preceding ante-nuptial contract, which is alleged to have been lost. But there is no testimony on which this could be predicated. It is the other way. The only thing purporting to be a contract, is that of which I have been treating, which was drawn up on the 22d Feb. 1868, and recited as lost. There is not a shadow of proof to controvert the testimony that this paper was drawn and signed so far as it had a signature to it, after the marriage of Hammett to his wife. The only evidence relied on is the recital in the last agreement that it was ante-nuptial. But this has been shown to be untrue by the scrivener who wrote it, and in no particular is his testimony impugned; on the contrary, it is supported by an additional witness, Mr. Balch. *Falsus in uno, falsi in omnibus*, is as applicable to it as a witness, as it would be to a living witness. The falsehood in essential particulars shows the source of information to be unreliable and fraudulent, unless accounted for. There was no attempt at this. The contract of the 29th Nov. 1869, therefore, gathers no force as the execution of a pre-existing ante-nuptial contract.

A contract between husband and wife, of the nature we are considering, in order to be binding, under the most favorable circumstances must in every way be fair and unexceptionable on equitable grounds. The best of faith must be shown on the part of the husband. *Uberrima fides* is the requirement. If the contract be unfavorable to the wife; if it may be inferred that undue influence, or the smallest amount of coercion has been used; nay, if the mode appointed by the law to ascertain the wife's consent in order to negative all idea of coercion, has been omitted, viz: a separate acknowledgment before a competent officer; if it appear that the contents of the contract, as well as the condition of the husband's estate, have not been made fully known to her, a Court of equity will relieve against the contract and remit the wife to her rights under the intestate laws. (Kreiser's Appeal, *supra.*) If the provision made be grossly inadequate to the consideration released, a Court of equity will relieve against an ante-nuptial, or any other contract. If the state of fact would shock a chancellor's conscience, he would regard the contract as void. (Morse *v.* Royal, 12 Vesey, Jr. 355; Story's Eq. 88, 267; Kline *v.* Kline, 7 P. F. Sm. 120.) In this last case, an ante-nuptial agreement was held void because of such an inadequate consideration for the release by the woman of her

Digitized by Google

marital rights as raised a presumption of fraud or undue influence, although the parties were then only betrothed. Much more might such a presumption arise when the relation is man and wife.

It has been argued by the respondents' counsel, with plausibility, at least, that the averment in plaintiff's bill, that the contents of the alleged agreement of the 29th Nov. 1869, were not made known to plaintiff, but fraudulently concealed from her by her husband, has not been proven, as in equity they are required to be proved.

The Master has found that the instrument was not read to her before execution. After execution, it was taken possession of by Mr. Hammett, and delivered by him to his counsel, who deposited it for safe keeping in a custody from whence it was never taken till after his death. Positive evidence that the paper was not read to her is not possible to be given, without her testimony, which I have held was not competent in this case. But it is a fact inferable from circumstances, like any other fact. Where the usual and accustomed practice is omitted in the transaction of a particular business, it is not a harsh presumption to infer that the omission had an object in view. In contracting it is usual and common for the contracting parties, on both sides, to appear before the scrivener and give him the substance of the contract to be reduced to writing, and if it happen that but one appear, then for the scrivener to prepare and read the instrument to the absent party. Here the paper was drawn by counsel at the dictation of Hammett alone, in the absence of his wife, whom the scrivener never saw during the preparation of it, and he never read it to her afterwards. There were blanks left in it, which were afterwards filled up by another, also Mr. Hammett's counsel, and who is named in it as trustee, without the presence of Mrs. Hammett, and he never read it to her or informed her of its contents, because, as he says, he supposed she knew all about it. The witnesses who were called to attest its execution, say it was not read in their presence before execution, and even the alderman who took her acknowledgment, and certified that the contents of the instrument were fully made known to her by him, testifies that he did not read it to her, that it was not his duty to do so unless requested. Add to this the internal evidence afforded by the contract itself, the relinquishment by Mrs. Hammett of her right, in the event of the death of her husband, to nearly $100,000—which would be her distributive share in his personal estate, and dower in from a half million to a million of real estate, largely productive, for an annuity of $1200 a year for life, to take effect after his death, raises an overwhelming presumption, I think, that it was signed in ignorance of its contents by Mrs. Hammett, which should stand for proof until rebutted. Under the rule in equity I regard, therefore, these circumstances, together with the misrepresentations in regard to the first alleged agreement in the second, as evidence not only that the instrument was not made known to the complainant, but that she was fraudulently kept in ignorance thereof, before execution, and that she had not access to it after its execution, until after the death of her husband. It is difficult to believe that anything but ignorance or coercion could have induced her to sign such an agreement. It will be remembered that this agreement was post-nuptial, and is not to be accounted for from the precedent relations of the parties, as might possibly have been inferred from a somewhat inadequate provision made for the wife before the marriage. The marriage was in accordance with Mr. Hammett's own choice and in no way enforced upon him, and it stands before the Court as every other voluntary assumption of the marriage relation. In this view, also, seeing that the contract was manifestly unequal and unjust to the wife, she ought not to be bound by it, and it ought to be declared null and void.

The only object of the plaintiff's bill is the setting aside of the alleged agreements or writings referred to. The prayer that the defendants, the executors, be required to transfer and pay over to the plaintiff her distributive share in the personal estate of her husband, was withdrawn and disclaimed on argument, by the counsel for the plaintiff, and is no longer in the case. Indeed, that belongs exclusively to the jurisdiction of the Orphans' Court.

It was furthermore contended by respondents' counsel that the subject matter of the entire bill was exclusively within the jurisdiction of the Orphans' Court. This has received much consideration from the Master, and he has arrived at a different conclusion from the learned counsel. The bill interferes in no measure with the administration of the estate of the decedent in the Orphans' Court, nor does it operate on the person or personal rights of any of the distributees or legatees under the will of Mr. Hammett. It is probable the amounts to be distributed may be affected as a consequence of a decision under the bill, favorable to the plaintiff, but the same result would follow a successful attack, on the testimony afforded by the agreements, in the Orphans' Court. The difference is that it is more conveniently tried in equity than in that Court. The contest is settled by one process, in the former jurisdiction, while in the latter, many contests over the same thing might be required. The prevention of multiplicity of suits is a distinct and most valuable head of equitable jurisdiction. Another head is, fraud, accident or mistake—the reformation or setting aside of contracts in which these elements exist. Both these heads sustain the plaintiff's bill. It does not, in the least, in-

Digitized by Google

fringe upon the jurisdiction of the Orphans' Court; it is a proceeding entirely collateral to that of distribution in that Court. In my judgment, these views do not conflict in the least with Dundas's Appeal (Leg. Int. of May 30th, 1873) or Linsebigler *v.* Gourly (6 P. F. Sm. 172) cited by respondents' counsel. Even if the Orphans' Court could entertain a bill, and decree the invalidity of a contract and set it altogether aside, it does so as a court of equity. It is the exercise of concurrent jurisdiction, and in cases of concurrent jurisdiction, that Court which has first taken jurisdiction will be allowed to proceed to a complete exercise thereof.

The Master reported a decree declaring the two agreements null and void. The defendants filed exceptions to the report, which were dismissed by the Court (WILLIAMS, J.) without opinion; whereupon the defendants certified the case into the Supreme Court.

Geo. Bull and *Hon. Henry M. Phillips*, for the defendants.

A settlement made after marriage is valid, if it is in pursuance of an ante-nuptial agreement.

Ramsden *v.* Hylton, 2 Vesey, Sr., 304.
Cookes *v.* Mascall, 2 Vernon, 200.

And if there was an agreement prior to marriage which after the marriage was reduced to writing and executed, it would be binding on the wife, because the first agreement would not be extinguished by the marriage.

Reeve's Domestic Rel. 176.
Bright's Husband and Wife, 112.

Now in this case, the averment of the bill is that the plaintiff *signed* after marriage, and there is no proof that there was not an ante-nuptial agreement for a settlement. The plaintiff could not have offered such proof under this bill, for the decision must be *secundum allegata et probata.* (Daniel's Ch. Prac. 326.)

The Master, therefore, went too far in reporting that "no ante-nuptial agreement for any settlement existed between the parties." This finding of the Master is subject to correction.

Phillip's Appeal, 18 Smith, 130.

It is not competent for the plaintiff to deny the truth of the recital in the second agreement, for she is estopped by her separate acknowledgment. A wife may contract with her husband in the same way as with a stranger, if there be sufficient consideration, and the intervention of a trustee is unnecessary.

Duffy *v.* Ins. Co., 8 W. & S. 433.
McKennan *v.* Phillips, 6 Wharton, 576.

Full relief can be had in the Orphans' Court, which has undoubted jurisdiction. If that Court has jurisdiction, no other court has, for the exceptions do not embrace this case.

Linsebigler *v.* Gourly, 6 Sm. 172.
Dundas's Appeal, Leg. Int. May 30, 1873.

Hon. Wm. A. Porter, contra.

Jan. 19. THE COURT. This case has been so well developed and so clearly stated by the distinguished Master, the late Chief Justice THOMPSON, that nothing is left to be said upon the merits.

The marriage settlement was clearly post-nuptial, and most probably was dictated by Mr. Hammett himself. The second writing misrecited the first in important particulars. We think Mrs. Hammett was not bound by either.

We concur with the Master that the Court of Common Pleas had jurisdiction of this bill. It involved no question of settlement and did not touch the estate of Mr. Hammett, except in its consequences, as the consequence may attend any other proceeding or action in the Common Pleas.

Its purpose was merely to set aside an instrument unduly obtained, injurious to the rights of the party. It is true the cancellation of the paper affects the measure of distribution by removing the evidence of a fact which, if suffered to be proved, would enter into the question of distribution. But this is no more than would follow the death of a witness or his conviction of an infamous crime, or a claim or title for or against the estate enjoined by a decree. On the contrary, equity exercises its most appropriate function here where it removes out of the way of the Orphans' Court, an obstruction constantly occurring to hinder or delay distribution. The cases of Dundas's Appeal (23 P. F. Smith, 474), and Linsebigler *v.* Gourley (6 P. F. Smith, 172), do not touch the point now before us. Dundas's Appeal rested on the fact that it was a proceeding in distribution for a share of the estate, where the Orphans' Court necessarily must take jurisdiction of the question of ownership of the share, in order to remove it out of the way of a decree; as in Souder's Appeal (7 P. F. Smith, 498). If Mrs. Hammett had proceeded in the Orphans' Court for the recovery of her share of the estate, and the post-nuptial marriage settlement had been set up as a bar, the Orphans' Court would have taken jurisdiction of the question as a necessary consequence of its rightful jurisdiction over the distribution of the estate. But this is no objection to the exercise of the jurisdiction of the Common Pleas over this particular question, as within a head of equity not forbidden by law, and before jurisdiction of the Orphans' Court had attached. The decree itself states that no matter of settlement or touching the administration of the estate was drawn within the power of the Common Pleas. No power of the Orphans' Court was trenched upon. It therefore does not conflict with the statement in Linsebigler *v.* Gourley.

Digitized by Google

PER CURIAM. Decree affirmed with costs to be paid out of estate of B. Hammett, and appeal dismissed.

WILLIAMS, J., absent.

[On the question of jurisdiction, see Hammett's Estate (O. C.), 2 WEEKLY NOTES, 430; Kimble v. Carothers, *ante*, 88.]

Oct. & Nov. '76, 34. Oct. 4.

Booth v. Meyer et al., to use.

Bankruptcy—Proceedings against a firm—Pendency thereof before adjudication of bankruptcy not a bar to an individual suit by one of the partners—Affidavit of defence.

After the filing of a petition by a member of a partnership, praying that himself and his partners might be declared bankrupts, but before an adjudication, another of the partners brought a suit on an individual claim. The defendant in this latter suit filed an affidavit of defence setting forth the commencement of the bankruptcy proceedings:

Held, that the pendency of these proceedings was no valid defence, either in bar or in suspension of the action, and that the affidavit was therefore insufficient.

Error to the Common Pleas No. 2, of Allegheny County.

Rule for judgment for want of a sufficient affidavit of defence.

This was an action on the case brought by J. Meyer and A. Meyer, trading as Joseph Meyer & Son, to the use of Robert Woods, against T. Booth, on a book account of $155, the price of certain furniture bought by Booth from the nominal plaintiffs. The title of Meyer & Son became vested in Robert Woods by virtue of a sheriff's sale.

The defendant filed an affidavit of defence, setting forth, *inter alia*, that J. Meyer and A. Meyer were members of a copartnership known as the Nation Trust Company; that after the purchase of the furniture, and before the commencement of this suit, L. M. Morris, a member of the said Nation Trust Company filed a petition in the U. S. District Court praying that himself and his copartners in the said company should be adjudged bankrupts; and that these bankruptcy proceedings were yet pending, no adjudication having yet been made.

The plaintiffs took this rule for judgment for want of a sufficient affidavit of defence. On argument the rule was made absolute, and judgment was entered against the defendant for $156.11. The defendant thereupon took this writ, assigning for error the above-mentioned action of the Court.

J. G. Bryant, for plaintiff in error.

A payment to a bankrupt after the filing of the petition for adjudication, will not discharge the debtor's liability to an after-appointed assignee. Until, therefore, the appointment of an assignee, or the dismissal of the petition, the right of action against the debtor is suspended.

Mays v. Bank, 14 Sm. 74.

R. & S. Woods, contra.

The mere filing of a petition in bankruptcy will not disable a creditor from suing on his unpaid claims.

Oct. 10. THE COURT. The single question in this case is, whether a petition presented by a member of a partnership to declare his partners and himself bankrupts, not prosecuted to a decree of bankruptcy, will prevent other members of the firm from bringing a suit on their individual claim, and prosecuting it to judgment. Clearly the right to pursue their debtors by action is not defeated by a proceeding not consummated against them by a decree. *Non constat* that the plaintiffs in the action will ever be decreed to be bankrupts, while their interest may demand an action to secure their debt or prevent a bar of the statute of limitations. No question of payment or set-off exists in this case, or other means of defeating the proceeding in bankruptcy. When that question arises it will be in time to consider the powers of the Court to suspend execution, or of the United States Court to enjoin against it, or of the assignee in bankruptcy to recover the proceeds of the claim.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

[*Cf.* Frostman v. Hicks, *post*, 202.]

March 7.

Commonwealth ex rel. v. Thompson.
Same v. Barlow.

Mandamus—Township officers—Special commissioners, power of legislature to create and abolish—Constitutional law.

Two Acts of Assembly created a special commission to mark out a State road, and to construct the same in the place of the township supervisors. The commissioners were authorized to give certificates to any person loaning them money, for the purpose, which certificates were to be paid out of the road taxes on certain lands and property thereon, "either by said commissioners receiving and paying over road taxes on such certificates, or by the road supervisors or collectors of road taxes in the respective townships, crediting the taxes on any such certificates."

Subsequently a repealing Act was enacted, sweeping away all the previous legislation for the construction of the road, and abolishing the office of the commissioners.

A petition having been filed by the commissioners for a mandamus to a township collector of road taxes to compel him to pay to them the taxes in his hands

Digitized by Google

appropriated by the Acts to the construction of this road—on demurrer:

Held (reversing the judgment of the Court below), that the repealing Act was not in conflict with the Constitution of the United States, ART. I., Section 10, nor with the State Constitution, ART. I., Section 17, the special remedy in this case being not essential to the contract.

Power of the Legislature to create, change and abolish municipal offices, and the effect of a legislative change of offices upon contracts theretofore legally made and the remedies thereon—discussed *per* PAXSON, J.

Error to the Common Pleas of Schuylkill County.

Petition by Althouse, Miller, and Jones for a writ of mandamus to Thompson, collector and treasurers of Porter Township. The relators averred in the petition :—

(1) That by the Act of 7 April, 1869 (P. L. 738), they were appointed Commissioners to examine, view, lay out, and mark upon the ground a State road from a point in Schuylkill County, through Porter Township, to a point in Dauphin County; and that it was provided in the said Act (Section 3), that said State road should be opened and constructed by the said Commissioners, and at the expense of the individuals or companies owning or occupying lands through, or contiguous or adjacent to, which the road should be laid out; and this to embrace in Porter Township all the lands north of the road, up to the north line of the township; *Provided*, that no such individual or company should be compelled to pay, for that purpose, any further quota or other sum than such road taxes as were or might be assessed, at the rates and in common with the lands or property of others in the respective township, upon the lands aforesaid, or the property thereon. That all road taxes then due, or which might thereafter be assessed upon such lands and the property thereon by the supervisors of the respective townships in which such lands lie, should, together with such other sums as might, for that purpose, be advanced by the said individuals or companies, and which sums advanced should be credited an account of road taxes that might thereafter be assessed upon such lands and property, be appropriated and applied by the supervisors of the respective townships to the opening and construction of the said State road, and to no other purpose, until said State road should be in good order for travelling with carriages and vehicles.

(2) That by a subsequent Act of 27 February, 1872 (P. L. 171), the said Commissioners were further empowered, in the place of the respective township supervisors, to take the charge of the construction of the said State road, and to receive from the township road tax collectors and county treasurers all moneys derived from taxes then paid or thereafter to come into their hands, and any money advances that might be made by individuals or companies, which were applicable under the Act of 7 April, 1869, to the opening and construction of the said road, and to use and pay out the same in repaying any expenses incurred, or advances, or outlays theretofore made by any individual or company for the purpose, and towards making the road under their contracts and otherwise. That any individual or company liable to the expense therefor, under said Act, who had theretofore advanced or expended any sums, or should thereafter advance to the Commissioners any sums to and for the opening and construction of the road, any portion or piece thereof, should receive from the Commissioners a certificate of the sums so advanced or expended, and that each and all of such sums should be repaid on each such certificate with interest, through and by means of all the road taxes, which were by said Act directed to be appropriated to the opening and construction of the State road, either by the Commissioners receiving and paying over the road taxes on said certificates, or by the road supervisors or collectors of road taxes in the respective townships, crediting the taxes, as they were by the said Act required to do from time to time, and as requested by any individual or company whose lands were liable, on any such certificate or certificates, or by both such methods, until all such certificates were paid off and the road completed.

(3) That in opening and constructing this road and paying the contractors therefor, the Commissioners had borrowed large sums of money for which they gave certificates which were still outstanding and unpaid.

(4) That the respondent, the collector of the road taxes and treasurer of Porter Township, had collected a large amount of taxes which were applicable under the Acts of Assembly aforesaid to the payment of the said certificates, and that he had refused to pay over the same to the Commissioners as required by the said Act.

The relators therefore *prayed* that a mandamus might issue to the respondent, commanding him to pay over all sums of money in his hands which ought to be appropriated to the opening and constructing of the State road.

The respondent made return, *inter alia*, that by an Act of 9 June, 1874 (P. L. 306), the third section of the Act of 7 April, 1869, and the whole of the Act of 27 February, 1872, were repealed; whereby the relators had no further right to collect or receive any moneys collected as road taxes in the township of Porter; to which return the relator filed a demurrer, assigning for cause that the Act of 9 June, 1874, was unconstitutional and void.

The Court below awarded a writ of peremptory

Digitized by Google

mandamus, PERSHING, P. J., saying: "The law in this case directs the relators to receive from the defendant as tax collector, certain taxes. The duty on the part of the respondent to pay them is purely ministerial, and we can find no sufficient reason why he should not perform it unless he is exonerated by the Act of Assembly passed June 9th, 1874. This Act repeals the third section of the Act of 7 April, 1869, and the whole of the supplemental Act of 1872. It leaves in force the first and second sections of the original Act by which the relators were appointed Commissioners for laying out this State road, but strips them of the power to make contracts for the making of the road, issuing certificates of indebtedness, and receiving from the tax collectors and county treasurer certain taxes to be used in the payment of certificates issued by them. The effect of this repealing statute upon the present legislation was argued at length. It was passed after the present proceeding was instituted in Court, and of course, after the Commissioners had issued the certificates mentioned in their suggestion. If the repeal has the effect claimed for it by the respondent, then the holders of these certificates have no remedy by which they can enforce their payment. We have had little difficulty in coming to the conclusion that the repealing Act of June 9, 1874, cannot affect certificates issued prior to that date. Where one statute is repealed by another statute, acts done in the mean time, while it was in force, shall endure and stand and be good and effectual. (Dwarris on Statutes, *675.) It is settled by a long roll of cases that the Legislature may vary the nature and extent of remedies, as well as the times and modes in which these remedies may be pursued, but that the abolition of all remedies by a law operating *in præsenti* is an impairing of the obligation of the contract, and therefore unconstitutional. The laws of the State in force at the time are a part of the law of the contract as to rights and remedies without any express agreement by the parties. These rights are annexed to the contract at the time it is made, and form a part of it, and any subsequent law impairing the rights thus acquired impairs the obligations which the contract imposes. (Bronson *v.* McKinzie, 1 How. 311.) A good illustration of this point is furnished by the case of Woodruff *v.* Trapnell (10 How. 90). In 1836 the State of Arkansas chartered a bank the whole capital of which belonged to the State. The 28th section made the bills and notes of the bank receivable for debts due the State. In January, 1845, the 28th section was repealed. It was held that the notes of the bank in circulation at the time of the repeal were not affected by the repeal, and that a tender in 1847, of notes issued prior to the repeal in 1845, was good to satisfy a judgment against a debtor obtained by the State. In Howard *v.* Bugbee (24 How. 461), it was held that a statute which authorized the redemption of mortgaged premises in two years after a sale under a decree, by *bona fide* creditors of the mortgagor, was void as to sales made under mortgages executed prior to the statute.

In the Hickory Tree Road (7 Wright, 139), a road view was presented and confirmed *nisi* by the Court, after which the road law under which it was made was repealed. This left no remedy for damages. The Supreme Court held that the final confirmation of the road, and proceedings to assess damages, must go under the old law as though it had not been repealed.

To take away by legislative act the existing remedies for enforcing the obligation of the contract, so as to leave the creditor without redress, would be a mockery of justice, and repugnant to the Constitution of the United States. The better doctrine is that all effectual remedies affecting the interest and rights of the owner, existing when the contract was made, became an essential ingredient in it and are parcel of the creditor's right, and ought not to be disturbed (1 Kent, *419, note). As bearing on this branch of the case, we might refer to Fletcher *v.* Peck (6 Cranch, 87); Green *v.* Biddle (8 Wheaton, 1); Quackbush *v.* Danks (1 Denio, 128); Billmeyer *v.* Evans (4 Wright, 324).

As the result of a careful examination of this case, we are compelled to decide that the answer of the respondent is insufficient, and we therefore award a writ of peremptory mandamus against him.

The same judgment was entered in the case against Barlow, County Treasurer. The respondents in each case took a writ of error, assigning for error the entry of judgment for the relators on the demurrer.

Hon. F. W. Hughes and *Wm. R. Smith*, for the plaintiffs in error.

The only question here is whether the Legislature has the power to take away from public officers their public functions, leaving others to discharge their duties. The Court below held that it could not. If we admit that the Legislature could not take away the special remedies, yet these could be enforced without the commissioners by township officers. One special remedy, viz., to credit on the certificates the taxes as accrued, these commissioners had no part in; therefore this remedy was left unimpaired by the repeal.

Geo. R. Kaercher and *John W. Ryon* (*James Ryon* with them), contra.

The remedy, method, and manner of recovery formed a vital and express part of the contract, and were beyond the power of the Legislature under ART. I., Sec. 10, Const. U. S., and ART. I., Sec. 17, of the Constitution of Penna.

Billmeyer *v.* Evans, 4 Wright, 327.

Digitized by Google

Oct. 9. THE COURT. Althouse, Miller, and Jones, the defendants in error, were authorized by an Act of Assembly passed on the 7th of April, 1869, designating them as commissioners for that purpose, "to examine the grounds for, and view, lay out, and distinctly mark upon the best ground, and to the best public advantage, a State road" in Porter Township, Schuylkill Co. The third section of said Act provides "that the said State road shall be opened and constructed of the width fixed therefor by the said commissioners, not exceeding fifty feet, and at the expense of individuals and companies owning or occupying lands through, or contiguous or adjacent to which the said road shall be laid out, etc." The commissioners accepted the appointment and proceeded to lay out a road in accordance with the terms of said Act. No movement was made, however, towards its construction.

On the 27th of February, 1872, the Legislature passed another Act, by which the same commissioners, or a majority of them, were authorized and directed, in the place and stead of the township supervisors, to take the charge of and carry through the opening and constructing of the said road. They were also authorized to receive from the township road tax collectors and county treasurers, all taxes already paid in or hereafter to come into their hands, and any money advances that may be made by individuals or companies, which are applicable under the said Act to the opening and constructing the said road. They are also authorized to grant certificates of indebtedness to any individual or company advancing money toward the construction of said road, and "each and all of such sums shall be repaid on each such certificate with interest, through and by means of all of the road taxes which are in and by the said Act directed to be appropriated and applied to the opening and construction of said State road, either by said commissioners receiving and paying over said taxes on such certificates, or by the road supervisors or collectors of road taxes, in the respective townships crediting the taxes as they are hereby required to do, from time to time, and as requested by any individual or company whose lands are liable, on any such certificate or certificates, or by both such methods, until all such certificates are paid off and the road is completed."

Shortly after the passage of this Act, the commissioners proceeded to the construction of between three and four miles of this road. It appears to have been done at a large expense, and certificates of indebtedness to a considerable amount were issued to individuals or companies for money advanced in the construction of the road. David P. Thompson, one of the plaintiffs in error, is the treasurer and collector of the township of Porter, and since the passage of said last mentioned Act, has collected road taxes to the amount of $1831, from the individuals and companies at whose expense it is claimed said road is to be opened and constructed under said Acts of Assembly. Upon the application of the commissioners, the Court granted a writ of peremptory mandamus against the township treasurer, requiring him to pay over the said sum of money to the said commissioners.

Prior to this application of the commissioners to the Court below, to wit, on the 9th of June, 1874, the Legislature passed an Act by which the third section of the Act of 7 April, 1869, and the whole of the Act of 27 February, 1872, were repealed. This swept away all legislation providing for the construction of the road, and at the same time abolished the office of the commissioners, and raises the really important question in this cause—whether the holder of the certificates can enforce their rights through commissioners who have no longer a legal existence, who are *functi officii*.

It must be conceded that this repeal did not affect the contract of those advancing money on the pledge of the fund appropriated to the payment of their certificates; that was beyond the power of the Legislature. But the repeal carried with it the office of the special commissioners who merely exercised a part of the functions of the municipality. Their office being repealed, clearly they are not entitled to receive the money. They were mere municipal agents, subject to be removed by the repeal of the law which brought them into existence to perform merely municipal functions.

The general road laws make ample provision for the construction of roads, collection of taxes, payment of debts and contracts, and all that is necessary to fulfil the obligations of the township in regard to the road or the creditors. On the repeal of the special commissioners, these duties fell back into the hands of the township officers. There is nothing to prevent the payment of the certificates as debts, or the crediting of the taxes upon them. The holders have by their contract relation the same right to demand payment out of the moneys collected for road taxes, or any surplus moneys on hand, and to have credit for their own taxes, the remedy for the latter being in their hands, to retain the taxes *nolens volens*. Under the constitutional provision forbidding the impairing of contracts, they were, as to all these matters, unaffected by the repeal, and their remedy against the township is ample, by suit; and against the township supervisor and treasurer, and the county treasurer, by mandamus. The commissioners were but mere agents, to receive and pay over the money to them; and, if they refused, the remedy of the certificate holders was the same, only against them.

Digitized by Google

Being but mere municipal agents or officers for a special purpose, these commissioners were liable to be changed at the will of the law making power. It would be a dangerous doctrine to hold that the officers, general or special, of a petty municipality like Porter Township were above the power that created them. The commissioners were but creatures of the law; they had no official life until it was breathed into them by the Legislature, and the breath that created them can blow them away. It might as well be argued that the municipal officers of a city, township, borough, or county could not be changed by law, and a new system of officers introduced, because the city or other municipality had contracted debts or issued bonds, warrants, or certificates; no one doubts the power of the Legislature to repeal a municipal charter or to divide or consolidate townships or counties, excepting so far as special legislation is forbidden by the new Constitution. (Dillon on Munic. Corp. § 30, and note; Borongh of Dunmore's Appeal, 2 P. F. Sm. 374.) It was said by our brother SHARSWOOD, in the City of Erie *v.* Erie Canal Company (9 P. F. Sm. 177), that "the charter of a municipal corporation is not a contract within the protection contained in the prohibition of the declaration of rights against laws impairing contracts." How much less is the protection afforded by the Constitution to a mere temporary commission created to perform a function of a municipal corporation? If the principal body be not protected against repeal, how can a mere member of it be entitled to a greater sanctity? This subject was discussed most elaborately in the case of John B. Bulton and others, Canal Commissioners *v.* Penna. (10 Howard, 402). The contracts (says Justice DANIEL) designed to be protected by the tenth section of the first article of that instrument (the Constitution) are contracts by which perfect rights—certain definite fixed private rights—of property are vested. These are clearly distinguished from measures or engagements adopted or taken by the body politic or State government for the benefit of all, and from the necessity of the case to be varied or discontinued, as the public good shall require. After showing the inconvenience of any other doctrine, which would perpetuate bad government, he says: "it follows, then, upon principle, that in every perfect or competent government there must exist a general power to enact and repeal laws, and to create and change or discontinue the agents designated for the execution of those laws. In Bank *v.* Knoof (16 Howard, 369, 380), Justice McLEAN restates these principles with equal force.

The office of these commissioners is not essential to the remedy of these creditors. The township is the principal and the commissioners agents to receive and pay over money collected by and in the hands of its official custodian. The collectors receive and the treasurers hold the money. The duty of paying it over can be as well done by the township officers as by the special commission. If the office of the commission cannot be repealed, the consequence must be that these commissioners may hold on after the repeal of their office, until the last certificate be paid, whether it be one year or twenty years. On what principle can the creditors, if they were parties, which they are not, stay the hand of the Legislature in changing the municipal agents? If they can, no matter what objection lies to these men; they may be dishonest, insolvent, or incompetent; their office may be obnoxious, hurtful, or inconvenient: yet they cannot be displaced so long as one certificate is outstanding. This doctrine is without support in reason or authority, and its assertion is as unsafe as it is novel. The doctrine is not denied that when the remedy is a part of the contract it cannot be taken away, but this, as all the authorities agree, is where the remedy is essential to the contract, and the latter cannot be executed without it. But legislation which simply changes the public hand which receives and pays out, does not interfere with the remedy.

It was urged that though the office of the commissioners is repealed as to the public, yet to the extent of the certificates for the advances, they may be viewed as trustees who cannot be displaced. Trustee of what? There is no fund of which they are the custodians. There are no securities as to which they hold the legal title in trust for certain beneficiaries. The certificate holders have a claim against the township; the township is their debtor to that extent, with certain of its revenues pledged by law for the payment of the debt. Here is simply the relation of debtor and creditor, such as frequently exists between municipal corporations and its creditors. An examination of the Act of 1872 shows that no such special character was intended to be conferred upon these commissioners. They were authorized and directed, in the *place and stead of the supervisors* to take charge of and carry through the opening and construction of the State road in said Act mentioned, and for this purpose forthwith to contract for the opening and construction, etc. etc., and to superintend and urge through the faithful performance of such contracts, and the opening and construction of said road. They were to receive and disburse taxes and advances of money as already stated. Here were public duties which the supervisors would have performed, but for the substitution of the commissioners; they were in fact a portion of the duties of the township supervisors specially delegated to and conferred by the Act upon these commissioners. The duties which they owed to the certificate holders were a part of their public duties as officers or

Digitized by Google

agents of the township. They were no more the private trustees of the holders of the certificates than the supervisors, treasurers, or other municipal officers are trustees for the creditors of their respective municipalities. They do not claim in the character of private trustees—the proceedings show that the claim set up at the bar is for the public money to construct the road; and this is based upon the continued existence of their office as commissioners. They make no special application on behalf of the certificate holders, and if they did how could they divide the money, collected generally, between the work of construction and that of payment of the certificates? It is clear there is no private trust here; if there is any trust at all, it is only such as attaches to them as agents or officers of the township, if the trust itself is of a public nature, and for the public benefit. That trustees of this character may be removed has been expressly decided. Philadelphia *v.* Fox (14 P. F. Smith, 169) is a case directly in point. In that case a large number of trusts were held by the city of Philadelphia for charitable uses, the most noticeable of which was the one created by the late Stephen Girard. In 1869 an Act of the Assembly was passed taking the direct control of these trusts from the city as trustee, and giving them to a board of fifteen persons, twelve of whom were to be appointed by the Courts. This case was argued in this Court by very eminent counsel, and evidently decided with great care. It was held that the trusts were charities; that all charities are in some sense public; that it was not competent for a mere municipal organization which is made a trustee of a charity to set up a vested right, in that character, to maintain such organization in the form in which it existed when the trust was created and thereby prevent the State from changing it as the public interests may require; and that the Act of Assembly authorizing the Judges of the Court to appoint trustees for the trust under the wills of Stephen Girard and others, was constitutional. This branch of the case does not need elaboration.

We are of the opinion that the commissioners were mere officers or agents of the township; that the repealing Act of 1874 was constitutional; and, as a legal deduction, that the office is now abolished. The commissioners having no longer a legal recognized existence, they have no standing in Court and no right to a mandamus against the plaintiff in error.

What has been said renders it unnecessary to discuss the case in which Barlow, county treasurer, is the plaintiff in error. The case rests upon similar principles, and the same judgment will be entered on each.

The order and judgment of the Court below awarding a writ of peremptory mandamus is reversed and set aside.

Opinion by PAXSON, J. WILLIAMS, J., absent.

July '74, 112. Feb. 18.

Reserve Mutual Life Ins. Co. v. Kane.

Life insurance—Insurable interest—An adult son has such an interest in his father's life—Poor Law of June 13, 1836, § 28.

In Pennsylvania an adult son has an insurable interest in his father's life, for, under the Poor Law of June 13, 1836, § 28, children are liable for their parents' support when the latter are unable to work. They have, therefore, a right to provide, by insurance, against possible future charges of this nature.

Error to the late District Court for the City and County of Philadelphia.

Debt by James P. Kane against the Reserve Mutual Life Insurance Company, to recover $2000 upon a policy of insurance on the life of John Kane, in favor of the plaintiff. Pleas, *nil debet, non est factum*, payment with leave, etc.

John Kane was the father of the plaintiff, and had several times received pecuniary assistance from the latter. He died June 26, 1872, leaving a widow and several children, three of whom were minors. The plaintiff was about thirty years old at the time of his father's death.

At the trial the plaintiff put in evidence his written application to the Insurance Company for the policy, and the policy itself dated April 1, 1872; likewise written proof of the death of John Kane.

The defendant offered no testimony, but submitted, *inter alia*, the following points: (1) If the jury find from the evidence that the plaintiff was at the execution of the policy of life insurance an adult son of John Kane, then as such he had no insurable interest in the father's life, and the verdict should be for the defendants. *Refused.* (2) If the jury find from the evidence that the plaintiff represented at the time of his application, that he had an insurable interest in the life of John Kane, it is now incumbent upon him to satisfy the jury that he had such an interest, and if he has failed to do so, the verdict should be for the defendants. *Refused.*

Verdict for the plaintiff for $2085 34 and judgment thereon. The defendant took this writ, assigning for error the refusal of the Court to charge as requested.

H. M. Dechert, for plaintiff in error.

A life insurance policy is invalid at common law, when the insurer has no pecuniary interest in the life insured, and an adult son has no insurable interest in his father's life.

Pritchet *v.* Ins. Co., 3 Yeates, 458; 4 Id. 168.
Adams *v.* Ins. Co., 1 Rawle, 106.
Ins. Co. *v.* Archer, 3 Id. 223.
Cammack *v.* Lewis, 15 Wall. 643
Ellmaker *v.* Ins. Co., 6 W. & S. 409.
Edgell *v.* McLaughlin, 6 Wharton, 176.
Ins. Co. *v.* Robertshaw, 2 Cas. 189.

Digitized by Google

D. C. Harrington, contra.

An adult son has an insurable interest in his father's life.

Loomis *v.* Ins. Co., 6 Gray, 396.
Lord *v.* Dall, 12 Mass. 115.
Mitchell *v.* Ins. Co., 45 Maine, 104.
Ins. Co. *v.* Johnson, 4 Zabriskie, 576.
Bevin *v.* Ins. Co., 23 Conn. 251.
Ins. Co. *v.* Robertshaw, 2 Cas. 190.
Cunningham *v.* Smith, 20 Sm. 456.

March 6. THE COURT. By the 28th section of the Poor Law of June 13th, 1836 (P. L. 547), the father and grandfather, the mother and grandmother, and the children and grandchildren of every poor person not able to work shall, at their own charge, being of sufficient ability, relieve and maintain such poor person, at such rate as the Court of Quarter Sessions of the proper county shall order and direct. Maintenance of a father or mother unable to work is, therefore, a legal liability. When we add to this the feelings of natural affection, and the desire produced by these feelings to provide for the comforts of parents, the right to effect an insurance on the life of the parent, to carry out these purposes, ought not to be denied. It would be technical in the extreme to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his lifetime, and thus both father and mother be cast upon the son; or if the father die before her, the necessity may fall at once upon the son. Why then should he not be permitted to make a provision, by insurance, to reimburse himself for his outlays, past or future? What injury is done to the insurance company? They receive the full premium, and they know in such cases, from the very relationship of the parties, that the contract is not a mere gambling adventure, but is founded in the best feelings of our nature, and on a legal duty, which may arise at any time. We are of the opinion that the policy is not void.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

Common Pleas—Law.

C. P. No. 1. Dec. 2.

Frostman et al. v. Hicks et al.

Bankruptcy—Adjudication of bankruptcy a bar to judgment in State Court, pending proceedings in U. S. Court for bankrupt's discharge —Bankrupt Act, § 5106—*Affidavit of defence.*

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on several promissory notes by holder against maker. The affidavit set forth that defendants were adjudicated bankrupts on the 12th of July, 1876, that the proceedings are still pending, but the time has not yet arrived for applying for a discharge; and, further, that defendants are informed that no judgment can be obtained without leave of the United States District Court, in which said proceedings are pending.

Diehl, for the rule. A mere adjudication in bankruptcy is not a sufficient defence; a discharge must be pleaded.

Raiguel *v.* Gerson, 2 WEEKLY NOTES, 304.
Longacre *v.* Myers, 1 Id. 109.
Ins. Co. *v.* Ketterlinus, 1 Id. 130.

R. P. White, contra. An adjudication is sufficient to stay proceedings.

Bankrupt Law, § 5106.
Hogendobler *v.* Lyon, 12 Kans. 276.

C. A. V.

December 12. THE COURT. This rule is in form a rule for judgment for want of sufficient affidavit of defence; in substance, it is a rule for judgment, notwithstanding the claim made by the defendant, Isaiah Hicks, in his affidavit, that plaintiff is not entitled to judgment at this time under the 5106th section of the Bankrupt Law.

The affidavit of Isaiah Hicks, made for himself and for each one of his partners, except Magee, sets up that on the 12th day of July, 1876, they were adjudicated bankrupts, and that proceedings in bankruptcy are still pending against them, and that the time for applying for their discharge as bankrupts has not yet arrived. Isaiah Hicks, who makes the affidavit, swears that he is advised that no judgment can be obtained against him without leave of the United States District Court, in which the said proceedings are pending, and that such leave has not been obtained.

The 5106th section of the Bankrupt Act is so clear in statement, and so emphatic in its command, that there seems to us to be no escape from the conclusion upon which the affidavit is founded. Congress, in the exercise of the power expressly granted by the Constitution of the United States, has passed a law, intended to be uniform in its application to all the States of the Union, regulating proceedings in bankruptcy. Such a law, which does not transcend this constitutional right, is the supreme law of the land, to which State Courts are required to conform. It was no part of the contention in this case that the 5106th section is a usurpation on the part of the law-making power of the general government, or that it is not an operative and binding portion of the law of which it constitutes a part. With this concession the section is its own interpreter, and nothing more is needed than to recite it in the terms in which it stands in the Act, as showing what its clear purpose and undoubted meaning is. It reads: "No creditor whose debt is

Digitized by Google

provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the Court in bankruptcy on the question of the discharge: *Provided*, There is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the Court in bankruptcy, may proceed to judgment, for the purpose of ascertaining the amount due, which amount shall be proved in bankruptcy, but execution shall be stayed."

There is in this case every essential element included in the section. The affiant and two other of his co-defendants have been adjudicated bankrupts. The debt is one which is provable in bankruptcy against the estate of the bankrupt. The question of discharge is still undetermined. There has been no unreasonable delay in obtaining a discharge, as the time at which it could be obtained is not yet at hand. There has been no leave given to the plaintiffs by the Court in bankruptcy to proceed to judgment in this suit. The bankrupt makes application for a stay of proceedings, to await the determination in bankruptcy on the question of his discharge. It seems to us there is no escape from the conclusion that the stay must be granted by refusing judgment.

In support of the present motion the cases of Longacre *v.* Myers (1 WEEKLY NOTES, 109), Insur. Co. *v.* Ketterlinus (1 Id. 130), and Raiguel *v.* Gerson (2 Id. 304), are cited. In each of these cases the question seems to have been, whether the plea of bankruptcy is a *defence* to an action, or whether judgment will be granted when there is no defence upon the merits set forth in the affidavit, and nothing but the averment that defendant had been declared to be a bankrupt. This was held to be insufficient *as a defence*. But that is not the issue presented here. The bankrupt debtor and defendant asks that the plaintiff shall not be allowed to prosecute to final judgment his suit until the question of the affiant's discharge in bankruptcy shall have been determined. It is therefore a question whether plaintiff can take judgment at this time, and at this stage of the proceedings in bankruptcy, and not whether he will not be entitled to judgment when the objections specified in the affidavit shall have been removed.

Rule discharged.

Opinion by ALLISON, P. J.

[*Cf.* Booth *v.* Meyer, *ante*, 196.]

C. P. No. 4. Nov. 4.

McLaughlin v. Kennard H. Jones, Chief of Police.

Injunction—Equity jurisdiction—Ordinance of July 11, 1876, *regulating hackney carriages —Act of May* 3, 1876, *regulating procedure for violation of ordinances of cities of the first class.*

Motion to continue special injunction.

The bill, filed by Daniel McLaughlin against Kennard H. Jones, Chief of Police of Philadelphia City, set forth that the plaintiff was engaged in the business of a livery stable keeper in West Philadelphia; that he had duly and regularly paid to the city of Philadelphia and the State of Pennsylvania a tax and license for the privilege of carrying on said business, in the pursuit of which he had rented a strip of ground or yard, owned by the Pennsylvania Railroad Company, on Thirty-second Street above Market Street, for a stand for his carriages; that in pursuance of orders given by the defendant, as chief of police, his officers arrested several of the plaintiff's drivers, at said location, and took them in custody before a magistrate to answer for an alleged breach of an ordinance of the city of Philadelphia, of July 11, 1876, §§ 10–15 (which provided, *inter alia*, that hackney carriages should be numbered, and the drivers should wear badges numbered to correspond with the numbers on their respective carriages); that the defendant, or his officers, threatened to again arrest any of the plaintiff's servants who might repeat the alleged offence.

The bill averred that neither the plaintiff nor his servants had violated any city ordinance applicable to his carriages on said stand, but, on the other hand, that the action of said defendant was unlawful and prejudicial to the business of the complainant; and prayed an injunction to restrain the defendant and his officers from arresting or interfering with the complainant's servants employed as aforesaid

P. T. Ransford (with whom was *C. Kneass*), for the motion.

The complainant having paid a tax and license to the city of Philadelphia as a "livery stable keeper," his business, as such, has been illegally interfered with by the enforcement of the ordinance. A court of equity has jurisdiction to enjoin in such cases.

Hunter's Appeal, 4 Wright, 194.
Hagner *v.* Heyberger, 7 W. & S. 104.

The ground rented of the railroad company was private property over which the defendant had no control.

R. N. Willson, Assistant City Solicitor, contra.

The enforcement of ordinances of cities of the first class is provided for by the Act of May 3, 1876 (P. L. 99), which provides as follows:—

Digitized by Google

"That any police officer or constable, upon view of the breach of any ordinance of any city of the first class, is authorized to forthwith arrest the person or persons so offending, without any process, and to take said person or persons forthwith before any police magistrate or alderman of said city, who shall thereupon require bail for the appearance of said person at a time to be fixed for the hearing of said charge, and in default of bail to commit for a hearing; and at said hearing the case shall be proceeded with as if the parties were appearing before said magistrate upon a summons duly issued and returned served, or, if both parties desire it, the case may be entered and determined by the magistrate or alderman in like manner, without requiring bail or further continuance."

THE COURT. We are of opinion that we have no jurisdiction in this case.

Motion refused.

C. P. No. 4. **Browning v. Rafsnyder.** Dec. 9.

Mechanic's lien—Plea of "no lien" bad.

Rule to strike off plea of "no lien."

Sci. fa. sur mechanic's lien. The defendant pleaded: "No lien, nil debet, payment with leave, etc., set off."

A. Thompson showed cause. The plea of "no lien" is in the nature of a demurrer.

Lee *v.* Burke, 16 Sm. 336.

A. J. Maloney, for the rule, was not heard.

THE COURT. (THAYER, P. J.) No doubt the plaintiff may accept such an informal plea if he chooses, but he is not bound to do so. This rule is equivalent to notice to plead specially.

Rule absolute.

[See Snyder *v.* Kohler, *ante*, 156.]

C. P. No. 4. Dec. 9.

The German Fair Hill Building Association v. Metzger.

Mortgage—Forfeiture—Default in payment of interest—Running of six months allowed for payment of arrears not suspended while a prior suit, prematurely brought and discontinued, was pending.

Rule for judgment for want of a sufficient affidavit of defence.

Sci. fa. sur mortgage. The affidavit of defence set forth that the mortgage contained a clause that it should not be sued out until after default in the payment of interest for six months; that only four months' default had occurred when a suit was brought in Court of Common Pleas No. 1; which suit was discontinued October 6, 1876, and the present suit commenced October 27; and that during the pendency of the former suit the plaintiff refused to take from deponent any of the monthly instalments of interest.

Jos. C. Rodel showed cause. The six months should not run while the former suit was pending, and since it was brought only four months after default, the defendant should be allowed the additional two months, to commence running from the date of the discontinuance of the former suit.

O. A. Law, for rule, was not heard.

THE COURT (THAYER, P. J.). Bringing suit is not equivalent to a refusal to accept interest. The defendant was bound to tender it.

Rule absolute.

C. P. No. 4. **Wendill et al. v. Magee.** Dec. 9.

Partnership—Action against partner who was not served in an action against the firm can be brought in a different court from that in which the original action was brought.

Rule to show cause why writ should not be quashed.

This suit was brought against Charles Magee, who had been sued in the Court of Common Pleas No. 2, with J. R. Hicks and others, trading as Hicks, Magee & Co. The writ in Common Pleas No. 2 was returned *nihil habet* as to Magee, and judgment was entered against the other defendants. Subsequently, this suit was brought against the said Magee individually, and the case was allotted, under the rule of Court, to this Court, No. 4.

W. S. Price (with whom was *F. W. Shain*), for the rule. This is a new suit upon a joint obligation, of which another Court has jurisdiction. The execution, the *sci. fa.*, etc., issue out of the same Court; and both by analogy, and the practice hitherto, the remaining partner should be brought in by an alias writ issuing out of the Court in which the original suit was brought.

S. Dickson, contra. The remedy against a defendant not served is by a separate action, which need not be brought in the same Court.

Act of April 6, 1830, Purd. Dig. 826, pl. 34.
Wann *v.* Pattengale, 2 Harris, 313.
Campbell *v.* Steele, 1 Jones, 394.
Bennett *v.* Caldwell's Ex., 20 Sm. 253.

Rule discharged.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] THURSDAY, DEC. 28, 1876. [No. 13.

Supreme Court.

May, '75, 112. May 5, '75.

Stoll, Executor, etc., v. Weidman.

Evidence—Act of April 15, 1869, § 1—*Actions "by or against executors"—Incompetency of husband or wife of party in interest to testify therein.*

When, under the proviso to the Act of 1869, a person is incompetent to testify, the wife or husband of such person is also incompetent; for the proviso restores, in certain specified cases, viz., actions by or against executors, etc., the disqualifications on account of *public policy* as well as those on account of *interest.*

Dellinger's Appeal (21 Sm. 425) overruled.

AGNEW, C. J., and SHARSWOOD, J., dissent.

Error to the Common Pleas of Lancaster County.

Assumpsit by Peter Weidman against John Stoll, executor of Jacob Stoll, to recover an amount claimed to be due from the decedent's estate for boarding and nursing decedent from April, 1868, to November, 1873.

The facts were as follows: Jacob Stoll was the owner of a small farm in Ephrata Township, Lancaster County, which he rented, in 1867, to his son-in-law, Peter Weidman. From April, 1868, to November, 1873, he lived in the family of the latter. In February, 1874, Stoll died, leaving a will in which he devised one-half of his estate to his son John Stoll, and the other half in trust for his daughter, Anna Weidman, the wife of the plaintiff, for life, and after her death to be divided among her children. John Stoll was appointed the executor of this will. After Jacob Stoll's death, Weidman brought this suit against his estate.

At the trial (before LIVINGSTON, P. J., the plaintiff offered to prove by Anna Weidman that in 1867 the decedent entered into a contract to pay the plaintiff twelve cents per meal for boarding and $25 per year additional for washing, mending, etc.; and that during his last illness, in 1873, on his promise of compensation, she rendered him, for ten weeks, services as nurse, worth $2 per week. Objected to, because the witness was the wife of the plaintiff, and interested in the action as heir of the decedent. Objection overruled and evidence admitted. Exception.

The evidence of John Stoll, the defendant, was offered to controvert that of Mrs. Weidman, and to prove a different contract between the plaintiff and the decedent. Objected to, on the ground that the witness was incompetent to testify as to matters occurring prior to the death of the decedent. Objection sustained and evidence excluded. Exception.

Verdict for plaintiff for $940.35 and judgment thereon. The defendant took this writ, assigning for error the above rulings of the Court on the evidence.

Philip D. Baker (with him *G. Nauman* and *J. B. Amwake*), for the plaintiff in error.

Under the common law a wife, on grounds of public policy, could not testify in any action in which her husband was interested. Now, upon a fair construction of the Act of April 15, 1869, § 1, all the disqualifications removed in ordinary cases thereby, both those of interest and those created by public policy, should still prevail in the excepted cases—actions by or against executors, etc.

But even on the ground of interest, Mrs. Weidman's testimony should have been excluded, for it is idle to say that a wife has no interest in her husband's case, and the policy of the Courts in interpreting this Act has been to exclude all parties who are interested adversely to a dead man from testifying against him.

Diehl *v.* Emig, 15 Sm. 320.
Karns *v.* Tanner, 16 Id. 297.
McBride's Appeal, 22 Id. 480.
Bowen *v.* Goranflo, 23 Id. 357.

M. Brosius (with him *J. L. Steinmetz*), contra.

The only possible ground on which Mrs. Weidman's testimony could have been excluded was that of public policy. But this disqualification is removed by the first clause of the Act of 1869, and is not restored by the exception as to actions by or against executors, which applies only to the disqualification of interest.

Craig *v.* Brendel. 19 Sm. 153.
Dellinger's Appeal, 21 Id. 425.

Mrs. Weidman's testimony was directly against her own interest, for the success of her husband's suit would diminish her share in her father's estate.

John Stoll's testimony was rightly excluded, for it was offered in support of his direct pecuniary interest.

Gyger's Appeal, 24 Sm. 42.
Diehl *v.* Emig, *supra.*
Craig *v.* Brendel, *supra.*
Dellinger's Appeal, *supra.*
McBride's Appeal, *supra.*
Bowen *v.* Goranflo, *supra.*

NOV. 8, 1875. THE COURT. "It is ordered that this case shall be reargued before a full bench, at the next term, on the question of the competency of the wife as a witness, and the over-

Digitized by Google

ruling of Dellinger's Appeal (21 P. F. Smith, 425)."

PER CURIAM.

Nov. 24, 1875 THE COURT. "It is ordered that the order of the Court made at this term, directing a reargument in this case, be countermanded, and that the judgment of the Court of Common Pleas be reversed, and a *venire facias de novo* awarded, and the record remitted."

PER CURIAM.

[No opinion was *filed in this case.* For the dissenting opinion of AGNEW, C. J., SHARSWOOD, J., concurring, see Taylor *v.* Kelly, below.]

Oct. & Nov. 1875.

Taylor, Ex'r, etc. v. Kelly.

Evidence — Act of 15 *April,* 1869 — *Actions "by or against executors"—Incompetency of husband or wife of party in interest to testify.*

In an action against an executor, the husband or the wife of a party in interest is not a competent witness, under the Act of 15 April, 1869, as to matters occurring in the lifetime of the decedent.

Dellinger's Appeal (21 Sm. 425) overruled.

AGNEW, C. J., and SHARSWOOD, J., dissent.

Error to the Common Pleas of Lawrence County.

Assumpsit by William Kelly against Samuel Taylor, executor of the will of Henry Barnes, deceased, to recover compensation for the board of decedent for a period of about eight years immediately preceding his death. On the trial (before McJUNKIN, P. J.) Samuel Taylor, the defendant, was called as a witness in his own behalf. Plaintiff objected on the ground that the wife of the witness was one of the daughters of the decedent and a residuary legatee under his will, and that witness was therefore incompetent to testify as to matters occurring in the lifetime of the decedent. Objection sustained; exception. Defendant then called Mrs. Henry Barnes as a witness. Plaintiff objected on the ground that the husband of witness was a son of decedent and a residuary legatee under his will. Objection sustained; exception. Verdict and judgment for plaintiff for $1388.87. Defendant took this writ, assigning for error the rejection of the above-named witnesses and the refusal of the Court to hear their testimony as to matters which occurred during the lifetime of the said Henry Barnes, deceased.

R. B. McComb and *J. McMichael,* for plaintiff in error.

Mrs. Barnes standing alone had no interest in this suit. Her husband alone was one of the heirs. The policy of the law formerly was to exclude the husband or wife of a party incompetent from interest. But this Court decided, in Dellinger's Appeal (21 Sm. 425), that this policy was removed by the Act of 15 April, 1869, and that the husband or the wife of a party was therefore competent. The ruling in that case governs the present case.

D. B. & E. T. Kurtz, contra.

The Act of 15 April, 1869, expressly enacts that "this act shall not apply to actions by or against executors." This language is positive, and the provision is general. It is not merely that the other party to the controversy shall not testify, but that in the cases mentioned "this Act shall not apply," thus leaving such cases to be tried under the rules of evidence unaffected by this Act. The rule of the common law excluding the testimony of husband or wife is not founded in policy alone, but also in interest arising from the identity of their legal rights and interests. (1 Greenleaf's Ev. §§ 329-334) The object of the proviso in the Act of 1869 was that where death intervened the surviving party should not have an undue advantage in the testimony. The reason of this rule applies as well to the testimony of the husband or wife of a party as to that of the party himself, for husband and wife are generally one not only in law but in interest, in feeling, in purpose, and in act.

The Act of 1869 should be construed according to the plain meaning of the words used, and in such manner as to approach as near as possible to the common law, since it is not to be presumed that any innovation was intended further than the case absolutely required.

Olmstead's Case, Brightly's Rep. 9.
Packer *v.* R. R. Co., 7 Har. 211.
Stowell *v.* Lanche, Plowd. 365.
Heydon's Case, 3 Co. 7.
1 Kent's Com. *p. 464.

Nov. 22, 1875. THE COURT. The assignments of error are to the rejection of two witnesses. One is the husband of a daughter, the other is the wife of a son of the testator. The wife of the former and the husband of the latter are interested in the estate. Unless the witnesses were made competent by the Act of 15th of April, 1869, they are clearly incompetent to testify to the matters for which they were offered. This is conceded. Their competency is sought to be established by the first section of that act. It declares "no interest nor policy of law shall exclude a party or person from being a witness in civil proceedings. *Provided,* this act shall not alter the law as now declared and practised in the courts of this Commonwealth, so as to allow husband and wife to testify against each other, nor counsel to testify to the confidential communication of his clients." If the proviso ended there, the witnesses would have been competent in behalf of the plaintiff in error, as to

Digitized by Google

matters which occurred in the lifetime of the testator; but it further proceeds to declare: "this act shall not apply to actions by or against executors, administrators, or guardians, nor where the assignor of the thing or contract in action may be dead, excepting in issues and inquiries *devisavit vel non* and others, respecting the right of such deceased owner, between parties claiming such right by devolution, on the death of such owner." Thus it appears the same imperative "shall not apply" extends to a case in which an executor is a party, as to the prohibiting of husband and wife from testifying against each other, and counsel to the privileged communication of his client. The language is neither doubtful nor obscure. Its clear and mandatory edict takes all these cases out of the statute. Evans' Administratrix *v.* Reed, decided at the present term [2 WEEKLY NOTES, 175], was a case in which the action had been brought between persons in their own right. On a former trial, both parties had testified, and their evidence had been reduced to writing. On a subsequent trial, after the death of one of the parties, and the substitution of his administratrix, we held that the testimony of the decedent, thus taken, might be given in evidence. We considered it substantially as a deposition taken when the party was competent, which is expressly authorized by the third section of the act. That action was not brought by or against an executor or administrator. The party was clearly a competent witness when the testimony was taken.

The present action was brought against an executor. It was on a contract claimed to have been made with his testator. The right of the witnesses to testify is rested on this Act of 1869. It is urged, inasmuch as it declares "no interest nor policy of law shall exclude a party or person from being a witness," and the witnesses offered not being directly interested in the event of the suit, they cannot be excluded by the policy of the law. Prior to the enactment of this statute, both interest and policy excluded husband and wife from testifying for and against each other.

We must not overlook the fact that all competency imparted to any witness, by the enacting clause of the first section, is entirely taken away by the proviso, in case an executor is a party to the action. It would be no more clearly in the face of the statute to hold that husband and wife may testify against each other, than that they may testify in their own favor, when an executor is a party to the action, to events which transpired during the life of the testator. Each is prohibited by the same expressive language. The same clause in the enactment made both husband and wife equally competent. The same prohibition in the proviso made them both incompetent to testify in behalf of each other, when an executor is a party.

The language in the statute requires no acuteness to interpret it. Any attempt to define its meaning cannot make it more clear. We have no right to assume that the Legislature did not intend what they have so distinctly and imperatively declared. We must not search for some occult meaning as if the language was obscure. We must yield to its language, so clearly expressed, its natural force and effect.

The subject matter about which the witnesses were called to testify is not within the exception to the proviso. It is not the settlement of a claim of right that passed by the devolution of the estate. The incompetency of the witnesses in this case stands as if the Act had never been passed. When the Legislature undertook to qualify this statute, as they did by the first section of the Act of 9th of April, 1870, they restricted the right of a party to testify, to matters only which occurred after the death of the person whose estate was represented on the trial.

The conclusion at which we have arrived is sustained by Diehl *v.* Emig (15 P. F. Smith, 320). That was an action by a daughter against the executor of her father's will. It was held that her husband was not a competent witness to testify to matters occurring in her father's lifetime. It is also in accord with the spirit and reasoning of Karns *v.* Tanner (16 P. F. Smith, 297), and Pattison *v.* Armstrong *et al.* (24 P. F. Smith, 476)

It is true the conclusion at which we have arrived is in conflict with Dellinger's Appeal (21 P. F. Smith, 425), but a more careful examination of the Act convinces us that due consideration was not then given to its provisos. It may be said, however, that Dellinger's Appeal was not a common law action by or against an executor, but the distribution of a fund in the Orphans' Court. It was, however, held in McBride's Appeal (22 P. F. Smith, 480), the word "actions," as used in the proviso, was intended to embrace civil proceedings, whatever their form, as well as actions technically so called. An action is the lawful demand of one's right in a court of justice. So in Gyger's Appeal (24 P. F. Smith, 48), it was held that a distributee is not a competent witness in the distribution of a decedent's estate as to matters occurring in the lifetime of the decedent.

A true enforcement of the statute of 1869 requires us to hold that it means what it says, when it declares "*this Act* shall not apply to actions, by or against executors, administrators, or guardians." We see nothing in the letter nor in the spirit of the Act, so far as it applies to husband and wife, to make one competent when the other

Digitized by Google

is incompetent. It, therefore, follows, the learned Judge was entirely correct in excluding the witness.

Judgment affirmed.

Opinion by MERCUR, J. WILLIAMS, J., absent.

Nov. 26, 1875. Dissenting opinion by AGNEW, C. J., SHARSWOOD, J., concurring.

The question of the competency of the witnesses in this case arose in Stoll *v.* Weidman, at Harrisburg in May last, and an opinion was written by Justice MERCUR, substantially the same as that filed in this case.* Its effect was to overrule Dellinger's Appeal (21 P. F. Smith, 425). I shall, therefore, file my opinion in Stoll *v.* Weidman in this case, not having had time to revise it, except to add a couple of references to cases decided at this term. Having a great respect for the maxim *stare decisis*, I do not desire to appear in the attitude of overruling the former decisions of this Court with facility.

To be filed in Taylor, Ex'r, etc., *v.* Kelly, Western District, S. C.

John Stoll v. **Peter Weidman.** } Error to the Court of Common Pleas of Lancaster County.

AGNEW, C. J., dissenting.

This was an action by a husband against the executor of his wife's deceased father to recover a boarding account. The wife had a large interest in her father's estate under his will. She was no party to the suit, and was called *against* her own interest to testify *for* her husband. Being no party and having no interest, it is clear she was not incompetent, except on the ground of policy, and on this ground she does not fall within the exception of the Act of 1869, for she is not called to testify against her husband. But her exclusion on the ground of policy was forbidden by the Act of 1869, and, being called against her interest, she was competent before that Act, so far as interest is involved. The Act of 1869 is broad in its main intent to remove objections on the ground of interest and policy, and therefore we are bound in fairness and honesty to maintain it. Now, in the Act, each of these subjects of the main intent has its particular class of exceptions. The first refers to its correlative policy, to wit, husband and wife shall not testify *against* each other, and counsel shall not disclose the confidential communications of his client. The second class of exceptions relates to its particular correlative interest, viz., actions by or against executors, administrators, and guardians, and where the assignor of a thing or contract in action is dead. Then on what principle of sound interpretation, or of reason, can we apply the exception relating to actions by or against executors, administrators, and guardians, to a case of policy, such as the one before us. The reason of the exception as to actions by or against executors, etc., has relation only to that interest which an adverse party has in making out his case against a deceased party, who cannot be present to testify on his own behalf.

This has been fully shown in Karns *v.* Tanner (16 P. F. Smith, 297), a case which has been followed constantly, until the principles ruled in it have become firmly embedded in the interpretation of the Act of 1869. What has the exception as to interest to do in a case of policy? Clearly nothing. Take the case of counsel called to testify to a confidential communication, in an action by or against an executor or administrator, and the client waives the objection. On what principle can the executor or administrator object to his testimony? It is evident that the exception as to actions by or against an executor or administrator does not apply to the witness who was excluded only on the ground of policy. The counsel has no interest, and the objection as to policy is removed by the client. So here the wife has no interest. She is called against her interest and the exception as to policy excludes her only when called against her husband. She is here called for him, and not against him. She has neither interest nor policy against her, and the main purpose of the enactment makes her competent. On what ground can the executor object to her? Her interest is on his side, and she does not stand as an adverse party, to whom the executor may object, because his testator cannot confront her. She is but a witness, and the exception does not exclude her. But, it is said, the wife's feelings are with her husband, and against her individual interest. The question of feeling is disposed of by the law itself, which makes her a witness for her husband. Such an interest of feeling never did exclude. It always went to the credibility, not the competency, of the witness. It is, therefore, not a case within the exception relating to actions by or against executors and administrators. And so it was held in Dellinger's Appeal (21 P. F. Smith, 425), a case directly in point and which rules this. It is there said that the first exception is the one applicable to the exclusion, by reason of policy, and does not apply to the case of a husband called *for* the wife, for *expressio unius est exclusio alterius;* while the second exception applies only to parties or persons excluded by interest, and not to those excluded by policy alone. That case was decided without a dissent, in 1872, and its principles recognized since, as will appear directly. To over-

* [The opinion of the Court by MERCUR, J., in Stoll *v.* Weidman, here referred to by the CHIEF JUSTICE, does not appear ever to have been filed of record, either in the Middle or the Western District. See note to Stoll *v.* Weidman, reported *supra*, p. 205.—ED.]

Digitized by Google

turn it in three years on a principle of literal construction, repudiated in several subsequent cases will be a poor compliment to the maxim *stare decisis*. Diehl *v.* Emig (15 P. F. Smith, 320) is not in conflict, for there both husband and wife were parties, and the husband liable for the costs of the suit, as well as interested in the land in suit, as tenant by the curtesy. Gyger's Appeal (24 P. F. Smith, 48) is just as wide of the mark, for there the distributee was offered as a witness to relieve himself from a claim of the estate against him by testifying to matters in the lifetime of the decedent. He fell directly within the exception of the act of 1869, and Justice MERCUR cites Karns *v.* Tanner as authority.

The attempt to rest the exclusion of the witness in the present case, on a literal reading of the Act of 1869, is directly opposed to several cases since decided, recognizing the principles of Karns *v.* Tanner, and holding that the legislative intent should govern. We may take the latest case, Tioga County *v.* South Creek T'p (25 P. F. Smith, 433), which utterly repudiates the idea of a literal interpretation of the Act of 1869. There Justice GORDON, speaking for the Court, holds that the policy of law which forbids proof of non-access of the husband by the wife, is not within the legislative intent, though within the very words of the law. He says: "The language of that Act (1869) at first blush might seem to include a case of this kind, 'no interest or policy of law shall exclude a party or person from being a witness in a civil proceeding.' But when we come to consider the fact that the 'interest or policy of law' which the Legislature had in view in passing that Act was that which before that time excluded parties from testifying in their own suits or where they had an interest in the subject matter in controversy, it becomes obvious that a case such as the one under discussion was not in the legislative mind when the Act was passed. It would, therefore, be an unnecessary and violent construction of the statute to make it include a policy of law wholly different from that under contemplation when it was framed." Just so here, it would be an unnecessary and violent construction of the exception as to suits by or against executors or administrators, to extend it to the case of a wife who is no party to the proceeding, who is called as a witness for the husband to testify against her own interest, and to her individual prejudice, and thus overturn the very letter and main purpose of the Act, which declares that no policy of law *applicable to her as a witness* shall exclude her. It strikes down the main legislative intent by perverting the exception to a purpose not intended, and thus falls within the ban of Justice GORDON'S decision. The rule now contended for, and stated by Justice GORDON, was also laid down by Justice MERCUR in the very late case of Eshleman's Appeal (24 P. F. Smith, 47): "In construing a statute (he says) the real intention when accurately ascertained will always prevail over the literal sense of terms. When the expression in a statute is special or particular but the reason is general, the expression should be deemed general." On page 48 the Justice cites Tanner's case approvingly. In Pattison *v.* Armstrong (in the same volume, 476), Justice MERCUR not only cites Tanner's case, but quotes its principle in the very words of the Judge who delivered the opinion, and makes its application to a peculiar case, by holding that the witness is competent in a case where an intermediate vendee was dead, on the ground that the original vendee being alive his mouth was not closed, and his adversary therefore could testify. Another recent case sustains the principle, McGeary's Appeal (22 P. F. Smith, 365). Land conveyed to a wife was sold under a joint mortgage of herself and husband, and in a contest among creditors for the proceeds, the wife was held to be a competent witness for the creditors claiming the property as the husband's.

In Dellinger's Appeal, now summarily overruled, the true intent of the Act of 1869 was sought for and established, but in this case the decision is rested on the letter of the statute, and any attempt to reach its true purpose repudiated, as if it were a novelty to try to ascertain the mind of the lawgiver. The language just quoted from Eshelman's Appeal would seem to be an answer to the new interpretation given to the Act of 1869; and yet another case decided at this term. Evans *v.* Reed, opinion by Justice MERCUR [2 WEEKLY NOTES, 175], is antipodal to literal interpretation. There in an action to which an executor became a party, by death, the testimony of the party taken at a former term was held to be good evidence, and the words of the Act were made to yield to its true intent, rather than that evidence should be lost by the mere letter. Evans *v.* Reed has been affirmed at this term in Speyerer *v.* Bennett, Ex'r of Bennett.*

The contrast of these cases with this is marked. Here the testimony of a witness not a party to the suit, called against her own interest, is discovered to be against the mere letter of the law, and a decision of only three years' standing is overruled. The effect is to cause a loss of evidence and to strike down Justice while she stands pleading for the main intent of the lawgiver, that no mere policy should continue to work such wrong.

In my judgment this attempt to be literal violates the main intent and true spirit of the law, as well as the very words of the principal enactment; rejects the most fundamental rule of interpretation, which requires us to seek the mind of the lawgiver, and unnecessarily sets aside that

* Reported *post*, p. 213.

Digitized by Google

wholesome maxim of *stare decisis*, which ought to be binding on all Judges, old and new.

Justice SHARSWOOD concurs with me in this dissent.

[See City to use of Morris, Ex'r, etc. *v.* Alsop, 1 WEEKLY NOTES, 473; Watson's Estate, 2 Id. 113; Crouse *v.* Staley, 3 Id. 83, and Bierly's Appeal, below.]

Jan. '75, 154. March 30, 1876.

Bierly's Appeal.
Bierly et al. v. Grimes et al.

Evidence—Act of April 15, 1869, § 1—*Actions "by or against executors"—Incompetency of husband or wife of party in interest to testify therein—When incompetent testimony ground to reverse decree confirming an auditor's report—Executors—Joint liability of.*

When, under the proviso to the Act of 1869, a person is incompetent to testify, the wife or husband of such person is also incompetent.

An Orphans' Court decree, confirming an auditor's report, will not be reversed for the admission of incompetent testimony, unless it be clearly shown that the auditor was thereby led into some specific error.

When two executors join in filing an account, they are jointly liable for a surcharge as to items of which both had knowledge. If one of them refuses to include such items, the other, to escape liability therefor, must file a separate account.

Taylor *v.* Kelly (*ante*, p. 206), affirmed.

Appeal from the Orphans' Court of Clinton County.

This case was heard, in the court below, on exceptions to the auditor's report in the matter of the final account of Peter S. Bierly and Samuel Bierly, executors of John Bierly, deceased.

The material facts of the case are briefly as follows: John Bierly, the testator, lived to the age of ninety-one years, and during the last few years of his life was extremely infirm both in body and mind. In the summer of 1866, owing to the fact that he had sold a piece of land at an extremely low price, forgetting entirely a previous offer much more advantageous, he became convinced of his inability any longer to transact business matters. On June 22 of that year, at his son Samuel's house, he delivered to Peter, another of his sons, all his business papers, in order that the latter might thereafter manage his estate. Emanuel Grimes, the husband of John Bierly's daughter Mary, was present on this occasion, and made a careful list of the several papers which passed into Peter Bierly's possession. Among them was a note of Samuel Bierly for $138, dated June 21, 1866, payable in one year, and seven notes of Peter Bierly, each for $200, dated April 1, 1864, and payable, the first, three years from date, and the others respectively at intervals of one year thereafter. On December 2, 1868, John Bierly, on account of some dissatisfaction with his son Peter, executed a general power of attorney to J. Haines and M. D. Rockey, and requested them to withdraw his papers from Peter's hands, and to take charge of all his affairs. These gentlemen soon afterwards called upon Peter, and asked him for the papers. The latter got very angry, and at first denied having any of his father's papers in his possession; but finally admitted he had them, and refused to give them up. A few days afterwards he procured the revocation of the power of attorney to Haines and Rockey.

John Bierly died in August, 1870, leaving a will, dated June 9, 1862, in which his sons Peter and Samuel were appointed executors. They filed their final account in September, 1872, without charging themselves with the above-mentioned notes. Exceptions were filed by the other children and devisees of the testator, and the account was referred to E. P. McCormick, Esq., as auditor.

Among the witnesses produced by the exceptants before the auditor was Emanuel Grimes, who testified, among other things, as to the delivery of the notes by the testator to Peter for safe keeping. Towards the close of his examination, counsel for the accountants objected to his testimony, on the ground that, being the husband of Mary Bierly, one of John Bierly's daughters and devisees, he was incompetent to testify as to facts which transpired before the testator's death. They submitted that this case falls within the proviso of the Act of 1869, and the supplement thereto of April 9, 1870, § 1 (Purd. Dig. 625, pl. 20), which provide that the modifications in the former Act of the rules of evidence shall not apply in actions by or against executors, as to matters which happened in the testator's lifetime. Objection overruled, and evidence admitted.

Evidence was admitted, under objection by the accountants, of various declarations of the decedent as to Peter's possession of his papers, and as to several purchases on credit from one Spangler, made necessary by Peter's refusal to pay him any of his income.

J. B. Rowe testified to declarations of Samuel Bierly, admitting Peter's possession of these notes subsequent to his father's death.

The accountants alleged that these notes were paid in full, partly in cash and partly in necessaries purchased for the decedent, offering no vouchers, but relying on the testimony of Peter Bierly, Mary his wife, and Mary the wife of Samuel Bierly. Such of their testimony as related to events happening before the decedent's death was admitted under objection. Annie Bierly, daugh-

Digitized by Google

ter of Peter, and Harvey Bierly, son of Samuel, likewise testified to various payments by Peter to his father during 1869 and 1870.

The auditor reported a decree surcharging the executors with the amount of the notes. The accountants excepted to this report on the ground that the auditor erred in admitting Grimes's testimony and the evidence of John Bierly's declarations in charging the executors with the amount of the notes, and especially in holding them jointly liable therefor.

The Orphans' Court dismissed these exceptions, and confirmed the report. The executors took this appeal, assigning for error these actions of the Court.

C. S. McCormick, for appellants.

Grimes was not a competent witness under the Act of 1869, for the proviso thereto expressly provides that the modifications in the Act of the rules of evidence shall not apply in actions by or against executors. The supplement to this Act repeals this proviso only as to matters occurring after the death of the testator.

The declarations of John Bierly, made in the absence of the appellants, are clearly inadmissible against them.

Romig *v.* Romig, 2 Rawle, 241.
Scull *v.* Wallace's Executors, 15 S. & R. 231.
Gray *v.* Goodrich, 7 Johns. 95.

The weight of the evidence was strongly in favor of the appellants.

S. R. Peale, contra.

Grimes's testimony was clearly admissible.

Yeager *v.* Weaver, 14 Sm. 425.
Dellinger's Appeal, 21 Id. 425.

An Orphans' Court decree confirming an auditor's report will not be reversed for the admission of incompetent testimony, unless it be clearly shown that the auditor was thereby led into some specific error. But both Grimes's testimony and the declarations of John Bierly were as to matters fully established by other unexceptionable witnesses.

Breneman's Estate, 15 Sm. 298.

May 8. THE COURT. The witness, Emanuel M. Grimes, was perhaps competent under the authority of Dellinger's Appeal (21 P. F. Smith, 425). He was not a party to the proceeding or a claimant upon the fund, and hence could not be excluded upon the ground of interest. He was called to testify upon behalf of his wife, who was a claimant and directly interested. Hence his exclusion rests upon grounds of policy. Dellinger's Appeal ruled that the exception in the Act of April 15th, 1869, does not embrace the case of husband and wife testifying for each other, and that the public policy which had theretofore excluded such witnesses was removed by said Act. The learned Judge of the Orphans' Court was right in following Dellinger's Appeal, for at that time it stood unshaken. Taylor *v.* Kelly, however, heard and decided at Pittsburg last year, overruled Dellinger's Appeal, and it was there held that when, under the Act of 1869, a husband or wife is incompetent to testify, the wife or husband of such party is also incompetent. This rule would exclude so much of the evidence of Emanuel M. Grimes as was admitted after the objection was made.

It is also clear that the declarations of John Bierly, Senior, made in the absence of the appellants, were incompetent. Upon what principle they were admitted does not appear. The learned Judge of the Orphans' Court concedes that the admission of this evidence by the auditor was improper, but regards it as unimportant. So much for the evidence on the part of the appellees. On the other hand, Peter S. Bierly, one of the accountants, was examined, against the objection and protest of the appellees, as to matters occurring prior to the death of the decedent; and even to prove the vital fact of the payment of his notes to the latter. It is true he was called by the appellees. But it was only as to a single fact subsequent to the death of the decedent. This did not entitle the appellants to prove, by the cross-examination of the witness, his transactions with the decedent. It was clearly in contradiction of the Act of 1869, and of the decisions of this Court upon said Act. (Gyger's Appeal, 24 P. F. Smith, 48; McBride's Appeal, 22 P. F. Smith, 480.) The wife of each of the accountants was also examined as to matters prior to the death of the decedent. They were clearly incompetent under Taylor *v.* Kelly. We have thus two assignments of error which, as a matter of law, must be sustained. We have also manifest error in the admission of evidence on the part of the appellants. As to the latter, there are no assignments of error, for the reason that the decree of the Court below was in favor of the parties objecting.

Were the case here upon a writ of error to a judgment in a common law proceeding, it would, perhaps, be our duty to reverse this case. But it is here upon an appeal from the decree of the Orphans' Court. We have the whole case before us both as to the law and the facts. It is provided by the second section of the Act of 16th June, 1836 (P. L 683), that "it shall be the duty of the Supreme Court of this Commonwealth in all cases of appeals now made, or that may hereafter be taken from the decrees of the several Orphans' Courts, to hear, try, and determine the merits of such cases, and to decree according to the justice and equity thereof." It has, accordingly, been held that on an appeal from the final decree of the Orphans' Court to this Court, the whole proceeding in the case may be examined, including the trial of a feigned issue to which no writ of error was taken. (Hallowell's Appeal, 8

Digitized by Google

Harris, 215; Finney's Appeal, 1 Wright, 323.) If, then, we eliminate from this record all incompetent evidence, and there yet remains sufficient to sustain the finding of the auditor, why should we reverse upon technical grounds? The only result would be delay and an additional expense to the estate. It was held in Breneman's Estate (15 P. F. S. 298), that an exception to the admission of an incompetent witness before the auditor was fruitless, unless it be shown that his testimony led the auditor into some specific error. This is the true rule. The application to the facts of this case is not difficult. No objection was made to the competency of Emanuel M. Grimes until near the close of his examination in chief. As no motion was made to strike out the portion of it given prior to the objection, strictly speaking such portion of it should stand. But it is wholly immaterial whether it stands or not. The only fact that he testified to of any importance was the delivery of the notes by the decedent to his son Peter for safe keeping. This is a conceded fact in the case, and does not depend upon the testimony of this witness; the allegation being that Peter had returned the notes to his father, and subsequently paid them; nor are the declarations of Bierly, Senior, essential to the case of the appellees. They refer chiefly to the possession of the notes by Peter, which, as before observed, is a conceded fact in the cause, and of which there was proof by his own admissions. The conversation with Spangler about the purchase of goods on credit was not material. The fact that he did buy the goods and did obtain a credit therefor from Spangler was in proof. It was competent, though of very little weight. It is manifest that the case of the appellees is not essentially weakened by striking out the entire evidence of these declarations, as well as the testimony of Grimes. We cannot say, therefore, that its admission led the auditor into any specific error. On the other hand, if the testimony of Peter S. Bierly, his wife, and the wife of Samuel Bierly is excluded, the case of the appellants is materially damaged. The direct issue was as to the payment of Peter's notes. If the evidence before the auditor, including the three witnesses above named, was not sufficient to establish the fact of payment, how can it do so with said witness excluded?

The only important witnesses left as to this fact are Annie E. Bierly, a daughter of Peter S. Bierly, accountant, and Harvey C. Bierly, a son of Samuel Bierly, the other accountant. Annie Bierly speaks of three or four payments in the year 1869, and mentions three sums, one of $200, another of $190, and the other about $160. The testimony of Harvey Bierly is indefinite. He says, upon one occasion, he heard his grandfather say that "Pete don't owe him anything," and further, that he was present upon two occasions when Peter S. Bierly paid the decedent money, "once in 1869 and the other time in 1870; don't know how much he paid either time; it was a nice lot; pretty large pile of bills." The auditor regarded the evidence of payment insufficient to establish such fact. We cannot say that he committed such clear error in this as would justify us in reversing his finding. No Court would disturb the verdict of a jury upon such a state of facts as is here presented. We give to the finding of the auditor precisely the same weight. That there was a conflict of evidence does not help the appellants, unless it first be shown that the auditor made a clear mistake, or that the weight of the evidence was decidedly with them. This has not been established. On the contrary, the probabilities of the case were all against the appellants. When John Bierly gave up the possession of these notes to his son Peter he was about eighty-seven years of age. He had become wholly unfit to attend to business, and had recently sold a piece of land for a much less price than he had previously been offered for it. When the former offer was brought to his attention, he said that he then recollected it, but that his memory was so poor that he had forgotten it; that he was no longer fit to attend to business, and that he would give all his notes and papers to Peter to attend to for him. The notes were accordingly given to Peter, and for this reason; seven of them were Peter's own notes in his father's favor, the first one maturing April 1, 1867, the last one April 1, 1873. It was proved by disinterested witnesses that these notes were in Peter's possession in December, 1868. It appears, that for some reason, the old man had become dissatisfied, and, during the month referred to, Esquire Harris and Mr. Rockey called upon Peter with a power of attorney from his father to demand the notes. Peter was in the woodshed. He became angry, raised his axe, and threatened them. At first he denied having the notes, but when confronted with the evidence finally admitted that he had them and would not give them up. Samuel Bierly, one of the accountants, according to Rowe's testimony, admitted the possession of the notes by Peter after the decedent's death. There was an attempt by Samuel to explain this away by his testimony, but his account is not very clear, and he was an interested witness. There is not a particle of written evidence of the payment of these notes or of either of them—no receipts or vouchers of any kind. In an ordinary case the possession of a note by the maker is *prima facie* evidence of payment, but no such rule is applicable here. The possession of Peter was the possession of his father. That possession certainly continued down to December, 1868, which was but about

Digitized by Google

eighteen months prior to the decedent's death. The decedent was then in his ninetieth year. It is conceded, and the evidence shows that he was unfit to transact business in 1866, yet the auditor was asked to believe that about four years later, when the old man's infirmities, in the natural order of events, must have been greatly increased, this son, who raised his axe against the men who called upon him with a power of attorney to demand the notes, voluntarily returned them to his father, and subsequently paid them without taking any voucher or receipt therefor. This, in the face of the admitted fact of the old man's unfitness to transact business, and that, as to three of the notes, they were not due for one, two, and three years respectively. The appellants may be right as to the facts, but we are not prepared to say the auditor was clearly wrong in finding to the contrary.

It is always hazardous to review the finding of an auditor upon the facts where it is in part based upon the evidence of witnesses, who either have a direct interest in the subject of controversy, or are so connected with those who have, as to render them liable to bias. In such cases it often becomes a matter of credibility. The auditor has the witnesses before him face to face, and their manner of testifying may, in many instances, stamp their story with either truth or falsehood.

We see no error in surcharging the executors jointly. They filed a joint account, and there is evidence that Samuel Bierly knew of the existence of these notes; knew they were in Peter's hands, and that they were unpaid. If he desired to escape liability therefor, it was his duty to have filed a separate account, or to have insisted upon his co-executor accounting for said notes in their joint account. Having done neither, the surcharge against them jointly must stand.

The decree of the Orphans' Court is affirmed and the appeal dismissed at the costs of the appellants.

Opinion by PAXSON, J. WILLIAMS, J., absent.

Oct. & Nov. '75, 249.

Speyerer & Co. v. Bennett et al., Ex'rs.

Evidence—Acts of 28 *March*, 1814, *and* 15 *April*, 1869—*Death of party to a cause whose deposition had been previously taken and filed —Admission of such deposition in evidence on the trial—Whether opposite party can testify against such deposition.*

The deposition of a deceased party to a cause taken and filed in the cause, previous to his death, is admissible in evidence under the Acts of 28th of March, 1814, and 15th April, 1869.

Evans *v.* Reed (28 Sm. 415; 2 WEEKLY NOTES, 175) followed.

How far in such a case the living party could, upon the trial, be heard against the deposition, not decided.

Error to the Common Pleas of Beaver County.

Assumpsit by Speyerer & Co., against Hugh Bennett upon two promissory notes drawn by one Kennedy and alleged to have been endorsed by defendant. The endorsement was denied by defendant whose deposition was taken in the cause and was filed September 12, 1874. Afterwards the defendant died, and on June 14, 1875, his death was suggested of record and his executors substituted. Upon the trial of the case (which took place June 15, 1875, before HICE, P. J.), H. J. Speyerer, one of the plaintiffs, was examined as a witness on their behalf. Defendants then offered the deposition of their testator. Plaintiffs objected on the ground that, the death of Bennett having closed the lips of the plaintiffs to contradict it, the deposition was inadmissible under the Act of 15 April, 1869, Sect. 1 (Purd. Dig. 624, pl. 16). The Court admitted the deposition, and plaintiffs excepted thereto. Verdict and judgment for defendants. Plaintiffs took this writ, assigning for error the admission of the deposition.

S. B. Wilson, for plaintiffs in error.

Plaintiffs could not be admitted to testify against the deposition of the decedent.

Allum's Ex'r *v.* Carroll's Adm'r, 17 Sm. 68.

It would be contrary to the spirit of the Act of 15 April, 1869, to admit the deposition when plaintiffs are denied the opportunity of testifying against it.

Chamberlain & Peirsol and *E. B. Daugherty*, for defendants in error, were not called upon by the Court. In their paper-book they cited—

Wolfinger *v.* Forsman, 6 Barr, 294.
McFerren *v.* Iron Co., 26 Sm. 180.
Karns *v.* Tanner, 16 Sm. 297.

Nov. 26, 1875. THE COURT. This case is ruled by the decision in the case of Evans *v.* Reed, heard at Harrisburg last May, and decided at this term; opinion by MERCUR, J. [28 P F. Sm. 415; S. C., 2 WEEKLY NOTES, 175]. The deposition of Hugh Bennett was taken when both parties were alive, and the plaintiff had an ample opportunity to cross-examine him. Had Bennett lived it is conceded the deposition was admissible under the very words of the Act of 28th March, 1814. What has occurred to make it incompetent? Not the death of the plaintiffs, or any one of them, and a substitution of the executors or administrators. The person dying is the witness himself, whose substituted representative is seeking to give the deposition in evidence against the living par-

Digitized by Google

ties. These parties insist on what? Not that the deposition was taken irregularly; not that they had no opportunity to cross-examine; not that their own depositions might not have been taken to prevent the loss of everything they knew; but insisting on the loss of the defendants of the knowledge contained in the deposition, by the accident of a death which has left nothing but this written statement of facts. But it is said it offends against the proviso of the Act of 15th April, 1869, that "this Act shall not apply to actions by or against executors, administrators, or guardians." But against whom is this process directed? The Act says no intent or policy of law shall exclude a party or person from being a witness. *Provided*—provided what? Clearly that no party or person shall testify in actions by or against executors, etc.

It is the *living* party or person then who is excluded, and this, as has been held repeatedly, on the ground of inequality. But the deposition of the deceased party is not within the letter of the Act, for it is the testimony of the dead party which is offered for the execution against the living party. Does this offend against the spirit of the Act? Clearly not, for the living party had the same means of preserving his own testimony against loss by death, and could cross-examine, aided by the light of his own knowledge. On what principle then are we to put aside the Act of 1814, which preserves and perpetuates the evidence for the purposes of justice? It is not expressly repealed by the Act of 1869, and no evil consequences demand an implied repeal. The argument that the living party cannot now be heard against the deceased witness is not sound, for this is to turn competency into incompetency by an accident, which offends against neither the letter nor the reason of the law. How far the living party can now be heard is not the real question, for the question before us concerns not the present state of the case, but that which existed when the deposition was taken. It may be that not having perpetuated his testimony by a written deposition he cannot now be heard against the deceased witness, but when the deposition of the deceased was taken, he could have been heard, and had all the privileges, both of an examining party and a competent witness. We perceive no reason, therefore, to strike down the operation of the Act of 1814, by holding it to be impliedly repealed, and therefore reaffirm the case of Evans *v.* Reed.

PER CURIAM. Judgment affirmed.

[See Pratt *v.* Patterson, *ante*, 161.]

Jan. '75, 173. **Bear v. Trexler.** Mar. 8.

Evidence—Book entries—Proof of—Entries against one partner, when evidence against firm—Promissory note dated on Sunday—Rights of endorsee.

A. sold goods to B. & C. and took their note dated on Sunday, which note he afterwards endorsed to D. Subsequently, A. made an assignment to K. for the benefit of his creditors. D. afterwards brought an action in the name of A. to the use of D. against B. & C., and on the trial (having first without objection put the note in evidence as an admission of indebtedness), offered A.'s book of original entries to show the sales of goods to B. & C., for the amount of which the note was given. Defendant objected to the book on the ground of irrelevancy.

Held, that this objection was properly overruled.

Plaintiff proved that A. had been absent from the county for seven years and could not be found.

Held, that proof of A.'s handwriting in the book of original entries was sufficient.

The book entries were against B. alone, but plaintiff offered to prove that the charges were intended to be made against the firm of B. & C., and that said firm received the goods and gave their note for the same.

Held, that the entries were properly admitted.

Error to the Court of Common Pleas of Berks County.

This was an action of assumpsit by Phineas Seidel to the use of J. S. Trexler against David S. and Edwin S. Bear. At the trial, plaintiff offered in evidence a promissory note for $700, dated October 1, 1865, payable one day after date, drawn by defendants to the order of Phineas Seidel, and by him endorsed to the equitable plaintiff. This note was dated on Sunday, but was received in evidence as an admission of indebtedness. In connection with the note, plaintiff offered the book of original entries of Phineas Seidel showing charges against David S. Bear, one of defendants, for goods sold, the amount due on which formed the consideration of the note. Plaintiff then proved the handwriting of Seidel to the book entries, and that Seidel himself, after making an assignment for the benefit of his creditors, had left the county seven years before this trial, and could not now be found. Defendants objected to the book entries, (1) that they were irrelevant; (2) that they were not sufficiently proved; and (3) that they appeared to be against David S. Bear alone, and not against both defendants. Plaintiff then offered to show in connection with the account that defendants received the goods, that the charges were intended to be made against the firm, and that the note was given for the goods. Thereupon the Court below (WOODWARD, P. J.) overruled the objections and admitted the book entries, to which ruling defendants excepted. It appeared from

Digitized by Google

the subsequent evidence on the trial that the assignee for the benefit of creditors of Seidel had brought suit upon this book account against the present defendants, but had suffered a nonsuit. Verdict and judgment for plaintiff for $1084.65. Defendants took this writ of error, assigning therefor the admission of the book account.

Livingood and *Shalter* for plaintiffs in error.

Trexler was only the endorsee of the promissory note, and had no remedy against defendants outside of that instrument. The book account had never been assigned to him, but belonged to the assignee for the benefit of creditors of Seidel. The note was void because given on Sunday, and to allow plaintiff to sustain it by proof of the original indebtedness would be to give to it the same effect as if dated on a secular day.

Geo. F Baer (with whom was *P. D. Wanner*), for defendant in error, presented no paper-book.

March 13. THE COURT. We discover no error in this record, and the judgment is therefore affirmed.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent. WOODWARD, J., having tried the case in the Court below, did not sit during the argument.

[In the above case the promissory note, although executed on Sunday, was admitted, apparently without objection, as evidence of indebtedness, and the Court seem to have treated its subsequent endorsement and delivery to the plaintiff as an equitable assignment of the debt for which it was given. How far a note executed on Sunday is evidence of an indebtedness between the parties seems not to be entirely settled. In Kepner *v.* Keefer (6 W. 231) it was held that a note dated on Sunday was not *per se* evidence of an indebtedness contracted prior to that day. In Lea *v.* Hopkins (7 Barr, 492) a bond executed on Sunday, but which recited a previous transaction between the parties and contained an express acknowledgment of the obligor's indebtedness on account thereof, was admitted in evidence as proof of the prior debt. In Bumgardner *v.* Taylor (28 Ala. 687), a note given on Sunday for a prior indebtedness was held insufficient to prevent the running of the Statute of Limitations.

In Chestnut *v.* Harbaugh (2 WEEKLY NOTES, 37), which was a feigned issue involving the ownership, as against creditors, of personal property held under an *executed* Sunday contract, the Court, in reversing the judgment, remarked that a promissory note made on Sunday might be given in evidence "as part of the history of the transactions," bearing upon a question of fraud.]

Common Pleas—Law.

C. P. No. 2.

Struthers & Sons v. The Evening Bulletin, etc.

Libel—Publication in newspaper—Civil action—Actionable words—Privileged communications—Right to discuss public matters in newspapers—Limits of such rights.

Case for libel.

CHARGE OF THE COURT.

Dec. 13. MITCHELL, J. GENTLEMEN OF THE JURY:

* * * * * * *

By the Constitution of Pennsylvania, as it was read to you by one of the counsel for the defendants, in what is called the Bill of Rights, "Every citizen may freely speak, write, or print on any subject, being responsible for the abuse of that liberty."

The abuse of that liberty is what is called libel.

More fully defined, a libel is said to be, in the language of a distinguished CHIEF JUSTICE of Pennsylvania, "Any malicious publication which tends to expose a man to ridicule, contempt, hatred, or degradation of character."

There is also a statutory definition of libel in the criminal code of Pennsylvania, and it is to this effect: "That if any person shall write, print, or exhibit any malicious or defamatory libel, tending either to blacken the memory of one who is dead, or the reputation of one who is living, thereby exposing him to public hatred, contempt or ridicule, such offence shall be deemed a misdemeanor," etc.

There are many definitions of libel given in the law books and reports, but they all agree substantially that any false, malicious, or defamatory writing, tending to injure the reputation of another, is a libel.

(1) Taking up this definition, somewhat in detail, the first question to which I invite your attention is the clause which says that a libel must contain words which are defamatory. There is a legal distinction, well known to all lawyers, between certain classes of defamatory words. There are, first, those which are said in technical language to be actionable in themselves, those which naturally and necessarily import damage to another; and then there are those which are only libellous when they do special damage, and when they are supported by special proof of damage.

There are many words which are entirely innocent in themselves, which to the ordinary compre-

Digitized by Google

hension do no mischief of any kind, and, under ordinary circumstances, would do no injury; yet they may be injurious, and therefore libellous under certain circumstances. . . . .

. . . . There is, however, no evidence in this case, nor is it claimed by either party, that any special damages have been proved; and, therefore, you may throw entirely out of consideration that class of words which are actionable only when they are followed by special damage.

The other class includes all cases of words whose natural consequence is damage, and there are many kinds of those which have been recognized in the law. Those with which we are specially concerned in this case are of two kinds: First, words that impute a crime to a person of whom they are spoken; and secondly, words whose natural tendency is to injure a man's office, profession, or business. Those are the only two classes of libel with which you need concern yourselves in the present case, and the question, therefore, which first arises for your consideration is, What is the charge that is made in these articles in the *Bulletin* against the plaintiffs, Messrs. Struthers & Sons?

These articles have all been read to you, and I will not go over them again. The one upon which the main stress is laid is the one, you will recollect, which alludes to the nomination of Judge PERSHING as Governor of the State of Pennsylvania, and calls the attention of one of the Public Building Commissioners, Mr. Cassidy, to the fact that Judge PERSHING had recently sentenced, in Schuylkill County, some persons to the penitentiary for having stolen money or defrauded the public in the erection of a certain public building, and adds that: "It is just as wicked to steal in Philadelphia as it is in Schuylkill County."

There are three articles which are specially complained of. The one of which I have spoken is the one which makes the most pointed and serious charge. These three articles, which you will have out with you, and which you will read, are all that are legally complained of in this case. All of the other articles which have been read are only before you as far as they tend to throw light upon those which are legally complained of.

In gathering the import of the language used in these articles you will take the words in their natural sense, according to the meaning which people generally reading the articles would attach to them. There are many cases where words are used in a special sense which have a special meaning. For instance, it might be perfectly innocent in one place to use them where in another it would be very injurious. Suppose a man in New York or in Boston were to say of another that he had been two years at Cherry Hill. The expression in itself to the man in New York or in Boston would probably be no particular reflection upon the person of whom it was said; but if it was said in Philadelphia it would probably import that he had been in the State prison at Cherry Hill for some indictable crime. There are, therefore, a large class of cases in which a specific meaning is attached to words, and those meanings must always be proved. But there are no such meanings in the words which have been used in this case. There is no evidence of any special meaning in any of the terms which have been used or the words of the articles complained of in the *Bulletin*. They are plain English words, and they are to be taken in their plain meaning according to the usage of the English language. . . . .

. . . . The real meaning of the articles is to be gathered by you from the whole language used, taking it in its plain, ordinary meaning in connection with the subject to which it relates, and obtaining all the additional light you can from all the circumstances and all the evidence in the case.

Judging the articles in this way, what do they charge against the plaintiffs? If they charge mere failure to comply with their contract, or mere deficiency in workmanship or amount of material, they are not actionable without special damage, and as there is no evidence of special damage in this case you should find a verdict for the defendants, and, therefore, that would be an end to this case.

If, however, they mean more than that; if they mean to charge either the actual crime of stealing, or failing to go quite so far as to charge an actual crime indictable by the penal laws of Pennsylvania, the articles charge such a fraudulent evasion of their contract as would tend naturally, if believed, to affect the plaintiffs injuriously in their business—if they do thus charge either actual crime or fraud in the sense explained, then they are defamatory in the sense of the law, and *prima facie* they sustain the plaintiff's action, and the plaintiffs are entitled to your verdict.

(2) Assuming that you find the words used in this case charge either crime or fraud, such as would naturally and necessarily tend to injure the plaintiffs in their business, then the burden of proving the *truth* of the charge is upon the defendants, and the next question for your consideration then is, whether they have done so. In order to prove it to be true the evidence must be such as would establish the charge as it is made. The justification must be as broad as the charge. It will not do, for instance, to charge stealing and prove mere bad workmanship, nor even undue parsimony in the use of materials. If the charge is stealing or fraud, the proof must be of stealing or fraud, or the defendants have failed to make out a justification.

Digitized by Google

The question is not whether the plaintiffs have literally fulfilled their contract, indeed it is admitted that, in some matters, they have departed from the letter of it, nor is it whether they have followed the very best mode of marble-working, because opinions differ as to many matters of this kind; but the real question involved is whether the defendants have shown that the plaintiffs have fraudulently evaded the performance of their contract. . . . .

. . . . . I will not go over the items of the evidence, even in a general way. I am sure the jury must be familiar with them. I, therefore, leave this branch of the case by saying that the real question upon this point for the jury to decide is to be determined by the difference between a fair choice of lesser evils where the plaintiffs were necessarily put to a choice, as they say, between modifying the letter of the contract or greatly delaying the progress of the buildings, or, generally speaking, between a fair and legitimate economy on the part of the plaintiffs in the use of materials and a fraudulent use of inferior or deficient materials and bad workmanship.

That really is the question you have to decide on this branch of the case. If you find what has been proved to you, in the way of a variation from the contract, was a legitimate and fair economy of materials and workmanship, or was rendered necessary because it was a choice of a lesser evil of the two, then the defendants have not made out a justification. If, however, on the other hand, the defendants satisfy you that it was the intention and desire of the contractors to skimp this work to such an extent, wherever it could be done, by inferior workmanship and deficient materials, as to amount to fraud, then the charge is sustained, and the jury should render a verdict in favor of the defendants.

(3) The third branch of the definition of libel is, that it must be malicious. Malice in fact, as it is called—or actual malice is what is understood by that word in its ordinary use, ill-will, desire to do injury. There is no evidence, however, of any such feeling in this case upon the part of the defendants. On the contrary, it is acknowledged that their relations were friendly, and in an article which was read to you from the *Bulletin* of the 8th of October, 1873, just after the contract had been awarded to Messrs. Struthers & Sons, the editors of the *Bulletin* spoke of the contractors with friendship and with confidence, and they rejoiced that the contract had been given to that firm.

There is, therefore, as I have said, no actual or express malice in these charges of the *Evening Bulletin;* but implied malice, as it is sometimes called, or inferential malice, has a much wider scope. It means doing a wrongful act without lawful justification or excuse. Every man is conclusively presumed in the law to intend the natural consequences of his act. Even in a trial for murder, the most technical and the most solemn of all human proceedings, malice is an essential ingredient of the crime, and yet a man may be put upon his trial for murder and may be convicted for firing a gun into a crowd, although it may be perfectly clear that he entertained no particular personal feeling against the party who was injured. In this case an act would be done, the result of which might be the injuring of another person, and a man guilty of such a crime is not allowed to plead ignorance of the consequence of his act. This has always been the rule of law, and it has been crystallized in one of those popular phrases which embody the common sense for which our race is remarkable, the homely saying: "Actions speak louder than words." No man is permitted to say that he did not intend to commit a deed when his actions speak for themselves and prove to the contrary. If these articles in the *Bulletin* charge either an indictable crime or a fraud upon the community, which would result injuriously to the business of the plaintiffs in the sense I have already explained, the law holds the publications to be malicious, and it does not allow that fact to be controverted by any personal motives which may or may not have actuated the persons who wrote them.

There may, however, be special circumstances which change the character of an act which would otherwise be unlawful, as in the instance I have related in regard to a man charged with having fired a pistol into a crowd, where, if he were a policeman, endeavoring to quell a riot, it would have been his duty, and justifiable because under the circumstances he was doing a lawful act, and that fact would disprove the imputation of malice.

(4) This brings us to the fourth question which you have to consider, and that is whether these articles, supposing them to be libellous and otherwise malicious, in the sense I have explained, are deprived of malice by being what is called privileged communications, and whether they are within the proper province of the defendants as public journalists.

The defendants are publishers of a public journal. It was their right, and perhaps even their duty, to call attention to and make comments upon the manner in which the Public Buildings were being erected. It was a question of great public interest, and according to the old familiar saying that "everybody's business is nobody's business," it certainly was the right of the defendants in their relation to the public, as public journalists, and they were probably doing the public a service in calling attention to the way the work was being done. The right of public discussion of public matters is important,

Digitized by Google

and it is to be exercised freely without being subject to a too strict limitation. And so long as it is exercised fairly and honestly it is protected and excused even though it may incidentally involve the publication of defamatory matter. Nor does such matter lose its privileged character by going somewhat beyond the limit of strict truth, or beyond what the writer may be able to prove. Editors are not infallible any more than other men, and a fair margin must be allowed to them for want of absolute accuracy, and for the necessities and the circumstances under which journalistic writing has to be done. But this is an allowance for fair and honest mistakes, a mere margin for human shortcomings, inevitable even with the best intentions; it is not to be used as a cover or protection for violent and unfair comment or for excessive and exaggerated statements of facts. The right is a right of fair discussion and criticism, and must be fairly exercised with reference to that object and without any ulterior views or purposes of any kind.

Strong feelings very frequently arise in regard to public questions, as they undoubtedly did a few years ago upon the location of the Public Buildings, and, perhaps, they have not yet subsided. Certainly one witness here admitted squarely that he was and is opposed to the whole thing.

The fullest freedom must be allowed for all proper discussion of public matters, but it is a freedom that must not be abused and must be confined to fair and legitimate comment, which, under all the circumstances, the jury consider fair in spirit and intention, as well as in language. Unless the comment is fair in that sense the mere good faith of the defendants is not a defence. To publish a man as a thief is not excused by showing that the writer considered, in good faith, that the facts justified such a term. Such a rule would be contrary to the first principles of law and natural justice, for it would make a man a judge in his own case. The tribunal to decide whether the language was fair in view of the facts is the jury. The defendants cannot be allowed to judge of that for themselves. A man who does an act which endangers his neighbor does it at his own peril, and his good faith in the premises is no excuse.

This is one of the most important points in the case, and perhaps it is one on which your verdict will turn. I invite you, when you go out, to read the charges in the articles complained of, and to say whether they contain fair comments on the facts which were before the *Bulletin* at the time of their publication. There were departures, no doubt, from the contract in the plaintiff's work which certainly justified the defendants in calling the public attention to the matter. Have they done so in a fair and proper manner, or have they exceeded their proper privilege? Journalistic writing, as I have already said, has its privilege, but it has also its dangers and its proper limits. The public is frequently slow and apathetic about matters of its own concern. It is not unfrequently a little deaf, and the newspaper must halloo pretty loud to attract its attention. You have a right to call a man's attention by hallooing at him, perhaps by jogging his elbows, but not even for his own important business to strike him with a club or fire a pistol at him. The natural tendency, therefore, is to the use of strong language, and perhaps a fair allowance may be made for that tendency. But, on the other hand, there is a danger of sacrificing private rights to editorial smartness—a tendency certainly of reporters, and perhaps extending to editors, to make a spicy paragraph at somebody's expense. That is an abuse of the proper freedom of the press.

I am assuming, gentlemen of the jury, that you find these articles do charge plaintiffs with some indictable crime or with fraud in their business, destructive to their business reputations, as I have already said; if not, you must find a verdict for the defendants. But supposing you do find that to be a fact, and accept that as a true interpretation of the meaning of the articles, and taking in this connection, the statement of the amounts alleged to have been lost to the city and inferentially pocketed by the plaintiffs, one article, as I remember it, stating it at $200,000, and comparing what has been proved, the real amount of saving or of stealing, whichever you may find it to be—the real amount of marble saved and the money value of it—you will determine for yourselves whether these articles complained of are a fair and proper comment upon the manner in which Messrs. Struthers & Sons have performed their contract with the city, or whether they are exaggerated and excessive in statement or comment, or both. If they are fair comments in your opinion, the defendants have acted within their privilege as public journalists, and you should find for the defendants; if not, then you should find for the plaintiffs, and in that event you will proceed to the consideration of the remaining question in this case, and that is the one relating to damages.

(5) That is a matter entirely within your discretion. Of course, there is no absolute money standard by which the value of an injured reputation can be measured, but by means of a verdict you express in your opinion as jurors, a vindication of the plaintiffs from the charges which have been made against them. In doing this you have a right to consider the mode in which the defendants have met this case. Where a man has made a mistake, or publishes a libel, if he at once admits his error and makes what reparation he can, or

Digitized by Google

retracts the charge he has made public, if he does not entirely eradicate his original offence, he sensibly mitigates the punishment which he deserves. But where he adheres to his error, and where he repeats and reiterates the libel up to the moment of trial, and the argument of his counsel is subsequently filled with charges of fraud, almost, I was going to say, worse than the original charge, then you have the right to consider that the offence requires a weightier vindication at your hands than a less defiant or more apologetic defence.

In this connection I have only a few more words to say. This is an action brought by the plaintiffs in their business capacity. It is a civil action for damages which they, the plaintiffs, allege have resulted from the injury occasioned to their business reputation. William Struthers, the senior plaintiff in the case, having died during the progress of the trial, you are discharged from all considerations as to him, as this is one of the class of cases which do not survive a deceased plaintiff. But as to the other plaintiffs, if their business reputation has been injured by the publication of these articles, and if, under the principles of law which I have explained, you believe they are entitled to a verdict, you should give them such damages as shall be a substantial vindication, and the amount of the damages you may award them for the accomplishment of that purpose is a matter entirely within your discretion.

The verdict was for plaintiffs—damages one cent.

C. P. No. 1. **Beach v. Wade.** Dec. 2.

Libel — Capias ad respondendum — Averments necessary to hold to bail—Defective affidavit.

Rule to discharge defendant on common bail.

This was a suit for libel. The defendant had been arrested on a *capias*. The affidavit to hold to bail set forth that defendant had falsely and maliciously accused plaintiff of committing adultery with his wife, said accusation being contained in a certain letter written by defendant to a step-daughter of the wife, and charging the wife with having slept regularly with plaintiff at a certain house in Brooklyn, N. Y. The affidavit further alleged that defendant has at various times and to other persons made similar accusations.

Swayne (with whom was *Sharpless*), for the rule.

The affidavit is defective on several grounds: It does not in terms set forth any distinct charge of crime. The letter containing the alleged libel was a privileged communication, having been written to a step-daughter of the wife against whose evil course defendant was justified in warning her. There is no averment of publication, as it is not stated that the letter was sent or received. No specific damage is alleged. Only a part of the letter containing the alleged libel is set forth.

Lukehart *v.* Byerly, 3 Sm. 418.
Cockayne *v.* Hodgkisson, 5 C. & P. 543.
Todd *v.* Hawkins, 8 Id. 88.
Coxhead *v.* Richards, 2 C. B. 569.
P. W. & B. R. R. Co. *v.* Quigley, 21 How. 202.
Beardsley *v.* Tappan, 5 Blatchford, 497.

Speakman, contra.

THE COURT. This affidavit is defective in not giving the exact words of the letter, and in failing to state that what is set forth is everything in the letter relating to the libel. And it is radically defective in not stating publication.

Rule absolute.

[See Marquis *v.* Goldstein *et al.*, 2 WEEKLY NOTES, 112; Taylor *v.* Ashworth, Id. 370.]

C. P. No. 2. **Shallcross v. Kohl.** Nov. 4.

Promissory note—Contemporaneous writing as to mode of payment.

Rule for judgment for want of sufficient affidavit of defence.

Assumpsit on a promissory note. The affidavit of defence set forth that by a written agreement the note was not to be payable until defendants had sold one or more of a row of seventeen houses; that they have used their best endeavors to effect a sale, but have not succeeded; that they have traded one of the houses for furniture, and have made a tender of the latter to plaintiff, which he has refused.

E. R. Worrell, for the rule.

Hannis, contra.

Rule discharged.

C. P. No. 3. Nov. 18.

Eyster et al. v. McCulla et al.

Reference by agreement under Act of May 14, 1874 — Rule of Court XXXIV. providing for notice of filing report does not apply to such reference—Practice.

Rule to dissolve attachment sur judgment and set aside judgment.

This cause was referred by agreement of the parties on April 28th, 1876, to Samuel C. Perkins, Esq., as referee under the Act of May 14, 1874 (Purd. Dig. p. 1940). On Oct. 9, 1876, the report of the referee was filed awarding to plaintiffs the sum of $1796.19. On Oct. 14, 1876, judgment was entered, and on Nov. 10, 1876, an attachment sur judgment was issued.

John Dolman, for the rule. Defendant's counsel had no notice of the filing of the report of the referee, which Rule XXXIV. of this Court requires.

Digitized by Google

Thomas J. Barger, contra. The rule of Court does not apply to references under this Act. An appeal or writ of error lies directly from the finding of the referee to the Supreme Court.

C. A. V.

Nov. 21. Rule discharged.

C. P. No. 3. **Levy v. Mustin.** Nov. 18.

Practice—Appeal from alderman—Pleading to alderman's transcript filed.

Rule on plaintiff to show cause why a narr. should not be filed.

Appeal from an alderman. Plaintiff ruled the defendant to plead to the transcript filed. The transcript showed the claim to be "for damages sustained by plaintiff by defendant's team driving against plaintiff's carriage in the park and breaking said carriage and destroying his harness."

Samuel E. Cavin, for the rule. The suit is in the nature of a tort, and plaintiff should declare specially. The transcript discloses no form of action known to the law to which defendant can properly plead.

Daniels, contra.

THE COURT. The transcript is considered as a statement under the Act. If the defendant considers it insufficient, he may demur.

Rule discharged.

[See Nathans *v.* Cummings, 1 WEEKLY NOTES, 416; Simons *v.* Kutz, Id. 553; Ellis *v.* Pennington, 2 Id. 29.]

C. P. No. 3. Dec. 4.

Boyd v. Clarence A. Hart, co-partner with Abraham Hart et al., trading, etc., who were sued, etc.

Partnership—What constitutes—Agreement to loan money for share of profits—Act of 6 April, 1870—Notice to vendor, before sale, that defendant was not a partner.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a book account for goods sold and delivered to the defendant, co-partner with others, trading as the "International Restaurant and Hotel Company," against which firm judgment had been obtained in another Court. The affidavit and supplemental affidavit of defence set forth that the defendant had never purchased or received any of the goods sued for, nor authorized any one to purchase them; that he never had been a member of the above firm or company, against which the plaintiff had obtained judgment in Common Pleas No. 1, for the same cause of action; that his only connection with the said firm had been signing an agreement, erroneously dated Dec. 13, 1875, but in fact made Jan. 7, 1876, between H. W. Faucett, of the first part, and deponent, Abraham Hart, one Pincus, and others, of the second part, under which the parties of the second part were to furnish Faucett, as a loan, such sums of money as might be necessary for him to carry on the restaurant business for one year, in consideration of which loan the parties of the second part were to receive, in lieu of interest, three-fourths of all net profits; that immediately after signing the said agreement, and before advancing money or receiving profits, the same "was rescinded by the parties thereto, so far as this deponent was concerned;" that he was informed and believed that, prior to the sale of the goods in suit, the plaintiff inquired of one of the members of the firm, who was making the purchase, whether the deponent was a member of the firm, and was answered "no;" that on March 23, 1876, the deponent being thereunto requested, endorsed in writing on the agreement his rescission, stating that "all the interest he had had in the International Restaurant and Hotel Company had been theretofore disposed of to the said Pincus;" and that the deponent was informed and believed that the plaintiff had received in part payment of his claim the sum of $165, in addition to the amounts credited by him.

H. G. Clay, for the rule, cited—

Kelly *v.* Hart, 3 WEEKLY NOTES, 93.
Collyer on Partnership, Book I., Chap. I., §§ 6 and 78; Chap. II., notes to § 120.
Story on Partnership, Chap. XIV., 334; Chap. VIII., 160–163.
Drennan *v.* House, 5 Wright, 30.
Edwards *v.* Tracy, 12 Sm. 374.
Deford *v.* Reynolds, 12 Casey, 325.
Newcomet *v.* Brotzman, 19 Sm. 185.
Act 11 April, 1848, Purd. Dig. 1121, pl. 8.

Sulzberger, contra.

Under the Act of 6 April, 1870 (Purd. Dig. 1121, pl. 15), no partnership existed, and but for the use of the word "interest" by a layman, in the acknowledgment of the rescission, there would be no room for argument.

If the defendant, C. A. Hart, was a partner, he was a secret partner, and although the adoption of the name of a company gave notice that there might be secret partners, the plaintiff had express notice that the defendant was not a partner, and the goods were sold without relying on the credit of the defendant.

H. G. Clay, in reply, argued that the affidavit was inconsistent.

C. A. V.

Rule discharged.

[See Kelly *v.* Same defendant, *ante*, 93.]

Digitized by Google

Weekly Notes of Cases.

VOL. III.] THURSDAY, JAN. 4, 1877. [No. 14.

Supreme Court.

Oct. & Nov. '76. Oct. 9 and 10.

Darlington et ux. v. United States.

Eminent domain, right of—Inherent in the United States government—Limitations of the right—Mode of exercise—Act of Congress of March 3, 1873—*Acts of Assembly of Feb.* 19, 1849, *and April* 2, 1873.

The right of eminent domain is inherent in the United States government, but as such right is in derogation of the common law, it must be exercised in each individual case according to the statutory mode specially prescribed therefor.

Every sovereignty may exercise the right of eminent domain for its own benefit, but it cannot delegate this right to another sovereignty, or exercise it for the benefit thereof.

By the Act of Congress of March 3, 1873, the Secretary of the Treasury was directed "to purchase at private sale, or, if necessary, by condemnation, in pursuance of the statutes of Pennsylvania," a piece of ground in Pittsburgh, suitable for the erection of a United States court house, post-office, etc. Proceedings were instituted to condemn four different sites, with a view of selecting one:

Held (reversing the judgment of the Court below), that the proceedings to condemn were illegal, because they did not set forth any previous effort to purchase at private sale.

Held, further, that the United States officials had no warrant for proceeding against four sites at once, because the Act of Congress conferred no such power, and the Act of Assembly of April 2, 1873, in so far as it attempted to do so, was unconstitutional.

Trombley *v.* Humphrey (23 Michigan Rep. 471) followed.

Gilmer *v.* Lime Point (18 California, 229) and Burt *v.* Ins. Co. (106 Mass. 356) disapproved.

Error to the Common Pleas No. 1, of Allegheny County.

This was, in the Court below, an appeal of W. M. Darlington and Mary C. Darlington, his wife, from the report of viewers appointed to appraise the value of a certain piece of land in the city of Pittsburgh, a proposed site for a new United States court house, post-office, etc.

The facts of the case are as follows: By an Act of Congress of March 3, 1873 (17 U. S. Statutes at Large, 621), the Secretary of the Treasury was authorized "to purchase at private sale, or, if necessary, by condemnation, in pursuance of the statutes of Pennsylvania, a suitable piece of ground in the city of Pittsburgh," for the erection of a United States court house, post-office, etc. To further the purposes of this Act, the following Act of Assembly of April 2, 1873 (P. L. 42), was passed:—

Section 1. The consent of the State of Pennsylvania is hereby given to the acquisition, by the United States, by purchase or by condemnation in the same manner as land is now taken for public purposes under any general or special statute for railroad or other purposes, . . . of one or more pieces of land situated in the city of Pittsburgh, on which to erect a court house, post-office and other government buildings and appurtenances, and the said United States shall have, hold, use, occupy and own the said land or lands when purchased, and exercise jurisdiction and control over the same, and every part thereof, subject to the restrictions hereinafter mentioned.

Section 2. In case the United States shall decide to resort to condemnation in acquiring land for the purposes specified in the first section of this Act, the said United States shall in all respects be governed by the laws of this State regulating the appropriation of private property for public use, and said laws are hereby made applicable: *Provided*, That the United States may pay the costs and refuse to take the land, if in their judgment the compensation assessed therefor is excessive.

On April 17, 1874, the petition of David Reed, United States District Attorney for the Western District of Pennsylvania, was filed, setting forth the above Act of Assembly, stating that the United States had already condemned three tracts as proposed sites for their court houses, etc., and had decided to condemn a fourth tract, the land in question in this case, bounded by Fourth Avenue, Smithfield Street, Third Avenue and Cherry Alley; and praying that seven discreet and disinterested freeholders might be appointed to appraise the value of the last named property.

Viewers were appointed in accordance with this petition, who on May 23, 1874, filed their report, which contained the following paragraph:—

"The reviewers estimate and determine that the owners of the said property will sustain damages by the taking and occupying thereof as follows, to wit: . . . .

"Lot No. 7, owned by William Darlington, being 120 feet on Fourth Avenue by 172 feet, with buildings thereon, the sum of eighty-nine thousand dollars ($89,000.00.)"

This report was confirmed, and thirty days were allowed the property holders to appeal or file exceptions. On June 18 Darlington appealed, and likewise filed, *inter alia*, the following exceptions:—

(2) It does not appear from the record of the proceedings in this case that the viewers appointed were freeholders.

(3) The petition does not aver and it does not appear that the petitioner or the proper repre-

Digitized by Google

sentative of the United States or the United States could not agree with the owners of the property sought to be condemned for the damages likely to be done to or sustained by such owners by reason of the taking of their said property, or that any effort had been made to agree with said owners or any of them, or that he or they were absent or legally incapacitated to enter into such an agreement.

(4) These proceedings are unauthorized. There can be no condemnation of property until a site has been selected, and the petition shows that no site has been selected, but that proceedings were taken, prior to the presenting of the petition in this case, to condemn three other sites, being separate and distinct parcels of ground, which proceedings are not disposed of.

(5) The Legislature cannot delegate the right of eminent domain, as it has attempted to do in the Act under which these proceedings are taken.

On October 17 these exceptions were overruled

On October 21 the Court made the following order: "And now, to wit, Oct. 21, 1874, it appearing to the Court that service was accepted of notice of the meeting of the viewers in above case by Wm. M. Darlington and Mary C. Darlington, his wife, by their attorney, J. W. Over, and it further appearing to the Court that the land for which damages was assessed by said viewers in paragraph No 7 of said report belongs to the said Mary C. Darlington, it is therefore ordered that the proceedings in said case be amended so that the damages which may be awarded in the foregoing action shall be to the said Wm. M. Darlington and Mary C. Darlington, his wife, in right of the said Mary, and that the appeal heretofore entered, and the exceptions heretofore filed be for the benefit of the said Wm M. and Mary C. Darlington."

To this order W. M. Darlington and Mary C. Darlington excepted.

On October 24 the Court ordered the amended appeal to be put at issue. An issue was accordingly framed, to determine, *inter alia*, the value of the said premises, and the case came on for trial.

Verdict for the plaintiff for $107,000, and judgment thereon. The plaintiff took this writ of error, and also a certiorari, assigning for error the action of the Court in overruling the above exceptions, in making the order of Oct. 21, and in appointing viewers on the petition, when it appeared on its face that no effort was made to obtain the property desired by private purchase before resorting to condemnation, and that proceedings for the condemnation of three other sites were pending.

D. T. Watson (with him *J. W. Over*), for plaintiffs in error.

In a statutory proceeding such as this, in derogation of the common law, all the statutory provisions must be strictly observed. Now both the Act of Congress of March 3, 1863, and the Pennsylvania statutes in accordance with whose provisions this proceeding was to be conducted, expressly provide that before resorting to condemnation an effort should be made to purchase the land desired at private sale.

Reitenbaugh *v.* R. R., 9 Har. 104.
O'Hara *v.* Penna. R. R., 1 Cas. 448.
Lance's Appeal, 5 Sm. 26.
Cooley's Constitutional Limitations, 528.
Dillon on Municipal Corporations, §§ 469, 470.
Potter's Dwarris on Statutes, 224.
Pittsburgh *v.* Walters, 19 Sm. 365.
Kensington *v.* Keith, 2 Barr, 219.

The power of eminent domain is born of necessity, and is lifeless unless such necessity exists. Now there was no necessity for the condemnation of four sites at once; this proceeding was, therefore, illegal in its inception, and the Court had no jurisdiction in the case.

Phillips *v.* Dunkirk R. R. 28 Sm. 180.
Potter's Dwarris on Statutes, 376.
West River Bridge *v.* Dix, 6 How. 507.
Pollard's Lessee *v.* Hagan, 3 Id. 223.
Kohl *v.* U. S., Am. Law Reg. Sept. 1876.
Trombley *v.* Humphrey, 23 Mich., 475.
Cooley's Constitutional Limitations, 538.
Kent's Comm., 338, 340.
Dillon on Municipal Corporations, 453.
Lance's Appeal, 5 Sm. 26.

Moreover the Act of Congress gave no power to condemn four sites, and the Act of Assembly of April 2, 1873, was unconstitutional in so far as it attempted to do so, for one government has no right to exercise its power of eminent domain for the benefit of another government.

Potter's Dwarris on Statutes, 374.
Cooley on Const. Lim., 524.
Am. Law Reg., April, 1876.
Mott *v.* Penna. R. R., 6 Cas. 27.
Ableman *v.* Booth, 21 How. 506.

H. H. McCormick, U. S. District Attorney, (with him *G. R. Hamilton*), contra.

The appeal from the award of the viewers was a waiver of the remedy by exceptions, and of the exceptions themselves.

Royer *v.* Meyers, 3 Har. 87.
Lutz *v.* Stroh, 6 S. & R. 34.
D., L. & W. R. R. *v.* Burson, 11 Sm. 369.
Church *v.* N. C. R, R., 9 Wr. 339.
Hays *v.* Risher, 8 Cas. 169.

A fair construction of the Act of Congress gives the Secretary of the Treasury the right to elect whether to purchase at private sale or resort to condemnation.

The Legislature of Pennsylvania made no attempt to delegate its power of eminent domain to the United States by the Act of April 2, 1873.

October 23. THE COURT. The right of the United States to take private property for public use is too well settled to be now disputed. Of the numerous cases upon this subject, it is sufficient to

Digitized by Google

refer to Kohl *v* The United States, which is believed to be the last, and will be found reported in the American Law Register for September, 1876 The opinion of the Court was delivered by Mr. Justice STRONG, who said: "The right of eminent domain is inherent in all governments by virtue of their sovereignty. For all purposes required by the Constitution this right exists in the United States independently of any consent of the State in which the property lies."

The right itself arises from necessity, of which necessity the sovereignty taking the property must be the judge, and is qualified only by the duty of making compensation to the owner. We are in no doubt, therefore, as to the right of the United States to take and condemn a site for public buildings in the city of Pittsburgh, under and by virtue of the Act of Congress, approved March 3d, 1873, entitled "An Act to purchase a site for public buildings in Pittsburgh." Said act provides "that the Secretary of the Treasury be and he is hereby directed to purchase at private sale, or if necessary by condemnation, in pursuance of the statutes of the State of Pennsylvania, a suitable piece of ground in the city of Pittsburgh, in the State of Pennsylvania, for the erection of a building, to be used for a court house, custom-house, post-office, United States marshal's office, and other government offices, the cost of the same not to exceed three hundred thousand dollars."

Here the power to take is expressly conferred, and the mode designated by which the owner or owners may receive compensation. The condemnation, in case of a failure to purchase, shall be in pursuance of the statutes of the State of Pennsylvania. The proviso in said act, that the State shall release and relinquish jurisdiction over the same, is fully met by the Act of Assembly of April 2d, 1873 (P. L. 42). We therefore think that it was competent for the United States authorities to proceed under said Act of Congress to purchase or condemn, if necessary, a site for public buildings in the city of Pittsburgh. Have they proceeded to do so according to law? Without entering into a tedious recital of the facts, it is sufficient to say that it appears from the record in this case that proceedings have been commenced to condemn four different sites, with a view of selecting one out of the four. There is no warrant for this in the Act of Congress. It authorizes the selection of one site, but it does not create a roving commission, to experiment upon the value of different sites. It is said, however, that this action can be sustained under the second section of the Act of Assembly referred to, which provides: "That the United States may pay the costs and refuse to take the land, if in their judgment the compensation assessed therefor is excessive." The most that can be claimed for this section is, that in case the United States should select a site, and the damages assessed should be found excessive, and no terms could be made with the owner, the United States might pay the costs. abandon the proceedings, and then proceed to condemn another site. It could not be held to justify proceedings against an indefinite number of sites at the same time, and thus chaffering with the respective owners for the lowest price; and if such construction could be successfully claimed for it, the answer is that the Legislature has no such power.

The State may take the property of a citizen for public use by virtue of the right of eminent domain, but it cannot take it for the benefit of another sovereignty, for the use of the citizens of the latter, nor can it delegate the right of eminent domain to another sovereignty for such purpose. I am aware that it has been held otherwise in Gilmer *v.* Lime Point (18 Cal. 229), and in Burt *v.* The Merchants' Ins. Co. (106 Mass. 356) But a different doctrine was asserted in Trombley *v.* Humphrey (23 Michigan) In that case, speaking of the exercise of the power by the State for the United States, the Court says: "For the one to enter the sphere of the other, and supply its officers and machinery in the exercise of its eminent domain for the benefit of the other, would not only be as much without warrant, but also as much a work of supererogation as for the United States to exercise the like authority and employ the like agencies for a foreign country." Again: "the eminent domain in any sovereignty exists only for its own purposes; and to furnish machinery to the general government, under and by means of which it is to appropriate land for national objects, is not among the ends contemplated in the creation of the State governments." The foundation of the right of eminent domain is a necessity. The reason utterly fails when one sovereignty proceeds to take land for the use of another sovereignty This seems to be the view taken by the Supreme Court of the United States in Kohl *v.* The United States (*supra*). Says Justice STRONG: "The proper view of the right of eminent domain seems to be that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond this there exists no necessity—which alone is the foundation of the right." It is not a sufficient answer to this to say that the public buildings proposed to be erected are for the accommodation of our own citizens. That is a secondary object. The primary object is the accommodation of the business of the United States government and the convenience and comfort of its officials. The citizens of this State have no rights in said buildings not common to all other citizens of the United States; nor have they any control over them.

Digitized by Google

These proceedings are radically defective for other reasons. The petition was evidently presented under the Act of Assembly of February 19, 1849 (P. L. 83), entitled "An Act regulating railroad companies," and its supplements I am not aware of any other act under which such proceedings could be instituted. The petitioners are bound by the terms of the act under which they proceeded. The eleventh section of said act provides that "when the said company (railroad company) cannot agree with the owner or owners of any land or materials for the compensation proper for the damages done or likely to be done or sustained by any such owner or owners of such land, ... or by reason of the absence or legal incapacity of any such owner or owners, no such compensation can be agreed upon, the Court of Common Pleas for the proper county, on application thereto by petition," may appoint viewers.

In Reitenbaugh *v.* the Chester Valley Railroad Company (9 Harris, 104), which was a case arising under this act, it was said by WOODWARD, J., in delivering the opinion of the Court, that "when a railroad company is about to appropriate the property of individuals, they are required by the Act of Assembly of 19th of February, 1849, entitled 'An Act regulating railroad companies,' to apply to the owner of the property wanted and endeavor to agree with him on the compensation, unless the owner be absent or legally incapacitated." Nor have they a right to petition the Court for viewers until such effort has been made; and when they do petition, they should set forth the names of the owners whose property is desired, the fact that they cannot agree on the compensation, or that the owner is absent or legally incapacitated to contract, and verify their statement by the affidavit of some person having knowledge of the facts." To the same point is O'Hara *v.* the Pennsylvania Railroad Company (1 Casey, 448). The petition filed in this case lacks all these essential prerequisites. There was no averment that any attempt had been made to agree with the property owners. Nor is any reason given why no such attempt had been made It was therefore error in the Court below to appoint viewers. There was no jurisdiction.

Again, in proceedings under the Act of 1849, there must be a taking. Here there was none. There was experiment and chaffering, nothing more A railroad company must locate its road, mark and survey the land, before they can petition for a jury, and such facts must be set forth in the petition, and verified by affidavit. (O'Hara *v.* the Railroad, *supra;* Neal *v.* the Pittsburgh & Connelsville R R. Co., 7 Casey, 19)

More might be said. What has been said is sufficient A proceeding of this nature is out of the course of the common law, and every requirement of the statute under which it is taken must be complied with. (Lance's Appeal, 5 P. F. Sm. 26; Dillon on Municipal Corporations, §§ 469, 470; Dwarris on Statutes, 224.) These proceedings are irregular from their inception.

The judgment entered in this case, and all proceedings subsequent to the filing of the petition, so far as they relate to the plaintiffs in error, are reversed and set aside.

Opinion by PAXSON, J. AGNEW, C. J., and WILLIAMS, J., absent.

July,'74, 124. Feb. 2.

Wyoming Coal Co. v. Price.

Canals—Commonwealth's ownership of lands taken for canal purposes—Legislation relating to canals—Practice—Production of books and papers—Notice to produce.

The Commonwealth is the owner in fee simple of lands taken for canal purposes, and owns *ad usque mediam terram.*

A., being the owner of land on both sides of the Pennsylvania Canal, granted it to B., in two parcels, described respectively as extending from a point, thence "by the said canal."

Held, that B took no title to the land under the canal.

Legislation relating to canals reviewed, and authorities discussed *per* MERCUR, J.

A party is not bound to produce books and papers upon the trial unless call be made for them in conformity with the rules of Court; and it is error for the Judge in his charge to animadvert upon their absence.

Error to the late District Court for the City and County of Philadelphia.

Assumpsit by Eli K. Price against the Wyoming Coal and Transportation Company, to recover royalty for coal mined by the defendants out of the plaintiff's lands. The declaration consisted of the common counts. Pleas, non assumpsit, payment with leave, and set off.

Upon the trial (before BRIGGS, J) it appeared that the plaintiff, in 1845, purchased from James Hancock a certain tract of land composed of two parcels, described as follows: "Beginning at a corner in the line of lot 36, on the northwest side of the Pennsylvania Canal, thence northwest to the Susquehannah River, thence southwest to the towing path of the canal, and thence by the canal to the place of beginning; also another piece of land, on the southeast side of the canal, beginning in the line of lot 36, thence southeast eight perches, thence southwest twenty perches, then northwest to canal eight perches, thence by said canal to the place of beginning" It is thus seen that the canal ran through the tract.

The defendants, who were the owners of an adjacent colliery, having accidentally trespassed

Digitized by Google

upon this land, subsequently agreed with the plaintiff to pay him for all coal mined thereout, a royalty of 35 cents a ton, making monthly returns to him of the amount mined This arrangement ceased in January, 1871 when the plaintiff took possession. In July, 1871, owing to the mining having been carried too near the roof, the water from the canal came through and flooded the mine, rendering an actual measurement of the coal mined impossible. In December, 1871, the plaintiff made a claim that a full return of the coal mined prior to January, 1871, had not been rendered him by the defendant, and this action was brough for the royalty on the same.

The defendants presented *inter alia* the following points:—

(3) The title to the coal lying beneath the canal bed is not vested in the plaintiff by the deed from Hancock to the plaintiff. *Negatived*

BRIGGS, J, also charged: "The defendants were honorary trustees to him in rendering the account of the exact amount of coal that was taken from his mine. It is for them to account to him, and not for him to drag out as best he can a detailed statement from them—they have got the facilities, he has not. They should show their accounts, it seems to me, in such a way, that the agent of Mr. Price himself can see at a glance exactly the number of tons that came from his mine. There has not been the scrape of a pen, a book of any kind, produced here for the inspection of Mr Price, and yet it is his property they have been handling."

Verdict for the plaintiff for $5338, and judgment thereon

The defendants took this writ, assigning for error the answers to their points, and the charge of the Court as above quoted

S. S. Hollingsworth and *J. V. Darling*, for the plaintiff in error.

Although in construing a deed conveying property *bounded* by a river or street, there is a presumption that the grantor intended to convey all his estate to the middle line of the stream or street, it has been held that this presumption does not exist from the use of the words 'along the side of" such river or street. Similar words were used in the conveyance from Hancock to Mr. Price, hence it follows that the latter did not get any title to the land under the canal.

The reasons of public policy and convenience which have established the rights of owners of lots abutting on public streets to the land to the middle of the street, do not apply to the land under a canal.

Cox *v.* Freedley, 9 Casey, 124.
Paul *v.* Carver, 2 Casey, 223.
Wood *v.* Appal, 13 Sm. 210.
Robinson *v.* Myers, 17 Sm. 9.
Kelly *v.* Graham, 9 Watts, 116.

The laws providing for the establishment and construction of canals in this commonwealth vest the entire fee simple title to the land, over which the canal runs, in the State, hence Hancock could convey no title to this land to Price, because he had none himself.

Commonwealth *v.* Fisher, 1 Pa. 462.
Haldeman *v.* Penna. R. R. Co., 14 Wr. 425.
Craig *v.* Mayor, 3 Sm. 477.

B. P. Wilson and *J. B. Townsend*, contra.

If a grantor conveying land bounded by a street or river desires to reserve to himself the land under such street or river, he must expressly reserve the same to himself in the deed.

The Commonwealth did not acquire under the Acts of Assembly creating the Pennsylvania Canal the fee simple title to the land covered by the canal. The Acts which were construed in the cases above cited were different from those establishing this canal.

May 8. THE COURT. The first six errors assigned will be considered together. They involve the question whether the defendant in error owned the land and coal under the canal.

If the question was a new one, untrammelled by previous decisions, I should feel disposed to answer it in the affirmative. If, however, the authorities have settled it otherwise, we must assent to them as the true exposition of the law.

A reference to the legislation leading to the construction of the Pennsylvania canals will show, that they were all parts of one general system designed at the commencement.

By the Act of 27th March, 1824 (P. L. 92), the Governor was authorized and required to appoint three commissioners, whose duty it was to view and explore routes for a canal in various parts of the State, and make report to the Governor, to be laid before the next Legislature, to enable it "to act with a full knowledge of all the necessary facts"

The preamble to the Act of 11th of April, 1825 (P. L. 238), recites: "Whereas, the establishment of a communication between the eastern and western waters of this State and the lakes, by means of navigable streams and canals, would advance our agriculture, commerce, and manufactures: would unite in a common interest the great natural divisions of the State, and would, in the end, be an important source of revenue to the Commonwealth: and, whereas, the best interests of the State require that this great and important improvement should be the property of the Commonwealth, and that the Commonwealth ought to embark in it with that zeal and energy that is best calculated to carry it into effect;" therefore, the Governor was thereby required to appoint five canal commissioners, with the view of their ascertaining the most feasible routes for the construction of a canal. Section 3d declared "that the routes to be examined by virtue of this act shall be one from Philadelphia through Ches-

Digitized by Google

ter and Lancaster Counties, and thence by the West Branch of the Susquehanna and the waters thereof to the Alleghany and Pittsburg; also from the Alleghany to Lake Erie; one other from the city of Philadelphia to the northern boundary of the State, towards the Seneca or Cayuga Lake; one other through Cumberland and Franklin Counties to the Potomac River; and one by the Conococheague or Monocacey and Conewango to the Susquehanna;" and also "through the county of Bradford, to connect the route of the preposed Chesapeake and Ohio Canal with the Juniata route as aforesaid."

Section 4 made it their duty to cause the grounds and streams which might "lie on or contiguous to the probable courses and ranges of said canal" to be explored and examined for the purpose of fixing the most eligible and proper routes for the same, and to cause all necessary surveys and levels to be taken, and accurate field notes, drafts, and maps thereof, to be made."

The Act of 29th February, 1826 (P. L. 55), is entitled "An Act to provide for the commencement of a canal, to be constructed at the expense of the State, and be styled the "Pennsylvania Canal." It authorized the canal commissioners "immediately to locate and contract for making a canal and locks, and other works necessary thereto, from the river Swatara at or near Middletown, to or near to a point on the east side of the river Susquehanna, opposite to the mouth of the river Juniata; and from Pittsburg to the mouth of the Kiskeminetas."

Section 8 authorizes the commissioners to agree with the owners of any land through which the canal was intended to pass, "for the purchase, use, and occupation thereof;" and in case of disagreement or legal disability of the owner, it prescribed the mode of ascertaining the damages. It further declared, that "on the payment thereof the State shall be seized of such lands as of an absolute estate in perpetuity, or with such less quantity and duration of interest or estate in the same, or subject to such partial or temporary appropriation, use, or occupation as shall be required and described as aforesaid, as if conveyed by the owner or owners."

The Act of 9th April, 1827 (P L. 192), is entitled "An Act to provide for the further extension of the Pennsylvania Canal." It authorizes the canal commissioners to locate and contract for the construction of a canal "up the valley of the Juniata from the eastern section of the Pennsylvania Canal to a point at or near Lewistown; also up the valley of the Kiskeminetas and the Conemaugh, from the western section of the Pennsylvania Canal to a point at or near Blairsville, and also up the valley of the Susquehanna from the said eastern section of the Pennsylvania Canal to a point at or near Northumberland." It further authorized the making of numerous examinations and surveys, and the taking of levels in various parts of the State, including one "from Northumberland up the North Branch of the Susquehanna to the State line."

By the Act of 24th March, 1828 (P. L. 221), the canal commissioners were authorized and required "to locate and contract for making canals from the commencement of the Pennsylvania Canal at or near the mouth of the river Swatara, to Columbia in Lancaster County; from Lewistown to the highest point expedient and practicable for a canal on the Juniata; from a point at or near Northumberland to the Bald Eagle on the West Branch; from Northumberland to the New York State line on the North Branch; from a point at or near Taylor's Ferry to Easton, and from Blairsville to the highest point expedient and practicable for a canal on the Conemaugh."

Thus it appears the construction of all parts of the canal was in pursuance of a general system designed at the beginning. It had its inception in 1824; assumed a more specific and comprehensive form in 1825; and in 1826 the actual construction of the canals was authorized to be commenced. At first one link on the Susquehanna, another on the Alleghany, with no connection between them. From time to time, as loans were effected, new links were formed and branches extended, until the system was completed in furtherance of the original design. The portion constructed along the North Branch of the Susquehanna river was, in its inception and construction, an integral part of the main canal. The State acquired the same right and title to the land occupied by that portion of the canal as to the land occupied by any other portion.

The mode of assessing damages by the Act of 25th February, 1826, was changed by the Acts of 9th April, 1827, and the 6th April, 1830 (P. L. 218); but neither of these professed to change the title which the Commonwealth acquired to the land. All the Acts were part of the same system They dealt with the same general subject matter They are in *pari materia*. They must, therefore, be construed in connection with each other. (Commonwealth *v.* Fisher *et al.*, 1 P. R. 462; Commonwealth *v.* McAllister, 2 Watts, 190.) This last case arose on the application of claimants for damages. The distinction between *perpetual* and *temporary* use, contemplated by the Act of 1826, received a careful consideration. It was there substantially held that "temporary" was designed to apply to the use or possession of that larger portion of land which might be occupied during the construction of the canal, while "perpetual" was restricted to that portion which was permanently occupied by it after its completion

Haldeman *v.* Pennsylvania R. R. Co. (14

Digitized by Google

Wright, 425), rested on a different state of facts. The land had been taken under the Acts of 1826 and 1827 for the Pennsylvania Canal. The damages sustained by the then owner of the land were duly assessed in 1828 and paid. The canal was constructed on the land and used till 1857. Then under an Act of the Legislature the canal commissioners were authorized to change, and did change the location of the canal at that point. The old bed of the canal was filled up. The defendant in error, under the Act of 16th May, 1857, purchased all that portion of the canal and its appurtenances. On the old bed of the canal thus raised up, the railroad company erected shops and buildings The land had wholly ceased to be used for the purpose for which it had been taken. Haldeman had acquired the title of the person who owned the land when possession was taken for the canal, and when the damages were assessed He brought ejectment to recover possession Thus the question directly arose: What title did the State acquire when she took the land for the purpose of constructing a canal thereon? This Court fully adopted the correctness of the decision in Com'th *v.* McAlister *supra*, in holding that the title was thereby vested in the Commonwealth in perpetuity, that being so vested, a subsequent change of its use, and the occupancy of it for other purposes, did not impair the title of the Commonwealth or of her vendee That it was unlike a public road, where the fee remained in the owner; but under the Acts relating to the canal the State acquired title. Whether it was acquired by purchase, and a deed from the vendor, or whether the State took it by virtue of her right of eminent domain, it mattered not. It, therefore, followed that a cessation of the use for which it was taken, could not revest anything in its former owner.

The title which the Commonwealth acquired was again considered in Craig *v.* Mayor of Alleghany *et al.* (3 P. F. Smith, 477). There the owner of the land had released his damages in consideration of the benefits which would result to the community in general, and him in particular, from the construction of the canal. As in Haldeman *v.* Penna. R. R Co, the canal had been constructed and used as such on this land for many years, had been sold by the Commonwealth in 1857, and had ceased to be used as a canal. The conclusion that the Commonwealth had acquired an estate in perpetuity in the land was again affirmed Being an absolute and perpetual estate in the land occupied by the canal, the estate was neither revocable nor reversionary. It was said the expenditure made by the State in the construction of the canal was equivalent to a pecuniary compensation to the grantor.

The same question was again discussed in Robinson *v.* West Philadelphia Railroad Co. (22 P. F. Smith, 316). This was also a case of release of damages. After many years' use the ground had there been abandoned as a canal and basin. The conclusion that the Commonwealth took an absolute estate in perpetuity was again reaffirmed. It was further said the absolute estate of the Commonwealth could not be defeated or impaired by the owner's neglect or refusal to make application for his damages within the time limited by the Act

The case of Union Canal Co. *v.* Young, 1 Whart. 410, also shows that when land is procured for the building of a canal thereon, the presumption is that the right of soil is acquired and not a mere easement thereon.

It must, therefore, now be declared as the settled law of this State, that whenever the Commonwealth took land for permanent use under the Acts in question, and constructed and operated a canal thereon, she acquired an estate in the lands so taken, in perpetuity, and she may dispose of the same in fee.

It is contended, further, by the defendant in error, that, inasmuch as a tenant cannot dispute the title of his landlord, under whom he entered, held possession, and enjoyed the profits without any disturbance under a paramount title, therefore it is not admissible to prove that the defendant in error had no title to the coal under the canal.

The law between landlord and tenant may be conceded as claimed, yet the conclusion by no means follows. There was no contract creating a tenancy of lands by any certain or defined limits or bounds; nor was there any putting into possession by any designated or prescribed lines or muniments Possession of a part of the mines at first inadvertently taken on the lands of the defendant in error. was merely continued under an agreement for the payment of royalty, for the coal that might be mined within a specified time. The defendant owned two separate and distinct pieces of land. Lying between them was this strip which he did not own, and of which he had no possession. There is no evidence indicating an intention to put the company into possession of land that he did not own. There is, therefore, no warrant for the assumption that the relation of landlord and tenant existed as to the land under the canal. Hence it follows that the question covered by the second assignment is irrelevant and the other five assignments are sustained.

The seventh assignment is that the Court instructed the jury "fairly to re-state the account between them just as if they had sent no statement at all." Looking at other portions of the charge, we understand the learned Judge to mean, that if the jury first find the account rendered to be inaccurate and untruthful, then they shall re-state as if none had been sent. So understanding it, we see no error in the instruction.

The ninth and eleventh assignments may be

Digitized by Google

considered together The mining operations in question closed on the 1st of January, 1871. An account of the quantity of coal mined in June was first rendered. After that quarterly returns were made, the last on the 19th of January, 1871. During the whole time the mining operations were in progress, no complaint was made as to the time, manner, or truthfulness of these reports. Crane, who was both secretary and treasurer of the company, swears that no objection was made until after the mine was flooded in July following. While the work was in progress the defendant in error was in nowise restrained in a free access to the mines, and to the mining accounts for any investigations he may have desired to make If he failed to exercise these rights the conclusion is a reasonable one, that he was then satisfied with the accounts rendered. Having then acquiesced in them for so long a time, the presumption is in favor of their accuracy That presumption may be overthrown by testimony showing them to have been either inaccurately kept or untruthfully rendered.

The testimony shows that in conducting the mining operations, each chamber or breast was numbered. Each car had a number attached to it, showing the breast from which it came. The credit was given to the car, and to the account of the man working the breast. As the coal came to the breaker these accounts were taken. These returns were entered on the books, but the evidence for this shows that those books were not thought worth preserving for any length of time, and were probably not in existence; but if in existence they were at Wilkesbarre, and no notice had been given to produce them In view of all the facts, we think the learned Judge unduly prejudiced the case in saying it was not for the defendant in error "to drag out as best he can a detailed statement from them," and in further saying "there has not been the scrape of a pen, a book of any kind produced here for the inspection of Mr. Price." It does not appear that anything asked for, which was in the power of the plaintiff in error to produce, had been withheld

We discover no substantial error in the remaining assignments.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by MERCUR, J. WILLIAMS, J., absent.

Oct. & Nov '76, 33. Oct. 7.

Thompson et ux. v. Thompson.

Voluntary settlement by husband on wife—When not fraudulent as against creditors—Estoppel—When creditor, who loaned husband part of purchase money, estopped from attacking wife's title.

A. bought a lot of land and gave it to his wife, the deed being made in her name. At the time of its execution, he borrowed from B., who was present, a portion of the purchase-money; part of this loan he subsequently returned, and he gave his judgment note for the balance, together with the amount of a new loan. A. subsequently became insolvent, and B., having purchased the property at a sheriff's sale under the judgment note, brought ejectment against A. and wife:

Held (reversing the judgment of the Court below), that, in the absence of evidence of indebtedness by A. at the time of the purchase, or of intent to defraud creditors, the voluntary settlement on the wife was good.

Held further, that the validity of the settlement was not affected by the debt incurred by A. at the time.

Held further, that it was a question for the jury whether B. knew at the time that the purchase was made in the wife's name; and that if he did, he was estopped from attacking her title.

Nippes's Appeal (25 Sm. 472) approved.

Error to the Common Pleas No. 1, of Allegheny County.

Ejectment by William Thompson against George Thompson and Jane, his wife, for a lot of ground on Lacock Street, Allegheny City. Plea, Not guilty.

The facts were as follows: George Thompson bought the land in controversy of R. C. Wilson, on March 22, 1866, and had the deed therefor made out in his wife's name. The price of the property was $1425, which George Thompson paid in cash, borrowing $500 thereof from William Thompson, at the time of the execution of the deed. There was no evidence that at the time of the purchase, George Thompson owed any other debts, or that he was about to enter into any hazardous business; nor were any other circumstances shown at the trial, which would indicate that the conveyance to his wife was made with an intention to defraud creditors. The debt to William was reduced by various payments to $187, before July 5, 1870. On that date William Thompson loaned George Thompson $600, which with the $187 and another small debt of $51 was included in a judgment note given by the latter to the former. The property was sold by the sheriff under a judgment entered upon this note, and was purchased by William Thompson, who brought this action to recover possession.

At the trial the defendant offered evidence to show that William Thompson was present when the deed was executed, and that the contract was

Digitized by Google

made in pursuance of his advice. His name appeared as a subscribing witness to its execution. George Thompson swore that he handed him the deed before it was signed, with a request that he would look at t to see if it was all right.

There was no evidence as to the extent of George Thompson s property, if any, at the time of the settlement

The defendant offered the following points: (1) The indebtedness of 1866 was paid by the judgment bond of July 5, 1870, which latter bond made an entirely new indebtedness, accruing four years subsequent to the purchase from Wilson *et ux.* (2) If the jury believe from the evidence, that the plaintiff knew of the conveyance to Jane Thompson, and loaned the money to George Thompson, then the plaintiff accepted George Thompson individually as creditor, without reference to the property. (3) If the jury believe that the plaintiff knew of the conveyance to Jane Thompson, and loaned his money to George Thompson, he is estopped, and defendant is entitled to recover. (4) His signature as witness to the deed is some evidence of knowledge on the part of plaintiff.

The Court (STERRITT, J.) refused to charge as requested, and instructed the jury to find for the plaintiff.

Verdict and judgment for the plaintiff. The defendant took this writ, assigning for error the above-mentioned action of the Court.

S. C. Schoyer, for plaintiff in error.

The evidence should have been submitted to the jury. If they believed that the plaintiff was present at the execution and delivery of the deed, and knew that the purchase was being made for the wife, the plaintiff would be estopped from denying Mrs. Thompson's title.

French *v.* Mehan, 6 Sm. 286.

If this position is not correct, the only question in the case is whether the conveyance to Mrs. Thompson was intended to defraud creditors This was certainly a question for the jury.

William *v.* Davis, 19 Sm. 21.
French *v.* Mehan, *supra.*
Nippes's Appeal, 25 Sm. 472.

The peremptory instruction of the Court was therefore erroneous.

Strohl *v.* Levan, 3 Wr. 177.

J. W. Kirker, contra.

Where a married woman claims, against her husband's creditors, property purchased after marriage, she must prove conclusively that she paid for it with funds not furnished by her husband. There being no such evidence in this case, the Court properly directed a verdict for plaintiff.

Gamber *v.* Gamber, 6 Har. 366.
Keeney *v.* Good, 9 Id. 355.
Raybold *v.* Raybold. 8 Id. 311.
Walker *v.* Reamy, 12 Cas. 410.
Winter *v.* Walker, 1 Wr. 156.
Anraud *v.* Schaffer, 7 Id. 363.
Tripner *v.* Abrahams, 11 Id. 220.
Baringer *v.* Stiver, 13 Id. 129.
Flick *v.* Devries, 14 Id. 266.
Curry *v.* Bott, 3 Id. 400.
Bowers' Appeal, 18 Id. 126.

Oct. 3. THE COURT. When George Thompson procured the conveyance to be made by Wilson to Mrs. Thompson, he owed no debts, and nothing appeared on the trial to show that he was about to enter into any hazardous business, or to contract fresh obligations. Doing no act indicating an intention to defraud creditors, it was competent for him to settle the land in controversy upon his wife. And his right to do this was not affected by the bare fact that he borrowed $500 to pay on account of the purchase money from William Thompson, the plaintiff below, at the time of the execution of the deed. In Williams *v.* Davis (19 P. F. Sm. 21), land subject to a purchase-money mortgage given by a husband had been conveyed to a wife. It was held that this was not such a debt as to render the conveyance void against subsequent creditors. The same point was ruled in Nippes's Appeal (25 P. F. Sm. 472). In the last case it was said that in the absence of proof of any fraudulent intention, the fact that the land conveyed was all the property the husband had was immaterial. If the plaintiff lent his money with full knowledge that the deed had been executed to Mrs. Thompson, the land in her hands could not be made liable for the debt her husband had incurred, in consequence of his subsequent inability to pay. The loan was to the husband, and if the plaintiff knew he had no title, it was upon his personal credit, and not on the credit of the property. On the other hand, if the money was lent in ignorance of the true nature of the transaction, and in the belief on the plaintiff's part, that the deed of Wilson and his wife had been made to George Thompson, he had the right to pursue the land. To permit the wife to hold it relieved from a claim for a portion still due and unpaid of the original purchase-money which the plaintiff had advanced under a mistake in regard to the ownership, would be the sanction of a fraud.

On the trial the defendants alleged that the plaintiff was aware of all the facts. There was evidence that he was present when the deed was executed. The contract to buy had been made in pursuance of his advice. George Thompson swore that he handed him the deed before it was signed, with a request that "he would look at it to see if it was all right." And his name appears as a subscribing witness to its execution.

The last three assignments of error raise in substance but a single question. The Court had been asked to instruct the jury that if they should believe from the evidence that the plaintiff knew of the conveyance to Jane Thompson, and lent the

Digitized by Google

money to George Thompson, then the plaintiff accepted George Thompson individually as his debtor without reference to the property; that upon such facts he would be estopped; and that his signature as witness to the deed was some evidence of knowledge on his part. The instructions asked were refused, and a verdict in favor of the plaintiff was peremptorily directed. All these points should have received an affirmative answer. In French *v.* Mehan (6 P. F. Sm. 286), land had been conveyed in 1828 to a husband and wife as joint tenants. The grantor at the time held a bond against the husband for which a judgment had been recovered in 1832. Under that and other judgments the land had been sold in the husband's lifetime. After the husband's death the wife brought ejectment, and it was held that she was entitled to recover. Judge WILLIAMS, in charging the jury on the trial in the District Court, said: "It has not been shown that the husband, at the date of the purchase, owed any other debt than the one to Dickerson, the grantor of the land, and it can hardly be presumed or inferred that the deed was made to the wife for the purpose of hindering and delaying the grantor in the collection of the debt due by the husband. It seems to me that both he and the purchaser under the judgment obtained by him for such indebtedness, would and ought to be estopped from making any such allegation." The judgment was affirmed on the grounds stated by Judge Williams.

The fact of knowledge was denied by the plaintiff. He said he first discovered that the deed had been made to Mrs Thompson during the winter before the trial. The question rested on the evidence of the witnesses, and could be settled legitimately only by a verdict. The Court should have referred it to the jury.

The first point of the defendant was properly refused. In the bond which was given by George Thompson on the 5th of July, 1870, a balance of $187 remaining due on the note of 1866 was included. If the plaintiff remained in actual ignorance of the conveyance to Mrs. Thompson until 1875, he was not estopped from asserting his claim against the land by his acceptance of the bond

Judgment reversed, and *venire facias de novo* awarded.

Opinion by WOODWARD, J. WILLIAMS, J., absent.

[See Tatham *v.* Crawford, 2 WEEKLY NOTES, 365.]

May '76, 116. June 9.

Rolland and Johnston v. The Commonwealth.

Criminal law—Burglary—Entry without breaking—Subsequent breaking out in attempt to escape—Entry by fraud or artifice a constructive breaking—Acts of 31 *March*, 1860, *sec.* 135, *and* 22 *April*, 1863, *sec.* 2—*Custody of jury wheel by commissioners—When sufficient—Act of* 10 *April*, 1867—*Irregularities in drawing grand jury—When not available to defendant—Return of jury commissioners to venire—Personal interest of grand juror—How taken advantage of—Discretion of Court as to order in which counsel shall sum up—Evidence—Practice.*

Where there is no actual or constructive breaking into a dwelling-house, the mere entry by night with intent to commit a felony does not constitute burglary.

Where there has been no burglarious entry, the breaking *out* of the house by a thief in an attempt to escape does not constitute burglary.

Obtaining an entry into a dwelling-house by fraud or artifice is a constructive breaking into it.

The 135th section of the Act of 31 March, 1860, was intended to define and punish the common law offence of burglary, and the words "break *or* enter" in said section should be read "break *and* enter."

The words "with or" (with or without breaking) in the second section of the Act of 22 April, 1863, were not intended to apply to dwelling-houses.

Two men, intending to gain entrance to a dwelling-house for the purpose of committing a felony, went to the door and endeavored to gain admission by pretending to have business with the occupant. Being informed that he was not in but would return shortly, they went away. About twenty minutes afterwards they returned and were admitted without any further reference to their pretended business. Upon their subsequent trial under an indictment for burglary:

Held, that it should have been left to the jury to say whether the first call was for the purpose of gaining admission to the house by fraud or artifice, and whether the second call was a part of the same transaction.

A jury wheel was kept in a locked chest in the vault of the County Commissioners' office, the clerk of whom was also clerk to the jury commissioners. The key to the wheel was kept in an unlocked drawer in the sheriff's desk, at his office:

Held, a sufficient custody of the wheel by the jury commissioners under the Act of 10 April, 1867.

A failure to comply with the requirements of the 135th section of the Act of 14 April, 1834, that the names of excused and exempted jurors shall be returned to the wheel, cannot be taken advantage of by a defendant.

It is not a good challenge to an array of jurors that the Sheriff drew the minimum number and failed to draw substitutes for three of these who were either dead or had removed from the county, there being no evidence that their death or absence was known to the sheriff at the time of the drawing.

It is the duty of jury commissioners to make a

Digitized by Google

return to the venire, but their failure to do so is amendable.

A grand juror may be challenged for cause, but if no such challenge is made, the fact that he has a personal interest in the prosecution forms no ground for quashing the indictment.

The order in which counsel shall sum up is in the discretion of the Court below, and is not assignable for error.

Error to the Court of Oyer and Terminer of Franklin County.

Indictment of Ralph L. Rolland and B. Johnston for the crime of burglary. The facts of the case were substantially as follows: The prisoners, Rolland and Johnston, on the evening of the 24th of March, 1876, about half-past eight o'clock, called at the residence of George R. Messersmith, cashier of the National Bank of Chambersburg, with whom Rolland was acquainted, and who lived in the building occupied by the bank They rang the bell, and Mr. Kindline, a brother-in-law of Messersmith, came to the door and informed them that Messersmith was not in. Rolland said that he would like to see Messersmith, that he had a friend from New York who wanted to transact a little business with him, and he then introduced his companion as Mr Johnston. They then left, saying that they would return later in the evening, which they did, and on again inquiring for Messersmith were shown into his private office. Rolland introduced Johnston to Messersmith as the person of whom he had previously spoken in reference to the purchase of a farm. After some conversation about the farm Messersmith was suddenly seized and an attempt made to gag him. He, however, resisted so desperately that the noise alarmed the other inmates of the house; Rolland and Johnston then attempted to escape, taking with them a package of money from the private desk of Messersmith. In leaving the house they unlatched and opened several doors, leading to the street, that being closed opposed their exit. They were captured shortly afterwards, and on April 25, 1876, an indictment was presented against them by the grand jury, containing four counts, which charged:—

(1) That the defendants "on the twenty-fourth day of March, A.D. 1876, about the hour of nine o'clock of the night of said day, with force and arms, at the county aforesaid and within the jurisdiction of this Court, the dwelling house of one George R. Messersmith, there situate, feloniously and burglariously did *break and enter*, with intent the goods and chattels, moneys and property of the National Bank of Chambersburg, in the said dwelling-house then and there being, from the presence and lawful custody of the said George R. Messersmith, and against the will of the said George R. Messersmith, then and there feloniously and burglariously and by force and violence, to rob, steal, take, and carry away, contrary, etc.

(2) That the said defendants . . . . with force . . . the dwelling-house . . . wilfully maliciously, feloniously, and burglariously did *enter* with intent the goods and chattels, moneys and property of the National Bank of Chambersburg in the said dwelling-house then and there being, from the presence and lawful custody of the said George R. Messersmith, and against the will of the said George R. Messersmith, then and there feloniously and burglariously and by force and violence to rob, steal, take, and carry away, contrary, etc.

(3) That the said defendants . . . . the dwelling-house . . . with force and arms feloniously and burglariously did *break and enter*, with intent the goods and chattels, moneys and property of the National Bank of Chambersburg, in the said dwelling-house, then and there being, then and there feloniously and burglariously to steal, take, and carry away, contrary, etc.

(4) That the said defendants . . . . the dwelling-house . . . . wilfully, maliciously, feloniously and burglariously did *enter* with intent the goods and chattels, moneys and property of the National Bank of Chambersburg, in the said dwelling-house, then and there being, then and there feloniously and burglariously, to steal, take, and carry away, contrary, etc.

A challenge was filed by the prisoners to the array of grand and petit jurors for the April term of the Court for, *inter alia*, the following reasons:—

(*a*) Because the jury wheel had not remained in the custody of the jury commissioners, and was not then in their custody as was required by the Act of 10 April, 1867. (Purd. Dig. 829, p 2.)

(*b*) Because the sheriff and jury commissioners at the time of the selecting and placing in the wheel the names of the jurors did not secure the jury wheel in the manner required by law, they having failed to secure the said wheel by sealing the same with their respective seals, the said wheel being sealed with only one seal, if any.

(*c*) Because the keys of the said jury wheel had not at all times been and remained uninterruptedly in the custody of the sheriff of the county.

(*d*) Because the number of persons drawn to serve as petit jurors at the present term of the Court of Oyer and Terminer was the *minimum* number, forty-eight, of which number only forty-five were actually summoned, two of the persons named in the venire being returned by the sheriff "not found," and another one being returned as "dead."

(*e*) Because the sheriff and jury commissioners of the county did not destroy the slips contain-

Digitized by Google

ing the name of the absent jurors nor that containing the name of the deceased juror, and proceed to draw other names until the panel was completed as required by law.

(*f*) Because the Prothonotary of the Common Pleas and clerks of Quarter Sessions and Oyer and Terminer did not nor did either of them, certify to the sheriff and jury commissioners of the county at the end of February term, 1876, the names of the jurors who appeared and served at that term, or who were excused from serving thereat, nor of those who were privileged and exempted from serving, as required by law.

(*g*) Because the names of the persons selected, drawn, summoned, and making default, also the names of the persons excused and exempted from serving as jurors at the February term of the Courts, were not returned by the sheriff and jury commissioners to the wheel from which they were taken at the time of the drawing the names of the grand and petit jurors to serve and be summoned for the present term of the said Courts, although such persons were resident within the county and competent and liable to perform the duties of a juror as required by law.

(*h*) Because it did not appear from the return to the precept that the jurors were legally drawn, how they were drawn, or that they were in fact drawn at all, nor did it appear from the record that they were legally summoned.

Evidence was produced in support of this challenge, which disclosed that the jury-wheel was kept locked in a chest in the vaults of the county commissioners' office, and that the clerk to the county commissioners was also clerk to the jury commissioners; that the key to the wheel and that of the chest were kept together in a small drawer in a desk in the sheriff's office, which drawer was not always locked, and that any person entering the office might at times have access to it. The sheriff, however, testified that he had no reason to believe that anybody had had access to the wheel since it had been locked. The jury-wheel had been sealed by the sheriff and certainly one commissioner, when it had been last opened, and their seals were recognized by them. There was no evidence that the other commissioner had not also sealed the wheel, nor was he called to testify as to this. No testimony was offered to show that the jury-wheel had been tampered with. No certificate of persons drawn, summoned, selected, and making default, nor the names of persons excused or exempted from serving as jurors at the preceding February term was ever furnished to the sheriff by either the prothonotary or clerk; nor were such names returned to the wheel by the sheriff or jury commissioners. The venire for April sessions, 1876, having been shown to the sheriff, he testified that it was put into his hands for the drawing and summoning of jurors in the Oyer and Terminer. The panel contained forty-eight names. The words "not found" were inserted in the panel, opposite to the names of two jurors, and the word "dead" opposite to that of another. The sheriff did not know at the time of the drawing of these jurors of their absence or death, and only discovered the same when he went to serve the summons upon them. No return to the venire by the jury commissioners appeared of record, and the commonwealth to supply the same offered in evidence a book called the Jury Record, which was kept by the jury commissioners, but was not sworn to by them. An entry in this, showed that the commissioners and sheriff had met on March 22, and drawn from the jury-wheel the jurors, grand and traverse, for April Term, 1876, of the Oyer and Terminer, and gave the names as drawn. This entry was signed by the commissioners but not by the sheriff until within a few minutes prior to its being offered in evidence. This jury record was objected to, but admitted by the Court, and an exception taken by the prisoners.

In addition to the challenge, a motion was made to quash the indictment; the reasons assigned being the same as those given in support of the challenge to the array of jurors, with two additional reasons, viz., that the foreman and another member of the grand jury were directors and stockholders in the Bank of Chambersburg. This latter fact was admitted by the district attorney.

After reviewing the evidence, the Court overruled the challenge, and the motion to quash the indictment, and exceptions were taken. The prisoners were thereupon arraigned and pleaded not guilty.

Upon the trial of the case several exceptions were taken to the rulings of the Court upon questions of evidence and practice, which, with one exception, it is unnecessary to state.

John L. Black, a witness for the Commonwealth, having testified that he occupied a room with a gunsmith; that Johnston looked like a man he saw there, but could not say positively; that the prisoner resembled the man more than any other he had seen, and that his best judgment was that Johnston was the man; the prosecution offered to prove that Johnston called at witness's shop to have the lock of a satchel repaired, to be followed by evidence of its contents on the night of the attempted robbery as found near the bank. The defendants' counsel claimed the right at this stage of the examination to cross-examine the witness as to his opportunities of knowing this defendant, and as to what constitnted the basis of his opinion as to identity. This the Court refused, and noted an exception.

No evidence was offered on behalf of the prisoners, and for this reason their counsel claimed

Digitized by Google

the right to make the closing speech to the jury. This was refused by the Court and an exception taken.

The prisoners' counsel presented a number of points which, with the answers of the Court thereto (ROWE, P. J.), were as follows:—

(1) Even if the jury do believe all the evidence adduced by the Commonwealth, still it fails to make out the crime of burglary, which is the crime, and the only one, charged against the prisoners in the present indictment. *Answer:* This is not a correct statement of the law of the case; I refuse to instruct you as herein required, and instruct you on the contrary, that the evidence adduced by the Commonwealth is sufficient to make out the crime of burglary charged in the indictment, if the witnesses are believed, and if such evidence shows that the defendants entered the dwelling-house of Geo. R. Messersmith by night, with intent to rob him of the moneys of the National Bank of Chambersburg, or to steal those moneys. For burglary at common law is, where one breaks *and* enters into the dwelling-house of another in the night time, with the intent to commit a felony within the same. But it is felonious burglary by our statute,* if any person shall, by night, wilfully and maliciously *enter* into any dwelling-house, with an intent to rob, steal, or commit any felony whatever, whether the felonious intent be executed or not. The language is break *or* enter, not break *and* enter. So that an entrance without breaking may be felonious burglary, according to the words of the statute.

(2) If the jury believe from the evidence that the prisoners rang the door-bell at Mr. Messersmith's dwelling, and the door was opened by Leonard B. Kindline, then a usual and habitual inmate of the house, and that he escorted them and showed them into the Cashier's room, where Mr. Messersmith was then sitting, and where the offence is alleged to have been committed against the property of the National Bank of Chambersburg, then alleged to be in his custody, these facts do not constitute such a breaking and entering as amount in law to the crime of burglary. *Answer:* This point is affirmed, and if there is no other evidence of a breaking, then the defendants cannot be convicted on the first and third counts in the indictment, which charge a breaking as well as an entering. For although there is evidence to show that the defendants alleged business to be their object, when they first called and were met at the door by Mr. Kindline, yet it appeared they were not then admitted, but were admitted twenty minutes or so afterwards, upon no pretence. So that there was no fraud in them, which the law could regard as equivalent to a breaking in the manner in which they obtained admittance into the house.

(3) There is no such evidence of fraud or trick practised by the prisoners to gain admission into the house at the time they actually did enter it, even if all the testimony in the case is believed by the jury, as makes the entry of the prisoners a burglarious entry. *Answer:* There is not sufficient evidence of fraud or trick practised by the prisoners to gain admission into the house as will establish a *breaking*, but the entry of the prisoners may have been a burglarious entry, without breaking, as we have already said.

(4) Even if the jury should believe from the evidence that after the alarm was made, and pursuit of the prisoners commenced, they retreated through the kitchen, unlatching the door and passing out, these facts do not amount in law to such a breaking and entering as will justify the jury in convicting the prisoners of burglary. *Answer:* This is refused. I instruct you to the contrary, that if the prisoners retreated through the kitchen, unlatching the door and passing out, these facts do amount in law to a breaking.

(5) If the jury believe from the evidence that the passing out of the house by the prisoners was as described in the fourth point, and this is the ground upon which the alleged offence is claimed to be burglary, the Commonwealth was bound to so state in the indictment, and having failed to do so there can be no conviction of burglary on the present indictment. *Answer:* This point is refused. A breaking out of a dwelling-house by one who entered it by night with intent to commit a felony, is burglary at common law, and the Commonwealth were not bound to state a breaking *out* in the indictment, but a breaking only, and there may be a conviction on this indictment, as well on the first and third counts, which charge a breaking, as on the second and fourth, which do not, but charge an entry only, for I have said that entering without breaking is enough.

(7) If the defendants are shown by the evidence to be guilty of any crime at all, it is the offence defined in the second section of the Act of 22d April, 1863,* and not burglary, and there

* The 135th Section of the Act of 31 March, 1860 (Purd. Dig. 352, pl 194), provides that "If any person shall by night, wilfully and maliciously break or enter into the State Capitol, or other public buildings belonging to the Commonwealth, or to any city or county thereof, or to any body corporate, society or association, or into any church, meeting-house or dwelling-house, or out-house, parcel of said dwelling-house, with intent to kill, rob, steal, or commit a rape, or any felony whatever, whether the felonious intent be executed or not, the person so offending shall, on conviction, be adjudged guilty of felonious burglary," etc. Penalty: fine not exceeding $1000, and imprisonment not exceeding ten years.

* The second section of Act of 22d April, 1863, (Purd. Dig. 353, pl. 195), which was in effect an amendment of the 136th section of the Act of 31st March, 1860, provides that "If any person shall in the day time, break and enter any dwelling-house,

Digitized by Google

can be no conviction of that offence, there being no count in the indictment charging such offence. *Answer:* The second section of the Act of 22 April, 1863, was intended to punish and provide for the breaking and entering of a dwelling-house, by day time, and of other buildings by day or by night. Any other reading of this section makes it cover what was burglary at common law, which was not the legislative intention.

Counsel for the prisoners excepted to the answers of the Court to each of above points.

Verdict, "Guilty in manner and form as indicted." The Court thereupon sentenced Rolland to ten years and Johnson to eight years imprisonment in the Eastern Penitentiary.

The prisoners took this writ of error, assigning for error the overruling of their challenges to the array of jurors and their motion to quash the indictment, the ruling of the Court on the questions of evidence above set forth, and the answers to their points.

J McDowell Sharpe (with him *Duncan & McGowan*), for the plaintiffs in error.

(1) Error in disallowing challenge to jurors. The Act of 10 April, 1867 (Purd Dig. p. 829, pl. 2), provides that "the jury wheel shall remain in the custody of the jury commissioners and the keys thereof in the custody of the sheriff of the county." This Act clearly contemplates entire and unrestricted custody of the wheel. Here they had neither personal custody of the wheel nor absolute control of the vault where it was kept. The absence of evidence that the wheel had been tampered with is no answer to a challenge on this ground.

Brown *v.* Com'th, 23 Sm. 322.

The wheel was only proved to have been sealed, when last locked, by the sheriff and one commissioner, while the Act of 14th April, 1834 (Purd. Dig. 831, pl. 16), rëenacted by the Act of 1867, *supra*, requires it to be sealed by the sheriff and both commissioners. This in Brown *v.* Com'th, *supra*, was held a fatal objection to the panel.

There was no evidence that the jurors returned had been drawn from the wheel. The only return to the venire (the sheriff's) merely stated that the jurors whose names were attached thereto had been *summoned*. In Eaton *v.* Com. (6 Bin. 447), a conviction by a jury returned in a similar manner was reversed.

(2) Error in refusing to quash indictment. Objections to grand jurors may be taken advantage of at any stage of the proceedings.

Doyle *v.* State, 17 Ohio, 222.
Huling *v.* State, 17 Ohio St. 588.
State *v.* Rockafellow, 1 Halst. (N. J.) 340.

(3) Error in answering points.

The word *or* (break or enter) in the 135th section of the Criminal Code is to be construed *and* (break and enter).

This section was intended to define that offence which at common law was burglary, and to constitute which, both a breaking and entry were necessary.

By any other construction, the Legislature has in two consecutive sections of the same act described the same offence and punished it with different penalties. "Or" has frequently been construed "and"; noticeably in the Married Women's Act (Murray *v.* Keys, 11 C. 384), and in the Act prescribing a penalty for marrying minors.

Bollin *v.* Shiner, 2 Jones, 205.

The "breaking out" of a dwelling-house was not burglary at common law, but was made such by the Statute of 12 Anne, which has never been in force here.

2 Shars. Blackst. *227.
2 Bishop's Cr. Law, § 99–105.
2 Whart. Cr. Law, § 1546.

Bowers, Dist. Att'y, and *Stewart* (with whom was *Kennedy*), contra.

The jury wheel was constructively in the possession of the jury commissioners, it being under the immediate control of their sworn clerk. The Act of 1867 does not require personal custody, for it is impossible

It was not necessary that the whole 48 jurors should be returned as summoned.

Rex *v.* Hunt, 4 Barn. & Ald. 430.
Foust *v.* Com., 9 C. 338.
Sparks *v.* Plankinhorne, 4 Y. 384.

And the failure to destroy the slips containing the names of the absent or removed jurors is accounted for by the fact that such absence or removal was unknown to the officers who drew the jury.

The irregularities attending the drawing of the jury did not tend in any way to affect the rights of the prisoners, and could not be taken advantage of by them

Friery *v.* People, 2 Keyes, 424.
Ferris *v.* People, 35 N. Y. 125.

Notwithstanding these cases relate to statutes of another State, the reasoning of the Court applies with equal force to our own statutes, because of the similarity of the provisions.

The Act of 1867 does not require a return by the jury commissioners of the drawing of jurors, but only by the sheriff. Eaton *v.* Com., *supra*, was decided under the Act of 4th April, 1807, which required returns by both sheriff and commissioners. The omission of the sheriff to return that jurors were drawn is amendable.

Dewer *v* Spence, 2 Wh. 221.
Com. *v.* Chauncey, 2 Ashmead, 99.

---

shop, warehouse, store, mill, barn, stable, out-house, or other building, or wilfully and maliciously, either by day or by night, with or without breaking, enter the same with intent to commit any felony whatever therein, the person so offending shall be guilty of felony," etc. Penalty: Fine not exceeding $500, and imprisonment not exceeding four years.

Digitized by Google

But it is by no means clear that the return in this case is insufficient, since the law presumes that a sheriff who has returned his writ executed, has proceeded according to law.

Com. v. Green 1 Ashmead, 292.

Objection to personal qualification of grand jurors must be made before indictment found.

Com. v. Clarke, 2 Browne, 325.

Com. v. Smith, 9 Mass. 107.

The 136th section of the Act of 1860 (Crim. Code), as amended by the Act of 1863, may be readily made to harmonize with the 135th section by excluding "dwelling-houses" from the purview of the word "same" in the second clause of the first mentioned section. The obvious intention of the Commissioners and Legislature was to define and punish the offence of entering a "*dwelling-house by night, with or without breaking*" with a severe penalty, while the entering of such a house by day *without breaking*, or any of the other buildings described in the 136th section *by day or by night* and *with or without breaking*, which are not so serious offences, are punished with a lighter penalty.

Even if the word "or" in the Act of 1860 is to be read "and," still the prisoners were charged in two of the counts of the indictment with breaking *and* entering, and as they were convicted on all of the counts, the judgment ought not to be reversed.

Oct. 23. THE COURT. This case was contested, step by step, in the Court below, and pressed with marked zeal and ability here. The Commonwealth was met at the threshold of its case with a motion to quash the array of grand and petit jurors, and also to quash the indictment. Both motions were overruled, and this action of the Court below forms the subject of the first and second specifications of error. We will consider briefly the reasons assigned in support of these motions respectively. It was urged that there was irregularity in regard to the custody of the jury wheel, the sealing of the same, and in the manner in which the keys were kept. It appears from the evidence taken in support of the challenge to the array that the wheel was deposited by the jury commissioners in the vault of the county commissioner's office, after being first placed in a chest, and the chest locked. The clerk of the county commissioners was also the clerk of the jury commissioners, and was duly sworn. It was therefore in the actual charge of their own sworn officer. After the drawing of the jurors for the February Term, the sheriff and one at least of the jury commissioners sealed the wheel. The other jury commissioner was not sworn. The sheriff says: "I have a seal; Mr. Etter has also a seal: my seal is on this wheel. These impressions are not with the same seal. Two seals were there, I think—that is my impression." It also appeared that the sheriff kept the key of the wheel in his desk at his office, to which his son, who is his deputy, had access. The desk was not kept locked all the time. The second section of the Act of 10th of April, 1867 (P. L. 62), provides that "the said jury wheel, locked as now required by law, shall remain in the custody of the said jury commissioners, and the keys thereof in the custody of the sheriff of said county." We must give this section a reasonable interpretation. It does not designate where the wheel shall be kept, and provides no place in which the jury commissioners may deposit it. It was not intended that they shall carry it to their private residences. In many instances they reside several miles from the county seat. Its removal from the seat of justice would be as inconvenient as unnecessary. It is difficult to see what better disposition these commissioners could have made of the wheel than to deposit it in a vault attached to one of the public offices, where it was under the immediate charge of their own officer. It was clearly in their custody within the meaning of the law. The objection that the wheel was not properly sealed is not made out by the proof. The onus was upon the party making the challenge, and it has not been sustained. In Brown v. Com. (23 P. F. S. 322) there was proof that the wheel was not sealed as required by law. Here there was positive proof that the sheriff and one commissioner did seal, and no proof that the other did not. It was the duty of the plaintiffs in error to have called the other commissioner. That he also sealed is probable from the testimony of the sheriff. In the absence of any negative proof the presumption is that his duty in this respect was properly performed. The sheriff had the custody of the key. In that the law was complied with. We think, however, that it was carelessly kept; officers charged with such delicate duties cannot be too exact in the performance of them. A prudent regard for the public interest requires that the key of the jury-wheel should be kept where it is not accessible to any one but the person charged with its custody. We do not see much force in the further objection that the minimum number of an Oyer and Terminer panel, viz., forty-eight, were not in point of fact summoned. One of the names drawn from the wheel was returned by the sheriff "not found," and one as "dead." This of course reduced the panel to that extent. Section 113 of the Act of 14th of April, 1834 (P. L. 39), requiring forty-eight jurors to be summoned and returned as petit jurors in the Oyer and Terminer must be read in connection with sections 118, 119, and 125 of said Act. Section 113 refers to the venire, and the manifest meaning of it is that the venire shall require that at least forty-eight jurors shall be drawn. Section 118 provides that so many persons shall be drawn

Digitized by Google

as shall be required by the writ of venire. By section 119 the slips containing the names of persons removed or dead are to be destroyed, and other names to be drawn in their stead until the panels are complete. This of course means where the death or removal of the persons whose names are drawn was known to the sheriff and commissioners at the time of the drawing. The 125th section provides that the sheriff shall summon, at least ten days before the return day of the venire, the persons whose attendance shall be thereby required. Taken together, we do not think that these provisions of the Act of 1834, require more than that forty-eight names shall be drawn from the wheel, and that in the absence of any knowledge at the time that any of the persons whose names are so drawn are dead or removed, the sheriff shall summon so many thereof as can be found within the county. This, we believe, has been the practice generally throughout the State, and is entirely consistent with Foust *v.* Com. (9 Casey, 338). In that case forty-eight persons were summoned, but one of them was disqualified by reason of not residing within the county and being an alien. He was therefore not a juror, and of no more service than the persons returned by the sheriff in this case as "not found" and "dead." It is not a right of a defendant to have forty-eight jurors in actual attendance in the Oyer and Terminer. If all are summoned and attend, the Court may excuse some of them, and this cannot be assigned for error. (Jewell *v.* Com. 10 Harris, 94.) Nor can a defendant be prejudiced thereby. It does not impair his right of challenge. He has a right to his peremptory challenges and as many more as he can show cause for, while special venires are provided by law in case the panel should be exhausted. It was clearly no ground of challenge that the sheriff and jury commissioners did not destroy the slips containing the names of the jurors absent or deceased, and draw others in their stead. It does not appear that such death or absence was known to either the sheriff or jury commissioners when the names were drawn. There was therefore no omission of duty on their part; nor do we see any force in the further objection that the names of persons exempted at the February Term from serving as jurors were not returned to the wheel at the time the present panel was drawn. The 135th section of the Act of 14th April, 1834 (P. L. 364), provides that "the name of every person selected, drawn, summoned, and making default as aforesaid, also the name of every person who shall be excused from serving, shall be returned by the sheriff and commissioners to the wheel from which it was taken at the time of the next drawing from the said wheel for any of the Courts of such county," etc. This duty was neglected. The names were not returned to the wheel as they should have been. But we are unable to see how the defendants were injured by this omission. It is a matter of which they have no right to complain. This section of the Act of 1834 was intended to secure equality in the performance of jury duty, and was not for the purpose of keeping the names in the jury wheel for the benefit of defendants. They have no such right; otherwise a person who should be tried at the commencement of the year would possess superior advantages over those tried at its close, when the wheel is comparatively empty. It was urged, however, that the array should be quashed, because "it does not appear from the return to the precept that the jurors were legally drawn, how they were drawn, or that they were in fact drawn at all. Nor does it appear from the record that they were legally summoned." I have examined the record with some care and it discloses no return to the venire by the jury commissioners. This is certainly an irregularity. It should appear from the record that the names of the panel were drawn from the wheel in the manner required by law. This can only appear by the return of the sheriff and jury commissioners. It is true the Act of Assembly does not require the jury commissioners to return the venire. But this is a common law duty, and needs no legislative command. It is the duty of every officer to whom a writ is directed to make return of the manner of its execution, and such return is the appropriate evidence of that fact. This omission could and ought to have been supplied in the Court below as soon as its attention had been called to it by an order upon the jury commissioners to return the venire. It was but an amendment of the record, and a record may be amended even after writ of error or *certiorari* lodged in the office. (In re Election of Sheppard, 27 P. F. S. 297.) Serious as this irregularity is we would hesitate to reverse upon this ground, especially in view of the Act of 21st of February, 1804 (6 Smith, 11: Purdon 388, pl. 56) and the construction which said Act received in Dyott *v.* Com. (5 Wharton, 67). The error is more formal than substantial, and the Court below appears to have had such evidence before it as satisfied its conscience that the law had been complied with in all important particulars. Yet as this judgment must be reversed for other reasons, it is proper to call attention to what we regard as a loose and careless practice.

What has been said applies as well to the motion to quash the indictment as to the challenge to the array. In support of the former motion, there was, however, the additional reason that two of the grand jurors were stockholders in the National Bank of Chambersburg. This was no ground to quash the indictment. It might have been a ground of challenge as to the par-

Digitized by Google

ticular jurors. It is well settled that a grand juror may be challenged for cause. This is the current of the English authorities. It was allowed in this country in the trial of Col. Burr, and in this State in an Oyer and Terminer case tried before Tilghman, C. J., and Breckenridge, J., in 1814 (2d Browne, 325). We see no merit in the third specification. The witness, John L. Black, had sufficiently identified the defendant, Johnston, to permit his statement in regard to the satchel to go to the jury, and it was not competent for the defendants' counsel to interrupt the examination in chief at this point in order to inquire into the opportunities of the witness of knowing Johnston. Such cross-examination was competent, but not at that particular time. The fourth, fifth and sixth specifications are also without merit, and need not be discussed. The admission of the "jury record," referred to in the seventh specification was of doubtful propriety, as it was not sworn to, and does not appear to have been kept in pursuance of any act of Assembly. The offer was to the court, not to the jury, and is unimportant. The eighth specification is wholly unsustained. The order in which counsel shall sum up is in the discretion of the Court below, and is not assignable for error. The learned judge was right in declining to affirm the defendant's first point, referred to in the ninth specification. The evidence for the Commonwealth, if believed by the jury, was sufficient to make out the charge of burglary, either at common law or under the statute.

There was error in the answer to the defendant's second point embraced in the tenth specification, but it was in their favor. They have therefore no cause of complaint. We might well stop there, but as this case must go back for another trial, we deem it our duty to indicate the principles upon which this branch of it should be ruled. It is established by numerous authorities, that there may be a constructive breaking. This may be done by an act *in fraudem legis*, or by fraud not carried on under cloak of legal process. Accordingly it has been held that where thieves came to a house in the night time, with intent to commit a robbery, and knocking at the door, pretending to have business with the owner, and being by such means let in, robbed him, they were guilty of burglary (Le Motts' Case, Rel. 42; 1 Hawk. P. C. 129; 2 Russell on Crimes, 9; 1 Hale; Arch. C. L. vol. 2, p. 269). The evidence for the Commonwealth upon this point was, that the defendants (plaintiffs in error), came to the door of Mr. Messersmith's house after dark on the evening of the 24th of March last. The witness, Kinderline, says: "I opened the door, and Rolland and another man were outside. - . . I did not know the other man. Rolland asked me whether Mr. Messersmith was in. I said he was not, that he had just walked out. He said he would like to see Messersmith; that he had a friend from New York who wanted to transact a little business with him. He introduced his friend as Mr. Johnston. . . . He said good-evening; perhaps we will call later in the evening." They did call about twenty minutes afterwards, rang the bell, and were admitted by Mr. Kinderline. Messersmith had returned, and they were shown into his room. Rolland introduced Johnston as the man of whom he had previously been speaking to Messersmith in regard to the purchase of a farm. Some other conversation occurred in reference to matters of alleged business, when Mr. Messersmith was suddenly seized, and the robbery attempted. There was evidence here to go to the jury of a constructive breaking; of a trick and a fraud by means of which the defendants had obtained admission to the house. The learned judge of the court below evidently regarded the first attempt to enter as a trick, but held that inasmuch as they did not obtain admission then, but went away and returned in the course of twenty minutes, and were admitted without any further reference to their pretended business, such entry was not a constructive breaking. This was error. It was for the jury to say whether upon all the evidence they believed the first call at Mr. Messersmith's house was for the purpose of gaining admission by fraud and artifice with intent to commit a felony therein; and whether the second call, when they actually obtained admission, was a part of the same transaction, in pursuance of such previously formed design.

The learned judge was right in refusing to affirm the prisoners' third point. But it was error, as has already been stated, to say that there "is not such evidence of fraud or trick practised by the prisoners to gain admission into the house as will constitute a breaking." It was also error to say in the same sentence that "the entry of the prisoners may have been a burglarious entry without breaking." There is no such thing as burglary in Pennsylvania without a breaking, either actual or constructive. We shall refer to this more fully when we come to the last assignment of error.

The answer to the fourth point was error. The mere unlatching or breaking of a door in an attempt to escape is not burglary in this State. We do not think it was ever so at common law. It is true, it was at one time asserted to be so by Lord Bacon, and other eminent English lawyers, but it was denied by authority of equal weight, notably by Sir Matthew Hale, by Lord Holt, and by Trevor, C. J., in Clark's Case (2d East's P C. ch. 15), in 1 Hale, 554, where it is said, "if a man enter in the night time by the doors open, with the intent to steal, and is pursued, whereby he

Digitized by Google

opens another door to make his escape, this, I think, is not burglary, for *fregit et exivit non fregit et intravit.*" (And see Black. Com. vol. 4, p. 230.) This difference of opinion among eminent jurists in England led to the passage of the statute of 12 Anne, which after referring to the doubt upon the subject, provides that a breaking out of a dwelling-house by a burglar in the night time in an attempt to escape was a sufficient breaking to sustain a conviction. This statute was subsequently repealed by the statute of 7 and 8 Geo. 4, ch. 27, and re-enacted by 7 and 8 Geo. 4, ch. 29.

The passage of the statute of 12 Anne is strong evidence that it was not the common law. No such statute was ever enacted in Pennsylvania, and I am not aware of any decision recognizing such a rule here. In the fifth report of the English commissioners on criminal law, we find the following remarks on burglary, which are so forcible and bear so directly upon this point, as to justify their admission here: "By the statute of 12 Anne, ch. 1, § 7 (subsequently repealed and re-enacted) the crime of burglary was extended to the case of an offender who having committed felony in a dwelling-house, or having entered therein with intent to commit a felony, afterwards broke out of such dwelling-house in the night-time. This extension does not, we think, rest upon just principles. After a felony has been committed within the dwelling-house, the offence is not in reality aggravated by lifting the latch of a door, or the sash of a window, in the night time, in order to enable the offender to escape A breaking out, indeed, may be an innocent act, as it may be committed by one desirous of retiring from the further prosecution of a crime, and the extension of the law of burglary to such a case is not warranted by the principles upon which the law is founded, inasmuch as a circumstance not essential to the guilt of the offender, or the mischief of the act is made deeply essential to the crime. It is ineffectual, even with a view to the object proposed; the pretext for this conviction fails in the absence of a breaking out, which is a casual and uncertain circumstance."

The thirteenth and fourteenth specifications raise a question that is not free from difficulty. It is not error to refuse to affirm the defendants' seventh point, for the reason that two of the counts of the indictment charge the offence of burglary at common law, to wit, the breaking and entering of a dwelling-house in the night time with intent to commit a felony But the case requires from us a construction of the 135th section of the Act of 31st March, 1860 (P. L. 415), and of the second section of the Act of 22d April, 1863 (P. L. 531). The first named act provides that if any person shall by night wilfully and maliciously break *or* enter into any dwelling-house . . with an intent to commit any felony whatever, whether the felonious intent be executed or not, the person so offending shall, on conviction, be deemed guilty of felonious burglary, etc. etc. It will be seen that by the terms of this act an entry, *without breaking*, in the night time constitutes felonious burglary. Then came the Act of 1863, before mentioned, which provides that if any person shall in the day time break and enter any dwelling house . . or wilfully and maliciously, either by day or by night *with or without breaking*, enter the same with intent to commit any felony therein, the person so offending shall be guilty of felony, etc. I have given so much of each act as relates to dwelling-houses. The learned Judge of the Court below held that the Act of 1863 was "intended to punish and provide for the breaking and entering a dwelling-house by daytime, and of other buildings by day or by night. Any other reading of this section makes it cover what was burglary at common law, which was not the legislative intent." The Act of 1863 is an exact rescript of the 136th section of the Act of 31st March, 1860, with the exception that the words "with or" are interpolated so as to make it read "wilfully and maliciously, either by day or by night, *with or* without breaking, enter the same," etc. That the 136th section of the Act of 1860 was intended to apply to cases where the breaking takes place in the daytime, or there is an entry by day or night, without breaking, with intent to commit a felony, is manifest. This was the view taken of it by this Court in Hollister *v.* Com. (10 P. F. Sm. 105). But the Act of 1863 supplied the aforesaid section of the Act 1860, and extends to an entry by night, with or without breaking. Then as to the 135th section of the Act of 1860. By its terms it makes an entry at night, with or without breaking, felonious burglary. If we construe this act literally, it is supplied by the Act of 1863, and the crime of felonious burglary no longer exists by statute in this State. The offence is reduced to the grade of an ordinary felony, punishable by four years' imprisonment. For it is impossible for two statutes defining exactly the same offence, the one punishing it as felonious burglary, and the other as a simple felony, to stand together. Under which statute shall a prisoner be sentenced? How shall he be tried? In the Quarter Sessions, or the Oyer and Terminer? These are matters that must not be left to conjecture, to be guessed at upon the trial, or decided upon the caprice of the judge. It is, therefore, our duty to put such a construction upon these statutes as will most effectually carry out the legislative intent, and produce a consistent and harmonious system. In view of all this legislation we have no doubt it was the intention of the Legislature, by the 135th section of the Act of 1860, to define and punish

Digitized by Google

the common law offence of burglary, and that the word "or" in said act "break *or* enter" was introduced by mistake or inadvertence. For the succeeding section (136th) of said act proceeded to punish the offence of entering a dwelling-house in the night time without breaking. It is made a lighter offence—a simple felony, punishable by four years imprisonment. To read the 135th section, therefore, to break *or* enter is inconsistent with the 136th section. We are, therefore, led to the conclusion that the word "or" in the 135th section should be read "and," which would make the offence that of burglary at common law Such a mode of construing a statute is not without precedent It was done by this Court in Murray *v.* Keys (11 Casey, 384), Bollin *v.* Shiner (2 Jones, 205), Foster *v.* Com. (8 W. & S 77). It is said in Dwarris on Statutes, 772, that "and" is not always to be taken conjunctively. It is sometimes in the fair and rational construction of a statute to be read as if it were "or," and taken disjunctively and distributively. Giving to the 135th section of the Act of 1860 the construction we have indicated, it harmonizes perfectly with the 136th section of the same act so far as relates to dwelling-houses; the former punishing as felonious burglary the common law offence of breaking and entering a dwelling-house in the night time with intent to commit a felony, and the other punishing a lesser offence, partaking of the nature of burglary, viz.: where the breaking takes place in the day time, or there is an entry by day or by night without breaking. Then we have the Act of 22d April, 1863, the second section of which interpolates the words "with or" into the 136th section of the Act of 1860, yet in all other respects leaves the latter act intact. What was the legislative intent in the Act of 1863? Was it intended that the words "with or" should apply to dwelling-houses? The whole subject was completely covered by the legislation contained in the 135th and 136th sections of the previous Act of 1860. They provide for: (1) breaking and entering by night; (2) breaking and entering by day, and (3) entering by day or by night without breaking. There was, therefore, no reason why the words "with or" should be applied to dwelling-houses, but, on the contrary, ample reason why they should not. It will be observed that the 130th section, with the single exception of dwelling-houses, relates to a class of buildings entirely different from those embraced in the 135th section. As to such buildings it is not difficult to see why the Legislature enlarged the offence by the Act of 1863, so as to make it the entering either by day or by night, with or without breaking.

We are of opinion that as to the 135th section the word "or" must be read "and," and that the words "with or" in the second section of the Act of 22d April, 1863, were not intended to apply to dwelling-houses. This construction makes the legislation referred to a consistent and harmonious whole

We are not surprised, in view of the wording of the 135th section of the Act of 1860, that the learned Judge of the Court below instructed the jury in answer to the defendants' fifth point, that there could be a conviction under the counts which charged an entry without breaking. But under the construction which we have placed upon said section, it was in error.

The judgment is reversed and set aside, and the record remitted to the Oyer and Terminer for another trial. And it is further ordered that the inspectors and wardens of the Eastern Penitentiary, at the city of Philadelphia, surrender the bodies of Ralph L. Rolland and B. Johnston, the plaintiffs in error, to the High Sheriff of Franklin County for custody and trial in due course of law. PER CURIAM.

Opinion by PAXSON, J. WILLIAMS and SHARSWOOD, JJ., absent.

Common Pleas—Law.

C. P. No. 3. Dec. 4.

Building Association v. George.

Building association mortgage—Fines for non-payment of interest when due—Usury—Penalties authorized by by-laws not usurious

Rule to open judgment, set aside assessment of damages and *lev. fa*, and let defendant into a defence.

Scire facias on a building association mortgage, in the ordinary form, conditioned for the monthly payment of interest and dues, and of such fines as might be imposed under the constitution and by-laws of the association. Judgment was obtained for want of an affidavit of defence.

In computing damages there were included monthly penalties of 5 per cent, calculated at that rate upon each month's dues that were unpaid, and for every succeeding month that they remained unpaid. The by-law on which this claim was founded read as follows:—

"Each and every stockholder or trustee who shall neglect or refuse to pay his or her monthly dues and interest as often as the same shall become due and payable, shall forfeit and pay the additional sum of five cents monthly on each and every dollar due by him or her."

Digitized by Google

L. Hirst, for the rule. The assessment of fines as above was unauthorized. After a fine for one month was inflicted the power of the association to fine again for the same month was exhausted The depositions show that we are willing to pay the amount admitted to be due.

Krumbhaar, contra. The fines are not excessive, being authorized by the by-law (*supra*) Each case of this sort depends on the charter and by-laws of the association Under the Act of Assembly, premiums or fines charged by building associations are not usurious.

C. A V.

Rule discharged.

[See Association *v.* Keller, 2 WEEKLY NOTES, 29; Association *v.* Newrath, Id. 95.]

C. P. No. 4. **Mayberry v. Gerber.** Dec. 16.

Practice—Appeal from magistrate in action for wages of manual labor—Security for debt and costs—Act of April 20, 1876.

Rule to show cause why appeal should not be stricken off.

The transcript showed that the judgment before the alderman was for "work and labor done," and the plaintiff's affidavit in support of the present rule stated that the claim was for "wages of manual labor." The defendant entered bail for costs only.

K. J. Tener, for the rule.

Under the Act of 20 April, 1876 (Purd. Dig. Supplement, 2083), the defendant in such case is required to give security for the *debt* as well as for costs.

Croasdale, contra.

THE COURT. Leave given defendant to perfect his appeal within one week.

[See Ryan *v.* McDonough, *ante*, 44.]

C. P. No. 4. **Suplee v. Harley.** Dec. 16.

Affidavit of defence—Lease—Surrender, sufficient allegation of.

Rule for judgment for want of a sufficient affidavit of defence.

Covenant to recover rent reserved in lease.

The copy of lease filed showed a letting by the plaintiff to the defendant for the term of six months from May 1, 1876; the arrears claimed were for August, September, and October, 1876. The affidavit of defence alleged that the defendant had rented the premises described in the lease for the sum named therein, to use as a boarding-house; that on June 30, 1876, the defendant surrendered the same to the plaintiff, who took possession, and therein conducted a boarding house; that the taking of possession was without qualification, and with no notice whatever of any claim on the part of the plaintiff to hold the defendant liable for any difference between the profits he might realize from the premises, and the rental reserved in the lease.

C. E. Morgan, Jr., for the rule.

The affidavit states matter of law, rather than fact. It does not state facts which amount to an acceptance of a surrender.

[THAYER, P. J. The defendant might have been more ingenuous, but we think this defence is colorable enough to preclude judgment.]

Rule discharged.

C. P. No. 4. **McGlensey v. Landis.** Nov. 18.

Attachment under Act of 1869—*Insolvency of purchaser at time of purchase, not legal fraud.*

Rule to dissolve attachment, issued under Act of 17th March, 1869.

Assumpsit. The affidavit on which the attachment was issued, set forth that in July and August, 1876, the defendant bought of the plaintiff molasses to the value of $1898.22, for cash, and immediately upon receipt of the goods, delivered them to another party to whom he had sold them prior to making the purchase; that at the date of the purchase, the defendant was insolvent, but concealed that fact; that he had property which he fraudulently concealed, having stored 200 barrels of molasses at No. 115 Arch Street, Philadelphia, while he had a warehouse of his own on Wood Street, in the same city.

The sheriff's return showed service upon the garnishees only.

J. Rich Grier, for the rule.

The affidavit is defective because it is too general, and because the provisions of the Act, that defendant shall be served, and an inventory shall be attached, have not been complied with.

[THAYER, P J. The simple fact that a man is insolvent when he buys goods, is not fraud legally.]

P S Ransford, contra.

Attachment dissolved.

[As to particularity required in an affidavit to support an attachment under the Act of 1869, see Chase *v.* Lennox, 2 WEEKLY NOTES, 487, and cases cited in note.]

C. P. No. 4. **Chestnut v. Meace.** Dec. 4.

Execution—Exemption—Appraisement—Whether a demand for exemption is made in time, is for the sheriff to decide upon his own responsibility—Appraisement set aside for inadequacy.

Rule to set aside appraisement and exemption.

Under a writ of *fieri facias* the sheriff had

Digitized by Google

levied upon the contents of a stable belonging to the defendant. On the day of sale, after advertisement, and after the hour appointed for the sale to commence, the defendant claimed the benefit of the $300 exemption law, and demanded an appraisement The deputy sheriff allowed the exemption, and the goods were appraised at $350. Depositions were read showing that the goods were undervalued.

Wm Hopple, Jr., for rule. The demand for appraisement is too late after advertisement.

Commonwealth *v.* Boyd, 6 Sm. 402.
Kensel *v.* Kern, 4 Phila. 86.
1 T. & H. Prac. part ii., p. 815.

[THAYER, P J. It has been our uniform practice to leave such a question to the sheriff. His duty is to allow or refuse the exemption upon his own responsibility.

ELCOCK, J. There is nothing upon the record upon which we can act.]

The depositions show the goods were of much greater value. The appraisement should be set aside for inadequacy.

E. Hunn, Jr, contra.

Rule granted for re-appraisement.

[*Cf.* Staples *v.* Wells 2 WEEKLY NOTES, 139.]

C. P. No. 4. Dec 7, 8.

Edwards, Adm'r c. t. a., v. Franklin Fire Insurance Co.

Insurance—Contract—Limitation in policy as to return of deposit money—Divestiture of title to policy of fire insurance by sheriff's sale of the premises insured.

Case stated

The facts agreed upon were as follows:—

Thomas Edwards, the plaintiff, was the administrator *c. t. a.* of James G. Edwards. On the 3d of August, 1852, the plaintiff's decedent was the owner of the Girard House, in the city of Philadelphia, and on that day effected an insurance thereon in the Franklin Insurance Company, the defendant, the deposit money for such insurance being $1000. The policy contained the following condition:—

(2) Every policy issued in the nature of a permanent insurance shall continue in force until the contract be terminated by one or the other parties as follows. The holder of the policy, being the owner of the building insured, may at any time reclaim the deposit money, which shall be paid within three days after demand subject to a deduction of five per cent. And in all cases of sale of the premises, if the policy is not transferred, the deposit money may be withdrawn, if applied for within sixty days after such sale, subject to the same deduction, but if not applied for within that time the deposit money shall be considered as sunk for the benefit of the company.

On January 6, 1853, Edwards assigned the policy to one George Brown, as collateral security for the payment of a ground rent, redeemable at any time, issuing out of the insured premises and the lot upon which they were erected. The policy was subsequently assigned to others, also as collateral security for the same ground rent.

In 1862, the title of Edwards in the insured property was sold at sheriff's sale, at the suit of said Brown, for arrears of ground rent, and the deed executed to one Tatlow Jackson, after which time neither the plaintiff's decedent nor any one for him had any right, title, or interest whatever in the premises.

On January 30, 1873, John Brown, Jr., Ex'r, assigned to Grace Brown the policy in question, which assignment was approved by the company on January 31, 1873, the plaintiff having no knowledge of either the assignment or the approval thereof. The approval was in the following terms:—

"We approve the above transfer of this policy in the hands of the present holders of the ground rent on the within named premises, it being agreed and understood that the only interest insured is that of the above-named parties as holders of a ground rent of $100 000 principal sum, and in the event of a fire it shall be the duty of this company (if the said ground rent holders demand that they shall do so) to pay their *pro rata* share of the par of the principal sum of the ground rent, and the arrears not exceeding an arrear of six months, and of requiring an assignment to the company of such a proportion of the ground rent upon such payment by the company, and, if such assignment shall not be made, the company shall not be liable for any loss under the policy."

There was also a change in the conditions of insurance made without the knowledge or consent of the plaintiff, and annexed to the policy at some time between February 1, and April 14, 1869.

No demand was ever made on the defendant, by the plaintiff or by any one in his behalf, for the deposit money or any part thereof, until November 13. 1875, when the plaintiff first learned of the above changes in the policy. The writ in the present suit issued December 4, 1875

The defendant did not, at any time, give notice to the decedent or the plaintiff of intention to terminate the insurance or of readiness to return the deposit money, nor was the plaintiff or his decedent aware of any claim on the part of the defendant that the deposit was sunk

It was agreed that the judgment should be entered as on a special verdict, with leave to sue out a writ of error; that if the Court should be of opinion that the plaintiff could recover, then judgment to be entered for $950, with interest from November 16, 1875 or for $1000 with interest from January 31, 1873 whichever sum the Court should be of opinion the plaintiff was entitled to receive.

H C Titus, for the plaintiff.

The assignment of the policy in 1853, with the assent of the defendant, made a new contract

Digitized by Google

with Brown, which was not discharged by the sheriff's sale The deposit money was left to support this insurance.

Insurance Co. *v.* Trask, 8 Phila. 32.
Buckley *v.* Garrett, 11 Wr. 205.

In this case the policy provided that if it were *not transferred*, the deposit might, in case of sale, be withdrawn within sixty days thereafter; but the policy was transferred beyond the control of the plaintiff, therefore the plaintiff does not fall within the limitation of the sixty day clause, which should not be enlarged to work a forfeiture.

Buckley *v.* Garrett, *supra.*
Merrick *v* Ins. Co., 4 Sm. 277.

The joint act of Brown and the company in 1873 changed the terms of the policy, and rendered it valueless as to the plaintiff. This was a misuse of collateral by Brown, thereby releasing it, and, being assented to by the defendant, it was as to them such a determination of the insurance as entitled the plaintiff to recall his deposit.

Denny *v.* Lyon, 2 Wr. 98.
Whitaker *v* Sumner, 20 Pick. 399.
Ins. Co. *v.* Marr, 10 Wr 507

[THAYER, P J. How can we so hold in a case to which Brown is not a party?]

The deposit belongs to the plaintiff.

Felton *v.* Brooks, 4 Cush. 203.

A. Sydney Biddle, for defendant, was not called upon.

THE COURT (*per* THAYER, P. J., ELCOCK, J., concurring): We are very clear that the plaintiff has no claim In this case the policy was made twenty-four years ago, and has stood ever since. The plaintiff's interest was divested by a sheriff's sale, and now without any title to the policy or ownership of the premises, he demands the return of the deposit. There are only two conditions which would enable him to demand a return. By the first he must have both titles in him The other is that when he sells the property without selling the policy, he may demand his money within sixty days. In the present case he has neither policy nor title; having parted with both, he asks to recover the premium We see no ground for the demand. If the assignees have misused the collateral, there is a remedy against them; there is no ground in law or equity to demand the premium.

Judgment for the defendant.

C. P. No. 4. **Coaler v. Schlecht.** Oct. 21.

Defective record—Stay of execution on account of a defective record refused where no defence upon the merits was shown

Rule to stay execution until the plaintiff file a copy of his original book entries in place of the copy mislaid or lost.

Judgment had been entered for want of an affidavit of defence, and damages assessed at $184.41.

Upon a rule to open judgment (reported *ante*, p. 27), the book of original entries, produced at the taking of the depositions, showed that the charges were against *Walter's and Schlecht's* house on Palethrop and Susquehanna Avenues, and only to the amount of $125. At the hearing of the rule to open judgment the copy filed had been mislaid or lost, and could not be produced. The rule was discharged. Subsequently, a second rule to set aside the judgment was taken, on the ground that if the plaintiff had filed a true copy he would not have been entitled to judgment, and if he had filed a false copy, that would have been a fraud upon the Court. This rule was also discharged. The present rule to stay execution, etc., was subsequently taken.

J. W. Hunsicker, for the rule.

We merely ask the Court to stay execution until the plaintiff file a copy, so as to make the record complete.

Callaway, contra.

We will reduce our claim to the proper amount.

THE COURT. No defence being shown on the merits—

Rule discharged.

C P. No. 4. **Kavanaugh v. Woll.** Dec. 16.

Affidavit of defence—Due bill payable in goods —Partial failure of consideration.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a due bill, which ran as follows:—

PHILADA., July 14, 1876.

Due to C. J. Kavanaugh, one hundred and twenty dollars in Bristles for value received, on demand. $120.

PETER WOLL, *per* ADOLPH WOLL.

The affidavit set forth, *inter alia*, that the defendant had given the due bill on condition that the plaintiff would assign and transfer to him certain merchandise, and would obtain for him, from one Rice, a certain promissory note for $60; that the plaintiff had not delivered the said note to the defendant, and that to that extent there was a failure of consideration.

Duffield, for the rule.

This is not such a failure of consideration *pro tanto* as to admit parol evidence to vary the written instrument. Moreover, the affidavit shows that the obtaining of the due bill was a "condition," and not part of the consideration.

[THAYER, P J. A partial failure of consideration is a good defence to an action on a contract.]

Rule discharged.

Digitized by Google

Orphans' Court.

Dec. 9.

Estate of Charles Frederick Beck, deceased.

Testamentary Trust—Jurisdiction of Common Pleas—Whether Orphans' Court has concurrent jurisdiction—Sale of real estate purchased by trustees for purposes of will.

Sur petition for confirmation of sale of real estate.

The petition of the surviving executors and trustees set forth that decedent died February 13, 1859, and by his last will and testament, after appointing his executors, gave to them and the survivors and survivor of them, full power and authority to sell all or any part of his real estate at public or private sale, and to execute conveyances therefor in fee simple; that the executors and trustees subsequently purchased certain real estate in the city of Philadelphia, described in the petition, really for the uses and purposes declared in the will of decedent, although not so expressed in the deed of conveyance to them; that one of the executors and trustees has since died, and the survivors have sold said real estate at private sale; that on November 25, 1876, petitioners presented their petition to the Court of Common Pleas, No. 3, setting forth the above facts, and further, that questions had arisen as to the right of petitioners to grant and convey said premises without an order of said Court, and thereupon praying said Court to approve, ratify, and confirm the sale, and authorize a conveyance thereof to the purchasers, freed and discharged of and from all trusts whatsoever expressed or created by the will of decedent, or by the purchase and conveyance of the premises as aforesaid, and without any liability on their part as to the application of the purchase-money; whereupon the Court granted the prayer of said petition upon security being entered; that, since, question has arisen whether the Orphans' Court may not have jurisdiction in the premises, original or concurrent with the Court of Common Pleas. The petitioners therefore prayed this Court to ratify, approve, and confirm said proceedings so as aforesaid had in said Court of Common Pleas, No. 3, and to adopt the same as its own with the same force and effect as if said proceedings had been originally instituted in this Court, and without entering further security.

Wm. McGeorge, Jr., for petitioners.

Dec. 11. THE COURT. The Court of Common Pleas, No. 3, having been first applied to, and exercised jurisdiction in the premises, we are of opinion that that tribunal has now entire control over the whole matter. The petition is therefore refused.

[*Cf.* Ingersoll's Estate, 1 WEEKLY NOTES, 417.]

Farrell's Estate. Nov. 20.

Widow's election—Right of widow to statement from executors of particulars of decedent's estate—When demandable—Practice.

Sur petition for citation and answer.

The petition of Margaret Farrell set forth that she is the widow of John Farrell, deceased, who left a will, whereby he made provision for the petitioner different from that to which she would be entitled under the intestate laws of the Commonwealth, and that she has remained in ignorance of the amount of testator's estate or of the debts due to it, so that she is unable to decide whether to take under the will or the intestate laws of the State. That since the death of the decedent, which occurred about Feb. 20, 1876, having no other means of support, she has received the rent of a house that was devised to her by the testator, but that the money was received by her in ignorance of her rights, without sufficient knowledge to make an election, and with no intention of waiving her right so to do. The petitioner therefore prayed for a citation to the executors of her husband's will, commanding them to show cause why they should not exhibit to her a just and conscionable inventory and appraisement of all the decedent's estate, together with a schedule of all the debts charges, and incumbrances against said estate, so that the petitioner may be enabled to make her election

The answer of the executors set forth that a devise of real estate and household furniture had been made to Mrs. Farrell in lieu of dower, over which she had exercised acts of ownership, and therefore accepted the provisions of her husband's will; that an inventory and appraisement of the personal estate of the decedent was made by the respondents, which was filed in the proper office, and is now open to the inspection of the petitioner; that the respondents, under testator's will, have no control of his real estate; and that, a year not having elapsed since the testator's death, it is impossible to state what debts are due by the estate.

J. Parrish, for the petitioner, cited—

Kreiser's Appeal, 19 Sm. 194.

C. H. Hart, contra. No replication having been filed, the answer must be taken as verity. It avers an election by the widow, which averment remains uncontradicted. She cannot obtain this citation until a year after her husband's death.

Dec 9. THE COURT said, that as the widow could not be compelled to make her election before the expiration of a year, so, by analogy, the executors were entitled to the same length of time before being compelled to file the statement asked for. If the widow desires to file her election before the expiration of that time, however, she has a perfect right to do so. Without disposing of the question of law raised in the case,

Digitized by Google

we think the application is premature, and the petition is therefore refused.

Opinion by HANNA, J.

[See Rhodes' Estate, 2 WEEKLY NOTES, 188; Toomey's Estate, Id. 682.]

Watson's Estate. Sept. 25.

Competency of witnesses—Act of 15 April 1869.

Sur exceptions to auditor's report.

On a previous hearing of this case upon exceptions to the auditor's report (see Watson's Estate, 2 WEEKLY NOTES, 113, in which case the facts are fully reported), the report was referred back to the auditor, with instructions to take the testimony of the witness, the widow and executrix of the decedent, and to weigh it in coming to his conclusions of fact. Before the auditor the objection to the competency of the witness was again renewed, but the testimony was taken under the previous direction of the Court, and again an issue was refused To this ruling exceptions were filed by the executrix.

Scanlan, for exceptant. The case is within the Act of 1869, and not excluded by the proviso.

Karns *v.* Tanner, 16 Sm. 297.
McFerren *v.* Palo Alto Iron Co., 26 Sm. 183.

Lister, contra, cited—

Diehl *v.* Emig, 15 Sm. 320.
McBride's Appeal, 22 Sm. 480.
Gyger's Appeal, 24 Sm 48.
Hyneman's Estate, 2 WEEKLY NOTES, 571.
Taylor's Executors *v.* Kelley, 32 Leg. Int. 430; *ante*, 206 (decided since the first argument).

Oct 7 THE COURT, on the authority of Taylor *v.* Kelley (*supra*), now held the witness to be incompetent under the Act of 1869; and further, that, the testimony in the case not being before them, they were bound by the conclusions of the auditor The exceptions were dismissed.

O'BRIEN, J. dissenting.

[See Crouse *v.* Staley, *ante*, 83; Taylor *v.* Kelley, *ante*, 206, and cases immediately preceding and following it, pp. 205, 210.]

Reinheimer's Estate. Nov. 20.

Distribution of balance in hands of testamentary trustees—Practice.

Sur petition for order to pay, and answer.

Upon the audit of the account of the executors of the decedent, the auditor found a balance in their hands of $4640 38, which he directed to be paid first to the legatees specifically named in decedent's will, and the balance remaining, amounting to $731.93, he awarded to the executors as trustees under the residuary clause of the will, which was a devise to the executors "in trust to put the same at interest . . . to pay the several legacies or bequests hereinafter named as they shall fall due or become payable." The bequests then followed; first, to pay the sum of $5 per week to decedent's stepmother during her natural life; also, to pay the sum of $1000 to Fanny Reinheimer at the time of her marriage; also, to pay the sum of $500 to Isaac Stein when he should become of age; to pay his sister's children $100 each, when they should be confirmed; and then further devises of his residuary estate. The income of the estate being insufficient to pay the weekly allowance to decedent's stepmother, the late Orphans' Court ordered that amount to be paid from the corpus of the estate. Upon her death Fanny Reinheimer, having married, made application to the executors to pay over to her the balance in their hands. Upon their refusal she filed the present petition, to which an answer was filed by the executors, submitting themselves to the order of the Court, but alleging that there were other claimants to the fund in their hands, claiming that they had rights similar to those of the present petitioner.

E. H. Weil, for petitioner, was stopped by the Court.

Coleman, for executors, did not appear.

Nov. 24. THE COURT. It appears that upon the settlement of the account of the executors, the balance of the estate remaining after the payment of certain legacies was awarded to them as trustees, under the residuary clause of the will. The balance was insufficient for the purposes designated by testator, to wit, the payment of an annuity and also pecuniary legacies. This being established, our predecessors authorized the trustees to pay the annuity out of the corpus of the estate The annuitant is now deceased, and one of the legatees claims that she is entitled to the amount remaining unexpended, on account of her legacy But this is resisted by other legatees who claim to be equally interested in the fund. We are, therefore, called upon to distribute the balance alleged to be in the possession of the trustees among the rival claimants. This cannot be accomplished in the present proceeding, nor would it be in harmony with the practice we have always adhered to in similar cases. The proper course is for the executors, as trustees, to file a final account; then upon the audit, the claims now presented can be heard, testimony adduced and distribution decreed to the parties entitled. (Estate of James J. Mazurie, dec'd, 33 Legal Intel 256.) The order for distribution is therefore refused, and the executors are directed to file a final account.

Opinion by HANNA, J.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, JAN.* 11, 1877. [No. 15.

Supreme Court.

SUPREME COURT. The following is the "Hour Rule" as adopted January 4, 1877, for the argument of cases in the Eastern District:—

The Prothonotary of the Eastern District shall make a list of causes taken from the list for the city and county of Philadelphia, and to be called the "Hour List." The attorney or solicitor of either party may order a cause on said list at any time before or during the term. No cause thus ordered thereon shall be stricken therefrom without permission of the Court. The causes on the said list shall be heard in the order they were set down thereon, and shall have precedence over all other causes, except those on the "Short List," capital cases, and cases specially placed at the head of the list. In the argument of cases on the "Hour List," counsel shall be heard one-half hour only on one side.

For the remainder of the term, the Prothonotary shall make a list for each week, to be called the "Hour List." The attorney or solicitor of either party may order a cause on said list at any time before or during the term, and prior to Tuesday noon of the week in which the case is assigned for argument. No case thus ordered thereon shall be stricken therefrom without permission of the Court. The causes on said list shall be heard in the order they were set down thereon, and shall have precedence over all other causes, except those on the "Short List," capital cases, and cases specially placed at the head of the list. In the argument of the "Hour List," counsel shall be heard for one-half hour only on each side.

Oct. & Nov.'76. 86. Oct. 18.

Alexander v. Weidner.

Errors and appeals—Practice—Assignment of errors—Acts of February 24, 1806, *of April* 15, 1856, *and of April* 17, 1856—*When charge of Court and answers to points are no part of record, although filed.*

Under the Acts of Feb. 24, 1806 (P. L. 270), and April 15, 1856 (P. L. 337), the charge of the Court and answers to points cannot be assigned for error unless a *request* by one of the parties to file the same *appears of record.* In the absence of such request appearing of record, the fact that the answers or charge were *actually* filed of record does not cure the defect.

The Act of April 17, 1856 (P. L. 396) which requires that the Court below "shall reduce the answers to the points to writing, ... and the said points and the answers thereto shall be filed immediately by the prothonotary, and become part of the record in the case," is not a general law, but is confined in its application to the Courts of the Sixth Judicial District.

A plaintiff in error who did not except to answers of the Court below to points presented by him, cannot avail himself, in the appellate Court, of exceptions taken thereto by the opposite party.

Strictures by SHARSWOOD, J. (re-enforcing those of TILGHMAN, C. J., and DUNCAN, J.), on the legislation requiring the entire charge to be reduced to writing, and filed, upon request of counsel.

Error to the Court of Common Pleas of Clarion County.

Assumpsit by M. A. K. Weidner against Wm. T. Alexander to recover compensation for the collection of a note made by one Galey and one Brown to the said Alexander.

On the trial of the cause (before JENKS, P. J.) the defendant presented two points in writing, the first of which the Court answered in the affirmative with a qualification, and the second simply in the affirmative. To the answers of the Court the plaintiff excepted, but the defendant did not.

Verdict and judgment for the plaintiff for $1075.

Defendant's points and the answers of the Court thereto were filed, but it did not appear of record that they had been filed *at the request of either party.* Defendant took this writ, assigning for error the qualification contained in the answer of the Court to his first point.

Corbett & Clarke (*Knox & Maffett* with them), for plaintiff in error.

Under the Act of Feb. 24, 1806 (P. L. 270), it was necessary that a request to file the charge appear of record.

Lancaster *v.* De Normandie, 1 Wh. 49.
Bratton *v.* Mitchell, 5 W. 71.

But the Act of April 15, 1856 (P. L. 337), dispensed with the necessity for it to appear of record that the filing of the opinion or charge was at the request of one of the parties or counsel.*

---

* The Act of 24th of February, 1806 (P. L. 270), provided, as to the Judges delivering opinions of the several Courts therein enumerated, that, "If either party, by himself or counsel, require it, it shall be the duty of the said Judges, respectively, to reduce the opinion so given, with the reasons therefor, to writing, and file the same of record in the cause."

By the Act of 15th of April, 1856 (P. L. 337), it was provided as follows: "The President Judges of the several Courts of Common Pleas of this Commonwealth shall, in every case tried before them, respectively, at the request of any party or attorney concerned therein, reduce the whole opinion and charge of the Court, as delivered to the jury, to writing, at the time of delivery of the same, and *shall* forthwith file the same of record."

Digitized by Google

Written points presented by counsel and answers of the Court filed in the cause become part of the record and may be assigned for error.

Wheeler *v.* Winn, 3 Sm. 122.

Wilson & Jenks, contra.

No exception was taken by the plaintiff in error to the qualification in the answer to the point submitted by him, and no notice should be taken of it in the appellate Court.

Moreland Township *v.* Davidson Township, 21 Sm. 371.

Holden *v.* Cole, 1 Barr, 303

Oct. 30. THE COURT. The Act of Assembly of February 24, 1806 (Pamph. L. 270), entitled "An Act to alter the Judiciary System of this Commonwealth," with another which followed close upon its heels—the Act of March 21, 1806 (Pamph. L. 326), entitled "An Act to regulate Arbitrations and Proceedings in Courts of Justice," were intended by that Legislature to inaugurate a new administration of justice, in which the profession of the law might be entirely dispensed with, and every man be his own lawyer and conduct his own suits. It need not be said that it entirely failed to procure its main object, and that the only class of men benefited by it was that at whose business it was aimed. An abundant harvest of litigation followed, and its deleterious influence has left many marks upon our jurisprudence which still remain to impede and embarrass the speedy and regular course of justice in civil proceedings. "Of the object of these Acts," says Chief Justice GIBSON, in Wike *v.* Lightner (1 Rawle, 290), "those who remember the temper of the times can best judge." Speaking of the 25th section of the Act of February 24, 1806, to be presently referred to, Mr. Justice DUNCAN, in 1823, remarked, in Brown *v.* Caldwell (10 S. & R 114): "The Act making it the duty of Courts, on the request of either party, to reduce their opinion with the reasons to writing and file it of record, has been found very inconvenient in practice, however beautiful in theory; and though the provision appears, on first sight, very simple, yet experience has shown it to be not a little complex. It has instead of easing the suitor, proved a source of vexation, perplexity, and delay, and sometimes of actual injustice. It requires legislative interposition, either by its total abolition or pruning many of the luxuriant branches which have grown from it and choked the progress to the termination of controversies. The bill of exceptions, its form, its bearing, were well understood and quite adequate to spreading on the record all legal points decided by the Courts in their instructions to juries." So Chief Justice TILGHMAN, in Reigart *v.* Ellmaker (14 S. & R. 124), speaking of the same section, observed: "This provision, though undoubtedly intended for a good purpose, has produced consequences of which the Legislature was not aware when it was passed. It may have done some good, but on the whole it is the general sentiment that it has caused much trouble, expense, and delay, and thrown many obstructions in the way of a speedy and fair administration of justice." The opinions of these very eminent jurists, however, have produced no effect upon the Legislature. Not only does the Act of 1806 stand unrepealed on the statute book, but it has been extended by the Act of April 15, 1856 (Pamph. L. 337), so as to require that the President Judge "at the request of any party or attorney concerned shall reduce the whole opinion and charge of the Court as delivered to the jury to writing, at the time of delivery of the same, and shall forthwith file the same of record." This had been held by the Court not to be required by the Act of 1806, in Reigart *v.* Ellmaker (14 S. & R. 121), and Munderbach *v.* Lutz (*Ibid.* 125). It will not add much to the weight of these opinions to say that I entirely concur with them, but I may be permitted to add that I sat for nearly twenty-three years in a Court to which these acts were held not to apply. During all that time I never filed a written opinion or charge—nor was there ever found to be any necessity for it; the old well-known remedy by bill of exceptions—*via trita, via tuta*—ministering ample remedy to the suitors against the mistakes of the Court upon points of law.

These two Acts of 1806 and 1856 both expressly require that there should be a request by one or other of the parties before the Judge's charge can become a part of the record. In Brown *v.* Caldwell (10 S. & R. 114), this Court held that this request need not appear of record, because, where the opinion signed by the Judge is on file, the Court could not suppose that it was his own voluntary officious act, without request of either party, but must presume it to be his official act done by request at the time. It matters not which party requested it. It is of record, and consequently the subject of revision. This case was, however, overruled by Lancaster *v.* De Normandie (1 Whart. 49), in which it was held that this Court will not consider any paper annexed to the record as furnishing the opinion of the Court below, under the Act of 1806, unless it also appear by the record that the paper was filed at the request of one of the parties or of his counsel. "The vexation and inconvenience of the practice, so faithfully depicted" (in Brown *v.* Caldwell), said Chief Justice GIBSON, "subsequently forced the Court in various instances to exact a rigid compliance with the requirements of the Act and settle the practice differently." "As the Act authorizes nothing which it does not enjoin, where there has been no request, it gives no authority to put the matter on the record at

Digitized by Google

all. It never was intended to permit the Judge to set before the parties gratuitous incidents to appellate litigation, by exposing on the record errors which had escaped their notice at the time. Even restrained to its legitimate uses the proceeding has been found sufficiently prolific of vexatious and unprofitable contest. By the express terms of the Act the Judge has authority to file his opinion of record, but at the request of a party desiring to have advantage from it; and when he does it of his own head he makes nothing matter of record which was not so before." This point, say the Court in Bratton *v.* Mitchell (5 Watts, 71), "is not now open to question."

It has been urged that the Act of 1856, by the repetition of the word "shall" before the word "file," dispensed with any request to file—and that this difference between the words of that Act and those of the Act of 1806, was designed by the Legislature. We cannot perceive any plausibility, much less force, in this contention. The preliminary request limits the entire sentence, but if it were so, it certainly would not avail according to the authorities, unless the request to reduce to writing also appears of record. The learned counsel appears to think that an exception amounts to a request to file That would be pushing construction beyond all reasonable limits, and it would be much better to return to the overruled doctrine of Brown *v.* Caldwell, that a request is in every case to be presumed.

Under these Acts and the judicial construction which they have received, the plaintiff in error has no standing in this Court. On the trial below, the defendant, the present plaintiff in error, put certain points to the Court in writing to the answers to which he did not except. The opposite party, however, did. The answers of the Court were filed, but the record does not show that they were filed at the request of either party. They are, therefore, no part of the record on which this plaintiff can assign error, and he certainly cannot avail himself of the exceptions of the opposite party.

It would not be right to dismiss this case without adverting to the third section of the Act of April 17, 1856 (Pamph. L. 396). That section provides "that, whenever the parties or either of them shall request the Court to charge the jury on particular points of law, drawn up in writing and handed to the Court before the close of the argument to the jury, the Judge who charges the jury shall reduce the answers to the points to writing and read them to the jury before they retire from the bar to consider the verdict; and the said points and the answers thereto shall be filed immediately and become part of the record of the case; and when exceptions are taken to the charge of the Court in the manner now practised, it shall be the duty of the Judge who delivers the charge to file the same in writing with the prothonotary before the rising of the Court, or within thirty days thereafter." If this is a general law, the case of this plaintiff in error is certainly saved by it. At first blush it would appear to be so, and the late Chief Justice WOODWARD evidently so regarded it in Wheeler *v.* Winn (3 P. F. Smith, 122), but it would seem from his citation that he took it from the Digest, and his attention was not called to the whole act of which it forms a part. In Patterson *v.* Kountz (13 P. F. Smith, 251), I took occasion to express the opinion that this law is not a general one, but confined in its application to the Courts of the Sixth Judicial District. It was not necessary to the decision of the Court in that case, and I was careful to say that it was my own opinion only. Since then, and in the study of this case, I have carefully reconsidered the question, and my opinion remains unchanged, and is now confirmed by the concurring opinions of my brethren. The title of the Act is "An Act to provide for the election of an additional Law Judge of the Sixth Judicial District." Every other provision of the Act is evidently confined to the Courts of that District. The first section provides for the election of the additional Judge. The second section directs when the Courts shall be held in the several counties composing the District. It concludes, however, with this provision: "Questions of law which may arise before the President Judge, or the said additional Judge, may in the discretion of the Judge be reserved for the determination of all the Judges, either in term-time, or at such adjourned sessions as they may appoint and hold for the purpose." Then follows the third section, which is now in question, and which has been recited at length above. It is to be observed it does not say "any" Court, or "a" Court indefinitely, but definitely "the" Court; grammatically the Court before spoken of and about which alone, according to the title, the Legislature was making regulations. It had not the words, "for other purposes," according to the old hackneyed form, now fortunately prohibited by the Constitution. The fourth section which provides for the dates and return days of writs is expressly confined to proceedings in "said Court." And so the fifth and last section makes provision for special Courts, "when both the President and additional Judges of the Common Pleas of the Sixth District" should be disqualified for holding the same. We do not see how any one can read the whole Act together without coming to the conclusion that the third section only relates to the Courts of the Sixth Judicial District. On any other supposition it would be very strange and unaccountable that two acts approved within two days of each other—the 15th

Digitized by Google

April, 1856, and the 17th April, 1856—both pending, no doubt, before the Legislature at the same time, and on the same subject-matter, should yet contain provisions so variant.

Finding no error on this record of which the plaintiff in error can avail himself—

Judgment affirmed.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

Oct. & Nov. '76. 208. Oct. 24.

Wentroth's Appeal.

Statutory lien—Act of April 9, 1872—Lien of laborer for wages—Who is a laborer within the meaning of the Act.

The "laborers" to whom the Act of April 9, 1872 (Purd. Dig. 1464), gives a lien, are those who perform with their own hands the contract they make with their employers, and not those who merely contract for work which they employ others to do for them.

By contract, S. agreed to deliver at W.'s mill all the timber cut upon a certain tract for $2.50 per thousand feet. S. did no work himself, but hired teams and drivers who did the work. The property of W. having been levied on and sold under a judgment, S. claimed a preference under the Act of April 9, 1872, for the amount due him.

Held (reversing the judgment of the Court below), that S. was not a laborer within the meaning of said Act, and that his claim should therefore be disallowed.

Appeal from the Common Pleas of Cambria County.

This was an appeal from the decree of the Court confirming the report of an auditor appointed to distribute the proceeds of a sheriff's sale of the personal property of W. Wolf. The evidence before the auditor showed the following facts: By a written contract, Frederick Snyder agreed to deliver at the sawmill of said Wolf all the timber cut upon a certain tract, for the price of $2.50 per thousand feet. Snyder performed said contract by hiring teams and drivers, who did the work, but he did no work himself, nor did it appear that he was present at any time when the work was being performed. The sawmill, fixtures and personal property of Wolf having been levied on and sold by the sheriff under two judgments obtained by John D. Wentroth, Snyder claimed a preference out of the fund for the amount due him as a laborer, under the Act of April 9, 1872 (Purd. Dig. 1464). The auditor reported that Snyder was entitled to priority to the extent of two hundred dollars, under the provisions of said Act. Exceptions were filed by Wentroth, which were overruled, and the report confirmed by the Court. Wentroth appealed, assigning for error the allowance of Snyder's claim.

Geo. M. Reade (with whom was *Wm. H. Sechler*), for appellants.

The Act of the 9th of April, 1872, gives a preference to the claims of miners, mechanics, laborers, or clerks, for moneys due them to an amount not exceeding $200, for labor or services rendered by such person. This Act is intended to give immediate relief to persons of limited means, and should not be perverted to apply to one who performed no labor, gave no part of his attention to the business, but who made the contract merely for the purposes of speculation.

Seider's Appeal, 10 Wr. 57.

R. L. Johnston, contra.

In Seider's Appeal (*supra*) it was decided that a contractor, though he employed a number of hands, and his claim was not for his own labor, but for horses, carts, and drivers, was still entitled to the provisions of the Act of the 2d of April, 1849. This Act was simply re-enacted and made general by the later Act of April 9th, 1872. It makes no difference, therefore, whether the appellee was personally laboring at the mill or not; he furnished men and teams, and his claims to the benefits of the Act of 1872 should be allowed.

Oct. 30. THE COURT. Frederick Snyder, the appellee, entered into a written contract with Nicholas Wolf, the owner of a sawmill, by which he undertook to deliver at the mill "all the hemlock timber now cut down and peeled on the Wentroth tract of land, formerly Rorabaugh's, and on the Pensacola tract," on or before a certain day; Wolf agreeing to pay him therefor the sum of two dollars and fifty cents per thousand feet. Snyder fulfilled the contract by hiring teams and drivers, but did no hauling himself. The sawmill, fixtures and other personal property of Wolf having been levied on and sold by the sheriff under two judgments by the appellant, an auditor was appointed to distribute the proceeds. He reported that Snyder was entitled to priority to the extent of two hundred dollars, under the provisions of the Act of April 9, 1872 (Pamph. L. 47). Exceptions filed by the appellant were overruled, and the report confirmed by the Court, and from this decree this appeal was taken.

The only question presented is whether Frederick Snyder was a "miner, mechanic, laborer, or clerk." These, and these only, are the classes of persons to whose claims priority is secured by the Act. "Miner, mechanic, or clerk," it is not pretended that he was. Was he a laborer? If he was a laborer, it must be conceded that it does not matter in what manner his services were to be compensated—whether by daily wages or by the quantity of lumber delivered. The Act does not say wages, but "all moneys that may be due, or hereafter become due, for labor and services."

Digitized by Google

What class of persons was intended to be comprehended by the word "laborer"? We think this question has been very accurately answered by this Court, in Daniel Seider's Appeal (10 Wr. 61). "By laborers," says Mr. Justice WOODWARD, in delivering the opinion of the Court, "we mean those who perform with their own hands the contract they make with the employer." It is clear that Frederick Snyder does not fall within this description. The Act meant to favor those who earned their money by the sweat of their own brows, not those who were mere contractors to have the work done, and whose compensation was the profit they would realize on the transaction. Had Snyder been a chief workman, and employed helpers or assistants, the case might have presented a different question, which it is not necessary here to determine; for it would seem that such helpers would be entitled to priority, and it is very clear that the Act did not intend to give a double lien. In such case, if he had paid the assistants, he might be entitled to stand in their shoes by substitution, and recover the balance as compensation agreed upon for his own services. A somewhat analogous question arose under the Mechanics' Lien Laws, and it was decided by this Court, in Jones *v.* Shawhan (4 W. & S. 257), that one who furnishes nothing but his superintendence and skill as an undertaker, had no right to file a lien for anything in pursuance of his contract as such. "It is he," said Chief Justice GIBSON, "who has found the labor or material, and not he who has ordered them, that is entitled to the lien. Were the contractor, as well as the mechanic or material men, allowed to file, there might be double liens, and possibly double recoveries, which the law does not tolerate."

Decree reversed at the costs of the appellee, and record remitted that the proper award of distribution may be made in the Court below in conformity with this opinion.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

Jan. '75, 37. **Kostenbader v. Spotts.** Jan. 26.

Communis error facit jus—Judgment note—Waiver of inquisition—Subsequent purchaser, how affected by—Act of 16 *June*, 1836—*Merchantable title—Incumbrance.*

A common though erroneous opinion of the law on a particular subject, under which many titles have been honestly acquired, will not be unsettled by a technical exposition of an Act of the Legislature.

One who purchases land subject to the payment of a judgment note given by his vendor, and entered of record, is bound by a waiver of inquisition contained in the note.

T., being the owner of real estate, gave to W. a judgment note (duly entered in Court), which contained the words, "without stay of execution, exemption, or extension, under the Act of June 6, 1836." T. afterwards conveyed his real estate to D., who by the terms of sale was to pay the judgment out of the purchase-money. While D. was in possession, a *fi. fa.* issued on the judgment, and the sheriff, after levying on the estate purchased by D., and without holding any inquest, sold the same on the *fi. fa.* to S. S. sold to K., the plaintiff in this action, who refused to take the title, and sued to recover an instalment of purchase-money paid:

Held (affirming the judgment of the Court below), that the words, "without extension, under the Act of June 6, 1836," amounted to a waiver of inquisition under the Act of 16 June, 1836.

Held, further, that under a strict interpretation of the law, the waiver of inquisition contained in a judgment given by the then owner of real estate, would not bind his vendee, but as in many parts of the Commonwealth it had never been doubted that the waiver in a judgment was coextensive with the lien, and as upon this theory many sheriffs' sales had been made, and many titles acquired, the Court would on the ground of *communis error* sustain the title of the purchaser under the execution in this case.

Error to the Common Pleas of Union County.

Assumpsit by Samuel Kostenbader against William Spotts to recover an instalment of purchase-money, paid under an agreement for the sale of real estate.

Plea, the general issue.

The facts appearing on the trial were undisputed. By an agreement, dated November 6, 1868, the plaintiff agreed to purchase from the defendant a tavern-stand, known as the "Great Western Hotel," for $8000, to be paid by instalments: $1500 on the execution of the agreement, $2500 on April 1, 1869, when possession was to be given, $2000 on April 1, 1870, with interest from April 1, 1869; and $2000 on April 1, 1871, with interest from April 1, 1869; a deed in fee simple, and of general warranty, to be made by the said William Spotts to the said Samuel Kostenbader on April 1, 1869, upon payment of the money then due, and securing the unpaid balance by judgment notes, or warrant of attorney to confess judgment.

The plaintiff paid $1500 on the execution of the agreement, and on April 1, 1869, tendered the second payment to the defendant, and demanded his deed. He refused, however, to take the deed then offered to him, because, as he alleged, the defendant's title was defective and unmarketable under the following circumstances: On October 20, 1863, Thomas Tunis, the then owner of the tavern stand, gave to one Weightman a judgment note, which was entered up in the appearance docket, thus:—

John Weightman v. *Thomas Tunis*, No. 62, Sept. T., 1863.

Judgment against the defendant, and in favor of the plaintiff, for $976.00 on single bill, dated October

Digitized by Google

20, 1863, and payable three years after date, with use, *without stay of execution, exemption, or extension under the Act of June* 6, 1836, with authority to enter judgment as above, etc. Entered October 21, 1863.

By deed, dated April 1, 1865, Tunis and wife conveyed the property, still subject to the lien of the judgment, to Jacob Dundore for $5000, it being expressly agreed between the parties that Dundore, the purchaser, should pay, out of the consideration money, this judgment, and others against the property. Dundore remained in undisturbed possession until May 22, 1868, when a *fi. fa.* issued on the Weightman judgment to the use of William Spotts, the defendant, under which the sheriff levied on the tavern stand on May 29, 1868. He held no inquisition, but sold under the *fi. fa.* the property levied on, to the defendant on June 20, 1868, and on the 24th day of the following September, duly executed and acknowledged a deed to him therefor.

It appeared also that the tavern stand had been a part of a farm, on which there was a mortgage of $3111.94, given to secure the annual payment of $186.71 to the widow of George Frederick, a former owner, as her dower. The defendant owned the portion of the farm remaining after his sale to the plaintiff. This, it was testified, was worth $15,000, or one hundred dollars per acre. That part sold to the plaintiff contained about three acres.

This suit was brought to recover the instalment of fifteen hundred dollars, paid on the execution of the agreement.

The Court below (JUNKIN, P. J.) charged to the following effect:—

(1) That "extension" being the usual term employed to show that on an inquisition the rents and profits will within seven years pay the liens, the words "without extension" contained in the judgment note were clearly a waiver of inquisition. (2) That Dundore, having by his agreement with Tunis retained part of the purchase-money to meet the judgment, he had made the debt his own upon its terms; "without extension," and therefore notice to him of the sheriff's sale was unnecessary. (3) That the title under these circumstances was merchantable, and one which the plaintiff was bound to accept. For a doubt could only be cast upon the title tendered by showing the sale from Tunis to Dundore, and, under the previous ruling, the latter owed the judgment on the same terms as his vendor. (4) That the existence of the mortgage was no ground for rescission, for the proportion on this land was only $300, while the plaintiff held unpaid purchase-money for more than sufficient to pay this lien.

Whereupon the Court directed a verdict for the defendant.

Verdict and judgment for defendant, to which the plaintiff took this writ of error, assigning for error the charge of the Court.

George F. Miller, for plaintiff in error.

The judgment note, or the entry thereof, did not under any circumstances authorize the sheriff to sell, without condemnation, on the *fi. fa.* The words of the bill are, "without stay of execution, exemption, or *extension*, under the Act of 6th of June, 1836." There is no Act of 6th of June, 1836, relating to this subject. That referred to is supposed to be the Act of 16th of June, 1836, allowing a waiver of inquisition. In order to create such a waiver, the agreement to do so must be clear and unequivocal, and must not rest upon influence or conjecture.

O'Neil *v.* Craig, 6 Sm. 161.

The clause in this note relied on by the defendant refers to an Act of Assembly not even in existence, and how can the waiver, then, rest on anything else than "inference or conjecture."

[MERCUR, J. When this alleged waiver was made, was there any Act of Assembly relating to extension and exempting property from execution, other than that of 16th of June, 1836?]

No; but we repeat that the waiver must be clear and unequivocal. There must be no doubt about it.

Granting, however, that the Act of 16th of June, 1836, was intended by the parties, yet the word "extension" may be used in this case in other senses than that employed by the Court below, viz., a waiver of inquisition. By Webster's, Wharton's, and Bouvier's Dictionaries, it will be seen that "extension" also applies to the granting of an indulgence to a debtor, in which meaning it might be with propriety used in this case. An inquest is a right which is not to be taken away by a forced construction, and by referring in doubtful language to an Act of Assembly that has no existence.

Stillwell's Estate, 8 Phila. R. 178.

But, however the law might be as to Tunis, the obligor, how stands the case when the waiver is enforced against Dundore, his vendee? Hope *v.* Everhart (20 Sm. 231) decided that a waiver is no part of the judgment, and that case as applied to this is not affected, as the defendant argues, by Hageman *v.* Salisbury (24 Sm. 280). Although the judgment note appears *in extenso* on the Appearance Docket, yet on the Judgment Docket there will, of course, be only a simple entry of judgment, and nothing will appear on the latter to give a purchaser notice of the terms on which the judgment was given.

The *owner* of real estate, at the time of the issuing of the *fi. fa.*, is the proper person to waive an inquisition.

Pepper *v.* Copeland, 2 Miles, 419.
Baird *v.* Lent, 8 Watts, 422.
Haden *v.* Clark, 2 Grant, 107.
Wolfe *v.* Payne, 11 Casey, 97.

Digitized by Google

Under all these circumstances, the title was surely not such as a chancellor would compel a purchaser to accept. It was not free from difficulty as to law and fact.

Dalzell *v.* Crawford, 1 Parsons, 37.
Nicol *v.* Carr, 11 Casey, 382.
Speakman *v.* Forepaugh, 8 Wright, 371.
Swayne *v.* Lyon, 17 Sm. 439.

The defendant was bound to convey to the plaintiff under their agreement an unencumbered title, for where the encumbrance does not by agreement form part of the consideration, the vendor must discharge it.

Nicol *v.* Carr, *supra.*

Therefore, as it appeared that the judgment on which the property was sold, contained doubtful and ambiguous language; that Dundore, the terre-tenant, had never waived inquisition, and that the property was encumbered, the plaintiff was right in refusing this title, and the Court erred in instructing the jury as matter of law to find for the defendant.

William Van Gezer and Linn & Dill, contra.

The main question is whether the words "*without extension*" had the same legal import as the words "without inquisition" would have had, and whether this waiver, if such it were, bound Dundore the vendee, of the obligor.

In correct legal parlance, an *extent* is the object of an *inquisition*, and the verdict is that the lands levied on are "*extended*," or "*condemned*," It is plain that the parties to the judgment intended an inquisition by the words "without extension."

If, then, there was a waiver, as there was, that waiver constituted part of the judgment under the ruling of Hageman *v.* Salisbury (24 Sm. 280). It was a vested right in Weightman, the plaintiff in the judgment, which could not be divested by Tunis selling the property to Dundore.

[AGNEW, C. J. Your case is not within the case of Hageman *v.* Salisbury. The question here is whether a subsequent purchaser is bound by waiver of inquisition by a former owner.]

The waiver descends to Dundore, because it is in evidence that he assumed to pay the judgment as part of the consideration money.

[SHARSWOOD, J. The Act says, "being the owner at the time of the execution."

AGNEW, C. J. It all comes to this: Is the waiver a covenant running with the land?]

The agreement for a waiver is a useless stipulation, if a defendant can avoid it by selling the property.

Oct. 9. THE COURT. We are disposed to adopt, without comment, the charge of the learned Judge of the Court below, except so far as it relates to the waiver of inquisition, as contained in the confession of judgment, of Tunis to Weightman, on the 20th of October, 1863. Our doubt is whether under the letter of the 45th section of the Act of June 16th, 1836, this waiver was binding upon the property in the hands of Dundore, to whom it was subsequntly sold by Tunis. The language would seem, at first blush, to put the power of waiver exclusively in the hands of him who owned the lands at the time of the issuing of the execution, thus attaching this right to the land rather than to the person of the debtor. Certainly the debtor could not waive the privilege of extent after the property, bound by the judgment, passed to his vendee. (Wolf *v.* Payne, 11 Casey, 97.) In such case, however, the debtor having disposed of the property, is but a stranger, and has no right in it that he can waive. As against one purchasing after the test of the *fi. fa.*, but before sale, such waiver has been held to be good. (Kimball *v.* Kelsey, 1 Barr, 183.)

In this case it seems to be taken for granted that the waiver, as contained in the judgment note, being effective as against the debtor, bound the property coextensively with the lien of the judgment, so no point was made as to its effect upon a purchase subsequent to its entry. The argument is, that the provisions relating to the inquisition and extent being intended for the benefit of the debtor, his waiver of such right, thus vested in himself, could not be questioned by any third party. For my own part, I think it is hardly possible to evade the force of this argument; for it is not to be controverted but that the statute does intend these dilatory provisions for the benefit of the debtor alone, and it is but natural to suppose that if he chooses to contract for their release, he should have the power so to do. Again, the contrary theory involves the anomaly that one may dispose of this right for a valuable consideration, and then by his own act annul the contract by which such disposition was made. The creditor, also, is entitled to some consideration; the waiver is part of the obligation for which he has paid his money, or goods, and he ought not to be deprived of a valuable part of his contract on any doubtful construction of the statute.

The majority of this Court, however, are not disposed to adopt this reasoning, but put the affirmance of this judgment on the ground of *communis error* alone. In many parts of the Commonwealth it has never been doubted but that the waiver in a judgment is coextensive with the lien, and upon this theory many sheriffs' sales have been made, and many titles acquired; we are, therefore, not inclined, by a technical exposition of the Act, to unsettle rights honestly acquired, and upon which many persons have rested for years.

Judgment affirmed.

Opinion by GORDON, J. WILLIAMS, J., absent.

Digitized by Google

July, '74, 18. **Pilling's Appeal.** Feb. 15.
Pilling's Estate.

Decedent's estate—Advancement—Statute of Limitations.

A. died in 1840, having bequeathed to his widow the income of all his estate, *durante viduitate.* The widow lived until 1872. In 1853, B., one of his children, received from the executor of his father's estate $1500, the interest to be paid to the widow. In 1859, all the heirs joined in a note for $1500, drawn in favor of the executor of A.'s estate. The auditor in the present case found that this note was for B.'s advancement, the joinder of the other heirs being for the executor's security. No interest was paid on this note. In 1872, on the death of the widow, the account of A.'s estate was filed, and this note deducted from B.'s distributive share.

Held (affirming the judgment of the Court below), that, this $1500 being an advancement, the statute of limitations did not apply.

Appeal by Caroline Pilling, executrix of Ellis Pilling, deceased, from a decree of the Orphans' Court of Philadelphia County, dismissing her exceptions, and confirming the report of the auditor in the estate of William Pilling, deceased.

William Pilling died in May, 1840. By his will, he bequeathed to his wife, Martha Pilling, the income of all his estate, which consisted entirely of personalty, during widowhood. She died on November 4, 1872, having never again married. This will provided further, as follows:—

"At the decease of my said wife, it is my will that all my estate, real, personal, and mixed, of whatsoever kind, be divided equally among my children, Ellis, Samuel, Mary, and Ralph, and all and every other lawful issue that I may hereafter have, share and share alike."

He never had any other issue, and all the children now survive, except Ralph. The decedent named as his executors Samuel Pilling, his brother, and Samuel Brooks. Samuel Pilling died about 1853. His executors filed their account of his transactions as executor of William Pilling, which was referred to Francis Wharton, Esquire, as auditor, whose report thereon was confirmed absolutely by the Orphans' Court, in July, 1853; Samuel Brooks, as surviving executor, then assumed the entire management and control of the estate. He died about May, 1864, and his executors filed the account of his executorship, which was referred to John O'Byrne, Esquire, as auditor, and his report thereon was confirmed absolutely by the Orphans' Court, in July, 1866. On the 10th of January, 1867, letters of administration *de bonis non cum testamento annexo* were granted to William J. Thomason, the accountant.

The principal question presented for determination was as to a debt alleged to be due the estate by Ellis Pilling, one of the distributees. As to this, the auditor reported as follows:—

The parties, who had a direct personal knowledge of the original borrowing, are now all deceased. The facts, as far as developed, are as follows: On the 5th of October, 1853, Samuel Brooks, surviving executor, receipted to the executors of Samuel Pilling for, among the assets of the estate of William Pilling which their testator had in his hands, the sum of $1500 in cash, as so awarded by Mr. Wharton, the auditor. This amount of money was about that time loaned to Ellis, out of the funds of his father's estate. Samuel, another son of the decedent, had borrowed a like amount from the same source, about ten years before. This was fully admitted, and was charged against his share in the distribution. It is referred to in the report of Mr. Wharton of 1853. In that of Mr. O'Byrne, in 1866, the sum of $3000 is spoken of as a debt due by the heirs, represented by two notes; the account he audited shows one to be that of Samuel for $1500, and the other that of the heirs, for the same amount. The present accountant was directed by him to assume both, and carry them as part of the assets of the estate. On October 5, 1859, all the heirs joined in a joint and several obligation, evidently the one accounted for in 1866, promising to pay to Samuel Brooks, twelve months after that date, the sum of $1500. The body of the paper is in Ellis's handwriting; the first signature is his, and the rest in their order; Samuel, Ralph W., and Mary McDonald are in theirs respectively. This paper Ellis admits as genuine, but denies having ever received any money for or by reason of it, or any money whatever from his father's estate, except $500, which was secured by a mortgage that has been paid. He alleged further that his family and his mother all owed or did owe him. The others testify that it was only signed by them to protect the executor, and that they never had a dollar from the estate. Samuel, too, states that Ellis admitted that he owed this money, and he knew he paid his mother interest on this sum.

Beside this oral testimony, there were produced a number of written documents and an account between the mother and Ellis, all in his handwriting. In this account, on the credit side, he credits his mother, under date of August 5, 1855, with "three years' interest on $1500 loaned me (him) by estate of William Pilling, $270." The account is without date, except as shown by the last item, October 22, 1855, which strikes a balance against the mother. It was conclusively proven that this account was in his handwriting, although in his testimony he states that he neither knew anything about it, nor in whose handwriting it was.

Another paper was also produced and proven, addressed to Samuel Brooks, dated October 22,

Digitized by Google

1855, the same date as the last item in the account just referred to. This paper is signed by the three Pilling brothers, and certifies that she has received the interest on $1500 loaned E. Pilling by the estate of William Pilling, in full to October 5, 1855; and another was also produced, proven and signed by her, in which she acknowledges to have received interest from Ellis up to October 5, 1856, without, however, specifying on what; and still another paper credits his mother with interest in two separate items, showing that it was calculated on $1500, to January 5, 1857.

It would seem clear, therefore, from these written documents alone, that Ellis Pilling is certainly mistaken when he alleges that he never received the sum of $1500 from the estate of his father or any other sum whatever, except the $500 before alluded to. The only discrepancy appears in a difference in dates, that of the joint note being on October 5, 1859, and all the credits for interest being previous to that time, and in the month of August. The certificates of Mrs. Pilling, however, fix the acknowledgment of interest payment to October 5, 1856.

In view of the length of time that has elapsed, and the death of all those who could have cleared up what is seemingly wanting, some facts must be supplied by deduction; the theory best to be supported would appear to your auditor to be that after considerable time had elapsed from the date of the original loan, the executor refused to continue or renew the obligation of Ellis without he was in some way secured by the other parties in interest agreeing to acknowledge it. He appears to have concluded he would be so protected by the obligation of October 5, 1859.

The conclusion to which your auditor has arrived, and the question is such a one as to compel this lengthy statement, is that some time about 1853 Ellis Pilling borrowed from the funds of the estate of his father, William Pilling, the sum of $1500, which he has never repaid.

To this claim, however, the statute of limitation was pleaded. This your auditor has overruled, because it will be recollected that the debt of the heir, $1500, became a matter of record, upon the absolute confirmation of the report of John O'Byrne, Esquire, in July, 1866. Nothing was adduced to show that any of them ever received any *pro rata* share or portion of this debt, notwithstanding they signed the obligation of 1859. In fact it seems to be clearly shown that all this money was received by Ellis Pilling. Such being the conclusion, therefore, that all those in interest except Ellis occupied the relation of sureties only to the note, and it having become a debt of record by reason of the auditor's report of 1866, the sum of $1500 will be charged against the estate of Ellis in the distribution.

Pending the audit, Ellis Pilling died. His will, dated September, 1855, was proven November 19, 1873. He bequeaths all his personalty to his wife, Caroline B. Pilling, absolutely, after the payment of his debts, devises to her his realty for life, with remainder to his children, and nominates her his executrix.

The executrix of Ellis Pilling filed exceptions to this report, and these being dismissed and the report confirmed, she took this appeal.

Charles S. Pancoast, for the appellant, argued that the testimony did not sustain the auditor's finding of the facts, and then took up the question of the statute of limitations. If this note became a debt of record, by the confirmation of the auditor's report in 1866 it was against all the heirs, and not against Ellis Pilling alone. That report cannot be reviewed in this proceeding, and is final.

Rhoads' Appeal, 3 Wright, 186.
Shindel's Appeal, 7 Smith, 45.
Leslie's Appeal, 13 Id. 355.

But if it be said that the $1500 was an advancement to Ellis, and the note was but a receipt, there is no evidence in the case to sustain this view in point of fact.

It is cogent evidence that advancement is not intended, if security be taken, or an attempt made to preserve evidence of it as a debt.

High's Appeal, 9 Harris, 287.
Roland *v.* Schrach, 5 Casey, 125.
Miller's Appeal, 4 Wr. 60.

John K. Valentine, contra, argued that the statute of limitations had no application to the case. If this even were an advancement, of course the statute does not apply. The statute does not embrace the claim of a legacy.

Thompson *v.* McGaw, 2 Watts, 161.
Thompson's Appeal, 6 Wright, 345.
McCandless' Estate, 11 Smith, 11.

March 6. THE COURT. Upon all the evidence in the case, it is evident that Ellis Pilling received but one sum of $1500 from the executors of William Pilling, and this he received on account of his share in the estate falling due at the death of the widow of William Pilling, to whom, by the will, the interest was payable annually. It was evidently a payment by anticipation, he undertaking to pay the interest to his mother. When the note of October 5, 1859, was taken, Ellis had had the money for about six years, and had continued paying interest upon it to Mrs. Pilling. It is evident when this note was taken, it was done for the protection of the executor, who wanted something to show both the payment to Ellis Pilling, and the assent of the other children of William Pilling. The acknowledgment of the widow of the receipt of the interest had been taken in 1855, and again in 1856, including Mrs. Pilling's release of the

Digitized by Google

acting executor, Brooks, from all claims of interest. Thus, it is evident that there had been a family arrangement to permit Ellis to anticipate his share to the extent of $1500, he paying interest to the widow, so that when the note of $1500 of October 5, 1859, was given, it was only a mistaken form in the instrument which did not alter the nature of the arrangement or prevent the executors from asserting it as against the estate of Ellis Pilling after his death. The Statute of Limitations would run against the instrument, but the facts as proved show the true nature of the payment, and that Brooks, the executor, was entitled to a credit for this amount as paid to Ellis Pilling.

Decree affirmed with costs, and the appeal dismissed.

PER CURIAM. WILLIAMS, J., absent.

May '76, 113. June 9.

Bricker's Administrators v. Dull.

Evidence—Failure to give notice of special matter under rule of Court—Subsequent amendment of narr. by adding special counts—Act of 21 *March*, 1806—*Practice.*

An action was commenced in 1861, and two years later a general declaration in assumpsit was filed. A rule of Court required that where general counts were filed notice of the special matter to be given in evidence thereunder should be furnished within twenty days after demand, or the evidence should be excluded upon the trial. After pleas were filed demand was made for the notice, but it was never furnished. On the trial the evidence was admitted and a verdict and judgment rendered for plaintiff, which was reversed by the Supreme Court.

Afterwards, in 1876, the Court below allowed the declaration to be amended by the addition of counts setting forth the special matter, and on the second trial plaintiff offered evidence in support thereof, which the Court below rejected:

Held, that the failure to give notice of special matter under the rule of Court was not cured by the filing of special counts twelve years afterwards, and that the evidence offered on the second trial was therefore properly rejected.

Error to the Common Pleas of Dauphin County.

Assumpsit by Drew *et al.* to the use of Bricker against Collins, Dull & Co. The summons was issued to August Term, 1861, and on October 9, 1863, a declaration containing general counts in assumpsit was filed. Defendants, on October 24, 1863, pleaded non-assumpsit, payment, etc.

The 67th rule of the Court provided that—

"If the plaintiff's action be a general assumpsit, not founded on a writing, he shall, upon a reasonable request, before the defendant be compelled to plead, or, where a plea has been entered, within twenty days after such request, file together with his declaration a written statement of the account or demand that he purposes to give in evidence, and rely on at the trial, and on failure so to do, no evidence thereof shall be received."

The 68th rule of the Court provided that—

"Either party to an action may require in writing of the other party an exhibition of any paper or papers upon which the action is founded, or which is relied on as a defence, and to have copies thereof, if necessary, made at his own expense, within twenty days after such requisition, and upon the refusal of either party to make such exhibition or permit such copies to be made, the same shall not be given in evidence on the trial."

Under these rules defendant, on January 2, 1864, served notices on plaintiff's counsel requiring him to exhibit to defendant within twenty days any paper or papers upon which the action was founded; and also requiring him to file within twenty days a written statement of the account or demand proposed to be given in evidence. No attention was paid by plaintiff to either of these notices, and no further steps were taken in the case until 1873, when a trial was had at which plaintiff offered in evidence certain orders accepted by defendants, which were objected to by defendant because notice had not been given, but they were admitted by the Court. The verdict and judgment obtained by the plaintiff was subsequently reversed by the Supreme Court because of the admission of this evidence. (Dull *v.* Bricker, 26 Sm. 255.)

Afterwards, in 1875, plaintiff obtained a rule to show cause why he should not be permitted to file a bill of particulars and amend his narr. by adding special counts. This rule was afterwards discharged as to the bill of particulars, but the narr. was allowed to be amended, the Court however remarking that upon the trial all evidence in support of the additional counts would be rejected for want of the notice of special matter demanded in 1864. The additional counts, declaring specially on said orders and having copies of them attached, were at once filed. At the second trial of the case, in May, 1876, the plaintiff offered the orders in evidence, together with the amended narr. The defendants objected on the ground that the notice required by the Court rule remained unfurnished.

The Court (PEARSON, P. J.) rejected the evidence, and, in the absence of other testimony, directed the jury to find for the defendant. Verdict accordingly for the defendant, and judgment thereon. The plaintiff took this writ, assigning for error the rejection of his evidence.

J. W. Simonton, for the plaintiff in error.

The notice of special matter required by the rule of Court is only intended to answer the purpose of a special count. (Dull *v.* Bricker, 26 Sm. 255.) The special counts filed by plaintiff therefore render such notice unnecessary.

Digitized by Google

Under the Act of 21 March, 1806 (Purd. Dig. p. 68, pl. 1), it has been held that if a defendant is precluded from giving evidence by omitting to furnish notice of special matter, he may amend his plea and set forth the special matter (Sharp *v.* Sharp, 13 S. & R., 444, affirmed in Yost *v.* Eby, 11 H. 327), where the Court in addition say, that allowing the amended plea to be filed, admits the evidence in support of it.

The delay in the disposition of the case cannot be taken advantage of by the defendants who have always had it in their power to speed the cause.

Sweeny *v.* McGettigan, 8 H. 321.
Hemphill *v.* McClimans, 12 H. 371.

Francis Jordan (*B. F. Etter* with him), contra.

Plaintiff cannot by amending his pleadings evade the requirements of a Rule of Court, nor avoid the effect of his failure to comply with it.

Thompson *v.* Hough, 9 Leg. Int. 46.

Evidence has been frequently held to have been properly rejected, when Court Rules requiring special notice of it have been disregarded.

Covely *v.* Fox, 1 J. 173.
Finlay *v.* Stewart, 6 Sm. 183.

And this notwithstanding the Act of 1806, as was held in Daniel *v.* Wilver (12 H. 516), a case on all fours with the present. Sharp *v.* Sharp, *supra*, is not a parallel case, there being no rule regulating the pleading, and Wilson *v.* Irvin (14 S. & R. 146), and McCay *v.* Burr (6 Barr, 147), assert a contrary doctrine.

None of the orders or papers enumerated in the amended narr. were recited or mentioned in the original declaration; and hence it was an effort to introduce new causes of action long since barred by the Statute of Limitations, contrary to the rulings of the Court in—

Shoch *v.* McChesney, 4 Yeates, 507.
Wright *v.* Hart's Adm'r, 8 Wr. 454.
German *v.* Judge, 27 Mich. 138.

The plaintiff by his delay had deprived himself of all right to the amendment.

Bank *v.* Israel, 6 S. & R. 293.

Oct. 9. THE COURT. This suit was brought to August Term, 1861. A general declaration in assumpsit was filed on the 9th of October, 1863, and on the 24th of that month, pleas of non-assumpsit and payment with leave were entered by the defendant. At that point the record stops until the 6th of May, 1873, when the cause was ordered for trial. It was tried the next day, a verdict and judgment were obtained, a writ of error was taken, and in July, 1874, the judgment was reversed. After the return of the record, on the 12th of February, 1876, the plaintiffs were permitted to file a special declaration in which their cause of action was specifically set forth. On the 2d of January, 1864, after the cause was at issue, the defendant's counsel gave notice to the counsel of James Bricker, then living and the plaintiff on the record, to file within twenty days any paper or papers on which the action was founded, and to file, also within twenty days, a written statement of the account or demand proposed to be given in evidence and relied on at the trial. These notices were authorized by the 67th and 68th rules of the Common Pleas, which provided that in case of failure to file the papers and statement required, no evidence of such papers or of the plaintiff's account or demand should be received. No action was taken in pursuance of the notices on the part of the plaintiff, and it was to meet the exigencies of the case created by this neglect that the application to amend the declaration was made. At the last trial the Court below were of the opinion that the defect of the record caused by the omission to comply with the provisions of the rules was not cured by the amendment after the long delay, and accordingly they rejected the evidence offered, and directed a verdict for the defendant.

It appears from the pleadings that this controversy grew out of a transaction between James Bricker and the firm of Collins, Dull & Co., who were contractors for the construction of the road of the Bedford Railroad Company. Bricker furnished goods and supplies to three sub-contractors, Keating, McCabe, and Dhrew, and for these the plaintiffs allege that Collins, Dull & Co. agreed to pay out of the estimates on the sub-contracts. The special declaration set out the amounts assumed by the defendant's firm on account of Keating at $524.20, on account of McCabe at $240, and on account of Dhrew at $1259. The aggregate of the principal sums was $2023.20. This was a pretty significant amount, and it was claimed out of a somewhat complicated transaction. There was a lapse of more than twelve years between the requisition for notice of the plaintiff's demand and the amendment of the declaration. More than nine years expired after the requisition before any step was taken to secure the trial of the cause. If the specification of the claim had been filed within a reasonable time, even after the expiration of the twenty days, or if, in lieu of the specification, the application to amend the declaration had been reasonably prompt, adequate relief would undoubtedly have been afforded by the Court below. But a delay of twelve years was fatal to the success of the efforts of the plaintiffs to cure a defect arising from their intestate's original neglect. In the Farmers' and Mechanics' Bank *v.* Israel (6 S. & R. 293), a delay of nine years in applying for leave to amend a declaration was said to be "out of all reason," and the same remark may be well applied to a case like this involving an inquiry into the accounts of five distinct parties interested in a railroad contract,

Digitized by Google

which, so far as the purposes of this suit are concerned, is shown by the record to have been executed for a period of fifteen years. The fact that the amendment was allowed was not enough to justify the admission of the evidence.

Judgment affirmed.

Opinion by WOODWARD, J. SHARSWOOD and WILLIAMS, JJ., absent.

Oct. & Nov. '75. 294-301. Nov. 16.

Bogue's Appeal.
Stein's Appeal.
Newburger's Appeal.

Auditor—Executions upon individual and partnership judgments—Distribution of proceeds Conclusiveness of sheriff's return—Estoppel of the plaintiff in the writ.

In a contest between the execution creditors of a partnership and the execution creditor of an individual partner, an auditor appointed to distribute the fund arising from a sale under the partnership executions, cannot inquire into the existence of the partnership, unless the returns are contradictory.

The sheriff's return to a writ of *fi. fa.* is conclusive upon the plaintiff therein.

A., an individual judgment creditor of B., issued a *fi. fa.* against him, to which the sheriff returned that he had levied upon the interest of B. in certain property of the firm of B. & Sons, and had afterwards, under subsequent executions against said firm, sold said property as theirs. Before the auditor appointed to distribute the proceeds of the sale under the executions against the firm, A. claimed the amount of his judgment out of the proceeds, and offered evidence to show that in fact no partnership existed between B. and his sons, and that the property belonged to B. individually:

Held (reversing the judgment of the Court below), that the auditor could not inquire into the existence of the partnership, and that A. was estopped by the return to his *fi. fa.* from claiming any of the proceeds of the subsequent executions against the firm.

Paxson's Appeal (13 Wr. 199) affirmed.

Appeal of York County Bank (8 Cas. 446); Vandike's Appeal (5 Har. 271); and Cope's Appeal (3 Wr. 284), distinguished.

Appeal from the Common Pleas of Fayette County.

These were appeals by Henry Bogue & Sons, S. Stein & Co., and Newburger & Hochstadters, from a decree of the Court confirming the report of an auditor appointed to distribute the proceeds of a sheriff's sale of the personal property of A. G. Minehart & Sons, under a *fi. fa.* issued at the suit of S. Stein & Co. The record as produced before the auditor showed the following facts: On March 24, 1875, a *fi. fa.* was issued upon a judgment of Brown, Kunkle & Co. against A. G. Minehart, and on the same day was placed in the hands of the sheriff. On April 16, 1875, four *fi. fas.* (numbered 144 to 147, June T., 1875) were issued upon four judgments obtained by S. Stein & Co. against A. G. Minehart and his sons, A. G. Minehart and Samuel Minehart, partners, doing business as A. G. Minehart & Sons. Afterwards on the same day two other *fi. fas.* were successively issued against said firm of A. G. Minehart & Sons upon judgments obtained against them by Newburger & Hochstadters and Henry Bogue & Sons, respectively. To the *fi. fa.* of Brown, Kunkle & Co. the sheriff made the following return:—

"March 26, 1875, levied on all the interest of A. G. Minehart in the business and property of A. G. Minehart & Sons; said partnership property, etc., consisting of ready-made clothing, ... etc., and subsequently sold said property as that of A. G. Minehart & Sons, as per return to *fi. fas.* Nos. 144 and 150 of June Term, 1875."

To the *fi. fa.* of S. Stein & Co., No. 144, the sheriff returned as follows:—

"April 16, 1875. Levied on all the following property belonging to defendants, A. G. Minehart & Sons, viz.: A lot of ready-made clothing, ... and after due and legal notice given, as required by law, I sold the same on the 22d, 23d and 24th days of April, 1875, for the sum of two thousand four hundred and four dollars and seven cents ($2404.07), which money, on leave given, I paid into court for distribution, according to law."

To the other *fi. fas.* against said firm the sheriff returned that he had levied on personal property of defendants, subject to the levy on *fi. fa.* No. 144, and had sold the same as per return to that writ.

Before the auditor Brown, Kunkle & Co. claimed that the amount of their judgment should be first paid out of the fund, and offered evidence to show that no partnership existed between A. G. Minehart and his sons; that the business carried on under the firm name was in fact carried on by A. G. Minehart alone, and that the goods sold as firm property belonged to A. G. Minehart individually. The auditor found that the evidence was sufficient to establish the fact that the goods sold were the individual property of A. G. Minehart. He was also of the opinion that under the authority of Appeal of York County Bank (8 Cas. 446), Vandike's Appeal (5 H. 271), and Cope's Appeal (3 Wr. 284), he had authority to "determine the ownership of the goods regardless of any return of the sheriff." He therefore reported that Brown, Kunkle & Co. should be awarded the full amount due on their judgment, viz., $743.88 with costs. To this report S. Stein & Co., Newburger & Hochstadters, and Henry Bogue & Sons, filed exceptions upon the ground, (1) That the auditor erred in finding that the property belonged to A. G. Minehart, and not to the firm of A. G. Minehart & Son. (2) That the auditor erred in admitting evidence

Digitized by Google

to contradict the sheriff's return to the *fi. fa.* issued by Brown, Kunkle & Co., the return to that writ being conclusive as to what property was levied on and sold under it; and, (3) That the auditor erred in awarding to Brown, Kunkle & Co. their claim before the executions against the partnership had been satisfied. The Court below dismissed the exceptions and confirmed the report. Exceptants appealed, assigning for error the dismissing of their exceptions, and the confirmation of the report.

D. Kaine, for appellants Bogue & Sons.

After a sale of partnership property as such, the proceeds cannot be appropriated to any other than partnership debts.

The authorities relied upon by the auditor do not sustain his position. He clearly possessed no authority to determine the ownership of the goods sold; on the contrary, the cases relied upon by him, and the Act of Assembly upon the subject, indicate that facts thus in dispute can only be decided by a court and jury upon an issue formed for that purpose.

Vandike's Appeal, 5 Harris, 271.
Act of 16 June, 1836, Purd. Dig. p. 656, pl. 108.

The sheriff's return to the Brown & Kunkle writ was conclusive upon the parties to it.

Paxson's Appeal, 13 Wr. 195.

N. Ewing, for appellees.

An auditor has entire power to determine the character of the fund he is called upon to distribute.

Appeal of York County Bank, 8 Cas. 446.
Vandike's Appeal, 5 H. 271.
Cope's Appeal, 3 Wr. 284.
Assigned Estate of Worthington, 2 Weekly Notes, 199.

If the execution creditors of A. G. Minehart & Sons are to be preferred in the distribution, it must be solely upon the ground of the equities existing between A. G. Minehart and his sons.

Appeal of the York Co. Bank (*supra*).
Rice *v.* Sherman, 7 Wr. 37.
Snodgrass' Appeal, 1 H. 47.
Jacobs & Co.'s Estate, 23 Sm. 466.

But, as shown by the evidence, the auditor could have arrived at no other conclusion than that, in reality, no partnership had existed, and therefore no equities could subsist.

And the auditor having found that the property sold was that of A. G. Minehart individually, and his report having been confirmed by the Court below, the finding is final and conclusive.

Heft's Appeal, 1 Weekly Notes, 174.
Gilbert *v.* Grim, Id. 306.
Hamaker's Appeal, Id. 452.

Mestrezat & Boyd, for appellants Stein and Newburger.

In a contest between the parties to the action, they cannot contradict the sheriff's return, which can only be impeached in an action against the sheriff.

Diller *v.* Roberts, 13 S. & R. 64.
Mentz *v.* Hamman, 5 Wh. 153.
McClelland *v.* Slingluff, 7 W. & S. 135.
Flick *v.* Troxell, Id. 67.

Nov. 24. The Court. These are appeals from the decree of the Court of Common Pleas of Fayette County, distributing the proceeds of a sheriff's sale of personal property. They all rest upon the same ground, and may be considered together.

Brown, Kunkle & Co had a prior execution in point of time issued upon a judgment against A. G. Minehart, which was levied upon the interest of the defendant in the business and property of A. G. Minehart & Sons. The executions of the appellants were issued upon judgments against A. G. Minehart & Sons, and were levied on the property as of the defendants and sold under these writs. The sheriff returned the sale as made under them, and paid the money into court.

The auditor in the Court below, to whom the question of distribution was referred, gave the priority to the execution of Brown, Kunkle & Co., on the ground, which he found to be the fact, that there was no such partnership as A. G. Minehart & Sons, and that the personal property levied upon and sold was the exclusive property of A. G. Minehart. Whether he was right in this finding of fact it will be unnecessary to consider, as we are clearly of the opinion that it was not a question properly involved in the distribution. He was evidently misled by a cursory examination of the cases he cites without observing a marked distinction between them and that which was before him for determination. (Appeal of the York County Bank, 8 Casey, 446; Vandike's Appeal, 5 Harris, 271; Cope's Appeal, 3 Wright, 284.) These were all contests between separate and partnership execution creditors, in which the sheriff had levied and sold under all the writs, and so made return. Neither party was concluded by the return made upon any execution except his own, and his own was in his favor. It followed that there were contradictory returns, as to whether the goods from which the money had been made was separate or partnership property, and it was held in those cases that the Court were bound of necessity to inquire and determine the fact in order to enable them to distribute the fund. But the facts here were entirely different. Upon the execution of Brown, Kunkle & Co., the sheriff made return that he had "levied on all the interest of A. G. Minehart, in the business of A. G. Minehart & Sons, said partnership property consisting of ready-made clothing, etc., and subsequently sold said property as that of A. G. Minehart & Sons, as per return to *fi. fa.* Nos. 144 and 150 of June Term, 1875." The *fi. fa.* No. 144, to which the sheriff refers in this return, was one in

Digitized by Google

favor of Stein & Co., against A. G. Minehart & Sons, and No. 150 a similar execution in favor of Henry Bogue & Son. To No. 144 the sheriff made return that he had "levied on all the following described personal property, belonging to the defendants, A. G. Minehart & Sons, to wit: A lot of ready-made clothing, etc. After due and legal notice given as required by law, I sold the same for the sum of $2404.07, which money on leave given I paid into court for distribution according to law." Upon the other partnership executions he returned severally that he had "levied on personal property of defendants, and sold the same as per return to *fi. fa.* No. 144."

That Brown, Kunkle & Co. were not prevented by the returns to the partnership executions from setting up their claim to the proceeds of the sale of the goods, as the individual and separate property of their debtor defendant, A. G. Minehart, is clear, but that they were concluded and estopped by the return to their own writ, is equally clear both on principle and authority. It was expressly so ruled by this Court in Paxson's Appeal (13 Wright, 199), where the books and cases are cited. The return to their execution not only stated that the levy under it was only upon the interest of A. G. Minehart in the business and property of A. G. Minehart & Sons, but also that it was partnership property, and that he had sold it as such under the partnership execution. There was no sale under Brown, Kunkle & Co.'s writ, the money was made under the partnership writs and so paid into court.

There was error therefore in trying the question of fact of the existence of the partnership, and the money ought to have been distributed to the execution creditors of A. G. Minehart & Sons, according to their respective priorities.

Decree reversed at the cost of the appellees, and record remitted to the Court below, that distribution may be there made according to this opinion.

Opinion by SHARSWOOD, J. WILLIAMS and MERCUR, JJ., absent.

Common Pleas—Equity.

The following new Rule was adopted in the several Courts of Common Pleas of Philadelphia County, December 30, 1876:—

All bills whose object is the enjoining of pending proceedings at law or in equity in any of the Courts of Common Pleas of this county, shall be assigned by the Prothonotary to the Court in which such proceedings at law or in equity shall be pending, without reference to the assignment of current business at that time under the general rules of these Courts.

Common Pleas—Law.

C. P. No. 1. Dec. 11.

Wharton v. Rosengarten & Bro

Process—Failure to name individual partners in a suit against firm—Insufficiency of return of service.

Certiorari to alderman.

Sur exceptions to record.

Action on book-account, and judgment for plaintiff by default in appearance. The record showed that suit was brought: "J. W. Wharton *v.* Wm. Rosengarten & Brother," and that the summons was returned by the constable, "Served by producing to the defendants the original summons, and made known to them the contents thereof."

Hinckle, for exceptions.

The judgment should be set aside, first, because the defendants were improperly summoned as "Rosengarten & Brother," instead of setting out the individual names of the firm; and, secondly, because the return does not show that the defendants were individually served, as is required when service is not at defendants' dwelling-house.

G. W. Arundel, contra, contended that "& Brother" was only surplusage, since, in point of fact, William Rosengarten was sole defendant.

THE COURT. We think that the two defects, taken together, vitiate the judgment.

Exceptions sustained and judgment set aside.

[*Cf.* Bold *v.* Harrison, 1 WEEKLY NOTES, 154; Lippincott *v.* Hopple, 2 Id. 186.]

C. P. No. 1. Nov. 25.

Cardwell v. Hickman et al.

Execution—Sheriff's sale of personal property—Inadequacy of price—Alleged sham sale in fraud of creditors—Proper method of testing question of fraud—Feigned issue—Practice.

Rule to set aside sheriff's sale of personal property.

The affidavit in support of the rule, made by one Harris, a creditor of the defendants, set forth that under the execution in this case, personal

Digitized by Google

property of the defendants (who were partners), of the value of $14,000, was levied upon and sold for about $800; that no advertisements of the sheriff's sale were made, no bills posted, nor a flag displayed previous to the sale; that said sale was made in fraud of the rights of the deponent and other creditors then having executions out against the said defendants; that although the goods at the sheriff's sale were not purchased nominally by the defendants, the latter still continue in possession thereof.

Depositions were taken, but, upon the hearing of the rule, the Court refused to have them read.

Gummey, for the rule.

The goods have practically been put into the hands of the original owners by an abuse of the process of the law. No actual bona fide sale has taken place, yet the creditors cannot enforce their rights. There was clearly no transfer of title by the sale.

Daniels, contra, was not called upon.

THE COURT. This was a judicial sale. It was fully consummated, and we cannot interfere. The creditors' proper remedy is to issue another *fi. fa.* and contest the ownership by a feigned issue.

Rule discharged.

C. P. No. 3. Nov. 18.

Whipple, Trustee, v. The Fire Association.

The Court will modify the judgment and control the execution in such a way as to protect the rights of parties where the subject-matter is in dispute in suits pending in other States—Practice.

Rule on plaintiff to show cause why judgment should not be modified by adding that no execution issue thereon until further order of the Court.

Debt upon the transcript of a judgment obtained in Rhode Island, by F. W. Whipple, trustee for the estate of Nathaniel Fullerton, against The Fire Association of Philadelphia. On Nov. 4, the Court entered judgment against the defendant for want of a sufficient affidavit of defence. The affidavit filed in support of the present rule set forth the following facts: The suit in Rhode Island was upon a policy issued by the defendant to Frederick W. Whipple, upon a mill property in Vermont, the amount insured being made payable to the estate of Nathaniel Fullerton. The property having been totally destroyed by fire in November, 1873, F. W. Whipple filed with the defendant sworn proofs of loss, setting forth that he was the owner of the property destroyed and that "no other person or party has any interest therein." This proof was dated 25 Nov. 1873, and signed by F. W. Whipple, and contained no mention of his being trustee. The money due by defendant upon said policy ($2360) has been attached in New York, at the suit of Watson & Co., creditors of F. W. Whipple to the amount of $20,745.32, who allege that the insured property belonged to Whipple and not to the estate of Nathaniel Fullerton.

A suit in equity also has been instituted in Boston, Mass., by the said Watson & Co., against the said Whipple, and others, including the defendant and eighteen other fire insurance companies, all of whom have taken risks upon the said property, on the ground of certain frauds alleged to have been committed by the said Whipple and others against their creditors in respect to the said insured property, praying the Court to restrain Whipple from prosecuting suit against the defendant and the other insurance companies until the questions raised in the suit be determined, and praying further that the insurance companies (including the company defendant) might be required to show cause why they should not pay into Court the insurance moneys for the benefit of the parties entitled thereto. This bill was filed in March, 1876. To it the defendant made answer admitting its indebtedness of $2360, and offering to pay the money into Court. Whipple also made answer averring that the property insured belonged to him but had been mortgaged by him to Nathaniel Fullerton, and the policy made payable to said Fullerton as security for the mortgage. He further averred that the suit in Rhode Island had been brought and was directed by the administrator of Nathaniel Fullerton, now deceased, and that in said suit, his, Whipple's name was used solely for the benefit of the said estate, and in order to facilitate collection.

E. Coppée Mitchell (with whom was *W. E. Littleton*), for the rule.

The pendency of the attachment in New York and of the equity proceedings in Boston are of course no defence to the action here, but they enable the Court to mould the judgment so as to protect the parties' rights.

Brown *et al.* *v.* Scott, 1 Sm. 357.

The defendant admits the debt sued for here, but desires to pay it to the party entitled thereto and in such a way as to be protected.

G. E. Megargee, contra.

The judgment in Rhode Island is virtually in favor of the estate of Nathaniel Fullerton, deceased. Whipple's name was used as trustee because the laws of Rhode Island required it. Attachments and proceedings against Whipple individually cannot affect us.

Mitchell, in reply.—Whipple's creditors allege that he was the plaintiff in the suit, and that the money due by the defendant on the policy belongs to Whipple individually.

Digitized by Google

THE COURT. We will make this rule absolute, but will allow the plaintiff at any time, upon reasonable notice to the defendant, to move the Court for leave to issue execution.

C. P. No. 3. Dec. 18.

Porter v. The Trust Co., Exrs.

Nonsuit—Services not in the way of plaintiff's business rendered to a decedent who was a relative—Evidence as to promise—Conditional promise—Statute of limitations.

Rule to show cause why a non-suit should not be stricken off.

Assumpsit brought by Dr. James J. Porter, against the Philadelphia Trust, Safe Deposit and Insurance Co., executors of Parthenia P. Mayfield, deceased, to recover the sum of $5000 alleged to have been promised the plaintiff by the testatrix in consideration of services rendered by him to her. Plea, the general issue.

At the trial the plaintiff showed that he was a brother of the testatrix, that in 1864 she was living with her husband in Nashville, Tennessee, where the latter died; that in consequence of a telegraph from testatrix to the plaintiff, who was a physician practising in Washington, requesting him to come to help her arrange her affairs, he immediately went to Nashville, expecting to be absent a week or ten days, but that he was detained there three months by his sister's business. He offered to show that on his return to Washington he told his family his sister had promised him $5000, but the offer was rejected. It appeared that after this time the testatrix was often at plaintiff's house and constantly spoke of her great obligations to him for his services in Nashville, which she said were indispensable.

In a letter from the testatrix to the plaintiff in 1869, she said she was sorry she could not at that time conveniently help him in the purchase of a house in accordance with his request. It further appeared by secondary evidence of the contents of a lost letter, said to have been written in 1871, that she congratulated the plaintiff on the prospect of her being able to sell her house in Nashville for $20,000, in which event she would be able to pay him what was due him, using the words, "then, James, you shall have your $5000." It did not appear that the house had been sold.

The plaintiff had been in the habit of assisting her in her business affairs both before and after her husband's death, and she in her conversations with plaintiff's family had used the word "obligation," but not indebtedness. Their relations had always been of the most friendly character She died in 1875, leaving a will by which, after bequeathing $5000 to a sister, which legacy lapsed, she left the residue of her estate to charities, making the defendants her executors.

On motion of the defendants the Court entered a non-suit.

Sharpless, having obtained a rule nisi—

Ashhurst showed cause.

There was not sufficient evidence of an express promise to go to the jury. The only evidence is the letter of 1871, which might as well refer to a gift as to a promise to pay for services, and the promise, such as it was, was made dependent upon a contingency which never occurred.

The nature of the services, coupled with the relationship of the parties, rebuts the presumption of an implied promise. Even between strangers such a presumption could hardly have arisen. The services were not in the line of Dr. Porter's profession, and they are not specifically set forth. As to inference from relationship, he cited—

Little *v.* Dawson, 4 Dal. 111.
Swires *v.* Parsons, 5 W. & S. 357.
Osborn *v.* Hospital, 2 Strange, 728.
Defrance *v.* Austin, 9 Barr, 309.
Lantz *v.* Frey, 2 H. 202.
Smith *v.* Milligan, 7 Wr. 108.
Duffey *v.* Duffey, 8 Id. 401.
Cummings *v.* Cummings, 8 W. 366.
Leidig *v.* Coover, 11 Wr. 534.
Amey's Appeal, 13 Id. 126.
Butler *v.* Slam, 14 Id. 456.

If a contract existed, yet there was no admission within six years. The letter of 1871 does not admit a debt, or promise to pay one. To take the case out of the statute there should be an unequivocal admission or promise to pay at all events.

Suter *v.* Sheeler, 10 Har. 310.
Weaver *v.* Weaver, 4 Sm. 153.
Senseman *v.* Hershman, 33 Leg. Int. 313; S. C., 2 WEEKLY NOTES, 693.
Boss *v.* Long, 33 Leg. Int. 306; S. C., 2 WEEKLY NOTES, 694.

Sharpless, for the rule.

The plaintiff offered to prove that he had stated his sister promised to pay him $5000. This declaration should have been admitted as part of the *res gestæ* to show what he then thought.

As to rebuttal of presumption of promise between relations, see—

Smith *v.* Milligan, 7 Wr. 107.
Gorden *v.* Heffley, 13 Id. 163.
Neel *v.* Neel, 9 Sm. 349.

Where the presumption is rebutted the relationship is generally that of parent and child, never that of brother and sister.

Rule discharged.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, JAN.* 18, 1877. [No. 16.

Supreme Court.

Jan. '74. 328. Feb. 8, 1876.

Fell v. The City of Philadelphia.

Municipal claims—Paving—City Ordinances—Compliance with—Advertising—What defences may be set up by the owner of property—Act of 19 *April*, 1843.

Although the City can waive irregularities and defects of form in dealings with its contractors for municipal improvements, yet the property owners can be made subject to a legal obligation only where the power conferred on the municipal authorities has been legally exercised. Where the record shows that the rules prescribed by law have not been complied with, there is no jurisdiction over the defendant or his property.

An ordinance of the city of Philadelphia required notice of an application for a paving contract to be advertised for two weeks prior to its presentation. Upon a *sci. fa.* sur claim for paving filed against property the owner of which had not requested or agreed to the performance of the work, no direct evidence was given on either side as to the advertisement of the application, but it appeared from the other evidence in the cause that the terms of the ordinance could not have been complied with:

Held (reversing the judgment of the Court below), that the contractor could not recover.

Semble, that in questions involving the liability of defendants for their proportion of the cost of municipal improvements, the relations between the city and the parties with whom they contract are ordinarily outside the line of legitimate inquiry. When such improvements are within what were the incorporated districts of the county of Philadelphia when the Act of 19 April, 1843, was passed, a defendant can only rely upon the defences allowed by that act.

Per WOODWARD, J. The Act of 19 April, 1843, relating to defences to municipal claims has been constantly recognized by the Supreme Court, notwithstanding the doubt intimated by WILLIAMS, J., in Philadelphia *v.* Edwards, 2 WEEKLY NOTES, 102.

Error to the late District Court for the city and county of Philadelphia.

Amicable action between the City of Philadelphia to the use of Cunningham & McNichol, contractors, and William Jenks Fell, owner, in the nature of a *scire facias sur* municipal claim for paving Beckett Street in front of the defendants' property. Pleas, non assumpsit, payment with leave, and set-off, and several special pleas not material here.

On the trial (before THAYER, J.), the plaintiffs, having offered in evidence the claim filed, produced the City Ordinance of 13 April, 1869, which required the Department of Highways to enter into a contract with competent pavers, who should be selected by a majority of the owners of property fronting on Beckett Street *from Woodland Street to Forty-third Street* for the paving thereof. They then offered, under objection and exception, an agreement, dated March 27, 1869 (and therefore prior to the approval of the above ordinance), by which some ten persons, the defendant not among them, describing themselves as "owners of property on Beckett Street between Woodland Street and *a point four hundred and five feet west of Forty-second Street*," contracted with Cunningham & McNichol to do the paving in front of their respective properties on the said street, the work to be done under the direction and to the satisfaction of the Chief Commissioner of Highways and at the rate of $1 25 per square yard. It was admitted that the signers of the agreement were a majority of the property owners on Beckett Street between the points named. They next offered the contract of Cunningham & McNichol with the city dated Jan. 24, 1869, to pave Beckett Street, from Woodland Street to Forty-third Street. Having proved that in 1869 they had paved the street from Woodland Street to a point four hundred and five feet west from Forty-second Street with cobble-stone pavement, the plaintiff, in explanation of the default to pave up to Forty-third Street, as required by the contract with the city and the Ordinance of 13 April, 1869, showed that Beckett Street had been opened west from Forty-second Street, four hundred and five feet only, being there cut off by the lands of the Hamilton Park Association, through which, by the Act of 18 July, 1863 (P. L. 1864, 1113), no street could be opened. It appeared, however, that the restriction had been repealed by the Act of 15 March, 1871 (P. L. 361).

The defendant set up (1) that the plaintiffs had not proved their compliance with the Ordinance of 31 December, 1862, which requires all persons applying for paving contracts to give notice of such application in two daily papers, at least two weeks before making the same (see the Ordinance in the opinion of the Court). (2) That by the ordinance of June 12, 1868 (afterwards repealed by Ordinance of June 21, 1869), only rubble pavements could be laid in West Philadelphia, in which Beckett Street was situated, the same Ordinance fixing the price of such pavement at $1 50, and that of cobble pavement at $1.25, per square yard; that under the circumstances, the signers of the agreement of March 27, 1869, as was shown by the price, had contracted for a cobble pavement, which was then unlawful; and that therefore by the agreement they had made no competent selection of pavers under the Ordinance of

Digitized by Google

13 April, 1869, *supra.* (3) That the bill rendered defendant was not certified to by the commissioner as required by the Ordinance of August 30, 1868. (4) That the contract between the city and the claimants was not approved by the city solicitor and councils as required by the Act of April 21, 1855 (P. L. 269), and (5) That the work was badly done

In rebuttal the Chief Commissioner of Highways testified for plaintiffs that he had visited the work while in progress, and was satisfied with it.

The Court left the quality of the work to the jury, and reserved the following questions of law, which had been submitted as points by the defendant:—

(1) If the jury find that Beckett Street has not been opened up to Forty-third Street, and that the plaintiffs did not pave up to said street, they cannot recover in this action

(2) The plaintiffs must show, before they are entitled to a verdict, that all the requirements of the ordinance of 31 December, 1862, have been fully complied with by them.

(3) The plaintiffs must show that they fulfilled their contract in strict accordance with the terms of the ordinance then existing.

(4) The plaintiffs must show that the bill rendered the defendant was certified by the Chief Commissioner of Highways, and in default thereof they cannot recover.

(5) The plaintiffs cannot recover here under a contract not approved by the City Solicitor and Councils

Verdict for plaintiffs for $2245.16. The Court afterwards entered judgment for plaintiffs on the reserved points, and discharged a rule for a new trial, THAYER, P J., delivering the following opinion:

By an ordinance of the City Councils, approved April 13, 1869, the Department of Highways was authorized and directed to enter into a contract with a competent paver or pavers, who shall be selected by a majority of the owners of property fronting on Beckett Street, *from Woodland Street to Forty-third Street, for the paving thereof*, the conditions of which contract shall be, that the contractor or contractors shall collect the cost of said paving from the property owners respectively, and shall also enter into an obligation with the city to keep the said street in good condition for three years after the paving is finished." On the 24th of June, the city, by the chief Commissioner of Highways, entered into a written contract with Cunningham & McNichol, the plaintiffs, to pave Beckett Street, *from Forty-third Street to Woodland Street.*

On the trial it appeared that the plaintiffs had paved Beckett Street from Woodland Street *to a point four hundred and five feet west of Forty-second Street.* It also appeared that the remaining distance between this point and Forty-third Street was a part of the property of the Hamilton Park Association, a corporation incorporated by an Act, approved March 17, 1864, (P. L 1864, page 192), and that it had not been paved in consequence of an Act of Assembly, approved July 18, 1863 (P. L. 1864, Appendix, page 1113), which enacted that no street should be opened or continued across or within the limits of said tract of land during the period in which it should be held and used as a park, without the consent of the owners thereof.

The defendant insisted that inasmuch as the ordinance of councils had only authorized the Highway Department to enter into a contract for the paving of the *whole* distance between Woodland Street and Forty-third Street, and inasmuch as the contractors had by the contract made with the city expressly undertaken to pave Beckett Street the whole distance from Woodland Street to Forty-third Street, and in point of fact had paved only a part of the distance contracted for, they could not recover. This was the principal question of law in the case, and on the trial it was reserved. The Commissioner of Highways testified on the trial, that he had supervised the paving during its progress; that he had inspected it when finished; that it was done in accordance with law, and met his approval. It was quite plain upon the evidence that the city officials approved of the prosecution of the work as far as the point to which it was actually completed, and that there was an impossibility of prosecuting it beyond that point, in consequence of the prohibition of the statute, a circumstance which seems to have been overlooked at the time of the passage of the ordinance.

Are the contractors, who appear to have acted in good faith, to go unpaid for the work actually done, because they did not perform that part of the contract which the law prevented them from performing, and in the non-performance of which the city, by the executive agents to whom the supervision of the matter was confided acquiesced? If the City Councils, through ignorance of the restraining statute, authorized a contract too large in its terms, and thereby induced Cunningham & McNichol, through the same ignorance, to enter into it, and if Cunningham & McNichol performed the contract as far as it was lawful to perform it, are they now to be told that they have no right to be paid for the part which they performed, because the law prevented the performance of the residue? To affirm this would seem to affirm a manifest injustice. True, the ordinance required the whole distance to be paved, and the ordinance was the foundation of the agreement, the law of the contract, but it is a case in which *impotentia excusat legem.* If H. covenants to do a thing which is lawful, and

Digitized by Google

an Act of Parliament comes in and hinders him from doing it, the covenant is repealed. (1 Salk. 198; Lord Anglesea v. Churchwardens of Rugley, 6 Q. B. N. S. 107, 114.) But is the whole covenant repealed when it is capable of division, and one party performs it as far as it can legally be performed, and with the knowledge and approbation of the other party? We think not. In such a case the party cannot lawfully be deprived of his compensation for the part lawfully performed.

But it is said that the only authority which the Highway Department had over the subject was to procure the paving of Beckett Street throughout the whole distance from Woodland Street to Forty-third Street, and that if the street could not be lawfully paved for the whole distance mentioned in the ordinance, the Highway Department had no authority to accept of less, or to authorize the paving as far as it could be lawfully done. Corporate agents, and especially the agents of municipal corporations, are to be confined, doubtless, within the literal boundaries of the authority delegated to them. In general, this rule is to be rigidly enforced. It is one of the necessary defences against dishonesty and a profligate administration of municipal affairs; and I may add, it is a rule which this Court has always been strenuous to maintain, and which it would not willingly relax. It has no application, however, to the circumstances of this case, for here has been no unwarrantable departure from the letter of the authority. The City Councils authorized their agents to have a work performed, which, up to a certain point, was altogether lawful, and beyond which the performance was prohibted by law. Was not this a good authority to the agent to have the work performed so far as it was lawful? Especially as the ordinance remained unrepealed, and stands to this day the evidence of a sufficient authority for everything which could be lawfully done under it. It is to be observed, also, that the Highway Department, in the form of the contract, followed in good faith the very letter of the ordinance, and thereby fell into the same error which the Councils themselves had committed; for the agreement which they prepared for the contractors and which they required them to sign bound them to pave the whole distance from Woodland Street to Forty-third Street. We can come to no other conclusion upon the evidence than that the parties to the contract acted in good faith. It seems to be highly probable that they were ignorant of the existence of the Act of July 18, 1863, which was a private act, and might therefore well be unknown to the parties, and which prohibited the opening of streets through the Hamilton Park grounds. And we are of opinion that the plaintiffs ought not to be prejudiced by this, but that inasmuch as they have performed the contract as far as it could be lawfully performed, the first point must be resolved in their favor.

Several minor objections were urged by the defendant. The first was, that the terms of the ordinance which require the pavers to be selected by a majority of the owners of property fronting on Beckett Street, from Woodland Street to Forty-third Street, were not complied with. It cannot be denied that the paper, dated March 27, 1870, agreeing that the paving should be done by the plaintiffs, was signed by a majority of the property holders on Beckett Street, between Woodland Street and Forty-third Street. It is true, that, in the paper referred to they describe themselves as the owners of property on Beckett Street, between Woodland Street and a point four hundred and five feet west of Forty-second Street, but it was in evidence that the ground throughout the whole remaining distance, that is, from the point indicated to Forty-third Street, all belonged to one person, viz., the corporation known as the Hamilton Park Association, and counting in the association as an owner, it is quite clear that the signers of the paper were a majority of owners between Forty-second and Forty-third Streets. This was one of the facts in issue, and was found by the jury in favor of the plaintiffs, and found upon sufficient evidence.

It was also objected, that the paper signed by the majority of the owners was dated before the passage of the ordinance. We do not think this a tenable objection. It would be putting a very rigid construction upon the requirements of the ordinance to hold that a selection made immediately before the passage of the ordinance, and in anticipation of it, is void under its provisions, and is to prevent a recovery by the party who has done the work upon the faith of it, especially in view of the fact that the majority allowed their selection to remain in full force, making no other selection, and permitting the work to proceed in accordance with the selection so made, when they might have revoked it at any time before the awarding of the contract. (Dickerson v. Peters, 21 P. F. Smith, 53.)

It was further objected, that at the time when the ordinance authorizing the paving of Beckett Street was passed (April 13, 1869), and when the selection of the pavers was made by the majority of property owners, an ordinance then in force (that of June 12, 1868) required all streets which might be paved in West Philadelphia, where this paving was done, "to be laid with rubble pavement, or material to be approved by the chief Commissioners of Highways, which shall be of stone, irregular in shape, with depth from six to nine inches and length five to twelve inches," whereas this paving had been done with cobble stones. But the ordinance of June 12,

Digitized by Google

1868, was repealed, so far as it related to Beckett Street, by another ordinance, passed June 21, 1869, which was before the execution of the contract between the plaintiffs and the city, the contract being dated June 24, 1869. Now, the ordinance authorizing the paving did not require any particular kind of pavement to be laid. Under it the commissioner was authorized to contract for any kind of pavement which might be in accordance with the city ordinances upon the subject, and at the time he made the contract for the city with the plaintiffs the cobble-stone pavement was in accordance with the existing ordinances upon the subject. This is a sufficient answer to the objection that the kind of pavement required by law was changed subsequent to the passage of the ordinance authorizing the paving to be done. So far as the objection rests upon the fact that the kind of paving authorized by the city ordinance was changed by another ordinance passed subsequent to the selection of the pavers by the majority of the property owners, it is disposed of by the considerations already referred to. The selection made by the owners was allowed to remain in full force and unrevoked, notwithstanding the commissioner had been released by the ordinance of June 21, 1869, from the restrictions contained in the ordinance of June 12, 1868. It is argued, that the property owners might have selected other pavers, if they had foreseen that cobble pavement was to be used instead of rubble pavement. If so, then why did they not revoke their selection and make a new one before the city commissioner made the contract? They had plenty of time in which to do so, but they allowed their selection to stand, and there is no evidence whatever that they have ever objected to it, or have ever desired to be released from it, or have ever desired to depart from it or annul it, or that they now object to it. The objection now made is not made by the majority of the property owners, but by the defendant alone, and there is no reason to believe that they approve or adopt his objection. The instrument which is the evidence of the selection made by the majority of the property owners, if it indicates anything in respect to the kind of pavement to be used, plainly indicates that the cobble pavement was to be used, for the *price* fixed is the price for laying the cobble pavement, which, as is well known, is cheaper than the rubble pavement, and that is the price at which the city contracted with the plaintiffs, and for which the plaintiffs have obtained a verdict. It would seem that the property owners had anticipated the repeal of the ordinance of June 12, 1868, confining the commissioner to rubble pavements, otherwise they would not have fixed upon the price of cobble pavement. The ordinance was repealed on the 21st of June, 1869, and the commissioner made the city contract with the plaintiffs on the 24th of June, 1869.

Finally, it is further objected by the defendant, that there was no evidence that the contract had been approved by the city solicitor, or that the plaintiffs had advertised their proposals. There was no evidence on either side upon the subject. In the absence of evidence to the contrary, the public officers are presumed to have done their duty in these respects; and *stabit præsumptio donec probetur in contrarium.* We are relieved, therefore, from considering the question, whether a non-compliance with these directions of the city ordinances would have imperiled the plaintiffs' contract.

Rule discharged, and judgment for the plaintiffs on the points reserved.

The defendant thereupon took this writ, assigning for error, *inter alia*, the admission of the agreement of March 27, 1869, and the entry of judgment on the reserved points.

Victor Guillou and *Samuel Dickson*, for plaintiff in error.

This was a case depending wholly on the forms and requisites of the law, and before the plaintiffs can recover they must show a compliance with all the forms and conditions which the law imposes.

City *v.* Lea, 5 Phila. R. 77.
City *v.* Edwards, 2 Weekly Notes, 102.

The first requisite, then, is that the plaintiffs show themselves to have been selected as pavers by a "majority of the owners" on Beckett Street, from Woodland Street to Forty-third Street, as called for by the Ordinance of 13 April, 1869, authorizing this particular paving. To satisfy this requirement, they offered in evidence an agreement entered into with them by owners of property on Beckett Street, Woodland Street to a point four hundred and five feet west from Forty-second Street, to do the paving *in front of the respective properties*, not to pave the whole street. This paper is in no sense a proper selection under the Ordinance of 13 April, 1869, for that Ordinance authorizes the department of highways to contract with pavers "who *shall be* selected," while this agreement was entered into before the passage of that Ordinance. The rights of the minority can be taken away only *sub modo*, and this contract cannot bind the owners who never signed it, and never agreed that the work should be done. Moreover, when the Ordinance of 13 April, 1869, was passed, the Ordinance of 12 June, 1868, was in force, by which only rubble pavements could be laid in West Philadelphia. By this Ordinance the price of rubble pavement is fixed at $1.50, and that of cobble pavement at $1.25 per square yard. As then the signers of the agreement of March 27, 1869, contracted for pavement at $1.25, it is evident that they contracted for a cobble pavement, which was unlaw-

Digitized by Google

ful. The Ordinance of 13 April, 1869, taken with that of 12 June, 1868, authorized a rubble pavement only, so that it is clear that this paper cannot be evidence of a proper selection. It is true that an Ordinance was passed on June 21, 1869, repealing the Ordinance of 12 June, 1868, as far as regards this street, but can that repeal, made nearly three months after the passage of the ordinance of 13 April, 1869, make the paper of March 27, 1869, a proper evidence of a selection to lay the pavement authorized by the later Ordinance.

The plaintiffs offered no evidence that they had properly advertised and performed the other requirements of the Ordinance of 31 December, 1862.

Again, the contract of the plaintiffs with the highway department, to lay the pavement up to Forty-third Street, being in contravention of the Act of 18 July, 1863, *supra*, was void. The plaintiffs bound themselves thereby to pave up to Forty-Third Street, and nothing but a complete performance would be a satisfaction. The contract is an entire one, and entire performance must be proved.

[AGNEW, C. J. If the city undertakes to contract contrary to law, is not the contract curtailed to that extent?

SHARSWOOD, J. Do you undertake to lay it down as matter of law, that if a man undertakes to do a thing part of which is impossible, and he goes on and does that part which is possible, that he cannot recover for that?]

Such is the result of the authorities if the contract be an entire one.

To explain their default, the plaintiffs alleged that they were prevented from finishing their work by the Acts of Assembly forbidding streets to be cut through the lands of the Hamilton Park Association; that is to say, they plead ignorance of the law. They and all other citizens are bound to take notice of these Acts, for these are not private, but are binding on the whole city.

Bills rendered for paving must be certified by the chief commissioner of highways (Ordinance of 30 August, 1868), and the sureties on a contract with the head of any city department must be approved by the city solicitor and councils. (Act of 21 April, 1855, § 20, P. L. 269.)

W. H. Lex and *H. M. Dechert*, contra.

The verdict shows a compliance by the plaintiffs with the terms of the city Ordinances then regulating paving. The plaintiffs produced a paper, signed admittedly by a majority of owners, selecting them as pavers. It is no objection that the paper was signed before the passage of the Ordinance. The provisions of the Ordinance of 31 December, 1862, are merely directory, and, the contract with the city being complete, it is to be presumed that the city officers did their duty. At all events the *onus* of showing the contrary rested on the defendant.

[SHARSWOOD, J. What do you say to the argument that it is essential that all the requisites of that Ordinance must be complied with, especially as to advertising?]

It was the duty of the defendant to so frame his pleadings as to raise an issue which would compel the plaintiffs to prove these things.

[SHARSWOOD, J. The plea was a general one, and put in issue the validity of the claim.]

It was alleged that there was no selection by a majority of property owners. The plaintiffs produced a paper signed by such majority, and which he had submitted to the highway department. It is to be presumed that the minor directory provisions of the Ordinance were complied with.

[SHARSWOOD, J. There is one point which is not considered—the right of non-approving owners to receive public notice, so that they may come in and object. It is a question whether that is a mere directory provision. Those parties have had no opportunity to be heard.]

The chief commissioner of highways testified that he was satisfied with the work, and that covers the want of his certificate.

The Act of 21 April, 1855, § 20, *supra*, refers only to new work to be done and paid for by the city.

This contract was a severable one, because the price to be paid was clearly apportioned to different parts of the work.

Cuningham *v.* Morrell, 10 Johnston, 203.

May 8, 1876. THE COURT. An agreement was entered into on the 27th of March, 1869, between a majority of the owners of property on the portion of Beckett Street which was intended to be improved, and Michael Cunningham and Daniel McNichol, for paving that street from its intersection with Woodland Street to a point four hundred and five feet west of Forty-second Street, in the Twenty-seventh Ward of Philadelphia. It was stipulated that the work was to be done "under the direction and to the satisfaction of the Chief Commissioner of the Highways," and was to be paid for at the rate of one dollar and twenty-five cents per square yard. When the agreement was executed, this work had not been authorized by the City Councils. On the 13th of April, 1869, an ordinance was passed, directing the department of highways "to enter into a contract with a competent paver or pavers selected by a majority of the owners of property fronting on Beckett Street, from Woodland Street to Forty-third Street, for the paving thereof;" and providing, as one of the conditions of the contract, that the cost of the work should be collected from the respective property

Digitized by Google

owners by the contractor or contractors. An ordinance of the 12th of June, 1868, requiring the streets of West Philadelphia to be laid with rubble pavement only, was in force at the date of the agreement of the property owners with Cunningham and McNichol. And the same ordinance fixed the sum of one dollar and fifty cents per square yard as the charge for rubble pavement, and the sum of one dollar and twenty-five cents per square yard as the charge for cobble pavement. On the 21st of June, 1869, so much of the ordinance of the 12th of June 1868 as related to Beckett Street, from Woodland Street to Forty-third. Street, in the Twenty-seventh Ward, was repealed. And on the 24th of June, 1869, a contract was executed by Cunningham and McNichol "to pave Beckett Street, from Forty-third Street to Woodland Street," in accordance with "all the provisions of section third of the ordinance approved March 27th, 1868." Under this contract, the work contemplated by the agreement of the 27th of March, 1869, was done. That is, Beckett Street was paved from Woodland Street to a point four hundred and five feet west of Forty-second Street. It was shown on the trial that performance of the stipulation to pave the part of the street between the point last named and Forty-third Street was impossible, because, under the provisions of the two Acts of Assembly, passed respectively on the 18th of July, 1863, and the 17th of March, 1864, the lands of the Hamilton Park Association extended to hat point, and the opening of streets on those lands, while they should be used for park purposes, was forbidden. The fact that the work was satisfactorily done by the contractors, was established by the verdict of the jury.

Various questions growing out of alleged irregularities in the proceedings, which resulted in the execution of the contract, were raised on the trial in the District Court. Many of these related to formal omissions of acts prescribed by statute or ordinance, on the part of the city officers. It was complained, for instance, that the certificate of the commissioner was not affixed to the bill which was rendered when the work was completed, according to the provisions of the ordinance of the 30th of August, 1868. But the commissioner testified that he had supervised the paving during its progress, and had inspected and approved of it when finished. The omission of the approval of the sureties in the contract by the city solicitor as required by the 20th section of the Act of the 21st of April, 1855, was also made ground for complaint. But such approval is not directed to be endorsed, and the fact that the bill was certified by the surveyor and solicitor, would imply in this action, and in which the city has joined as the legal plaintiff, a ratification by the proper authorities of the action of the highway department. The existence of the Hamilton Park Acts of 1863 and 1864 was overlooked when the ordinance of the 13th of April, 1869, was passed, anc when the contract for the paving was subsequently executed. The work of the contractors was stopped at the line of the property of the Park Association by the express provisions of a statute. They did all which they could lawfully do under the contract with the city, and they executed literally the agreement they had made with the property owners on Beckett Street. Rules in cases of this kind could easily be made so rigid as to work injustice. In questions involving the liability of defendants for their proportions of the cost of municipal improvements, the relations between the city and the parties with whom they contract are ordinarily outside the line of legitimate inquiry. When such improvements are within what were the incorporated districts of the county of Philadelphia when the Act of the 19th of April, 1843, was passed, a defendant can "only deny that the work was done, or the materials furnished, or prove that the price charged was greater than their value, or that the amount claimed has been paid or released." Notwithstanding the doubt intimated by Mr. Justice WILLIAMS in Philadelphia *v.* Edwards (32 Legal Intell. 397; 2 WEEKLY NOTES, 102), that Act has constantly been recognized by this Court to be in force. It was recognized in the City *v.* Burgin (14 Wr. 539), and has been so expressly held, down to the decision of the City *v.* Brooke, in February last (33 Legal Intelligencer, 169; 2 WEEKLY NOTES, 537). Indeed, the terms of the 44th section of the Consolidation Act of February 2, 1854, scarcely leaves the question open to debate. Those terms are: "All Acts of the Legislature not inconsistent with this Act, now in force, shall continue in operation within the limits of the county, city, district, borough, or township, in which they are now operative, under the authority of the City Councils, Courts and officers created by this Act, or permitted to continue as consistent therewith, until such Acts shall be altered or repealed by the Legislature: *Provided*, That the City Councils shall have power, by ordinance, to extend the operation of laws now in force within the city, police or municipal districts, to other parts, or over the whole of the enlarged limits, and to declare what laws have become obselete by this Act, or by the extension as aforesaid of other laws." It has been uniformly held, that it is not competent for a defendant to raise questions relating to the former details of agreements between the city and its contractors, and to their execution and performance, where the acts of the municipal officers have been ratified, and the work

Digitized by Google

done by the contractors has been accepted. (City *v.* Wistar, 11 Casey, 427 ; City *v.* Burgin, *supra;* and Hutchinson *v.* Pittsburgh, 22 P. F. S. 320.)

Other deficiencies, however, are developed in this record which have more significance. The ordinance of the 31st of December, 1862, is in these words: "Hereafter, before any contract for paving any street or streets, shall be entered into by the highway department, the person or persons applying for such contract shall give notice of such application in two daily papers having the largest circulation by three consecutive insertions, at least two weeks prior to the making of such application, such notice to set forth: 1. The name of the contractor or contractors; 2. The locality of the space or spaces intended to be paved, with the length of each space in linear feet; 3. The name and residence of each person signing for contractor, together with the number of feet owned or represented by each person so signing fronting on said street or streets; 4. To such notice shall be added an invitation to the owners of property to meet at the department of highways, at a certain hour on a given day, to show cause, if any, why such contract should not be awarded to the applicant." No evidence was given by either party on the trial on the subject of notice by these contractors. If the proceeding had been in other respects regular, the plaintiffs could rest on the presumption that the municipal officers had performed the duties imposed by law upon them. But while the contractors held the agreement of the 27th of March, 1869, and while the ordinance authorizing the paving of Beckett Street had been passed on the 13th of April, 1869, yet the agreement stipulated for the cost of a cobble pavement, and no power to lay any other than a rubble pavement in West Philadelphia was conferred by Councils until the 21st of June, 1869. The contract was made on the 24th of June, 1869. There was thus an interval of just three days between the grant of authority to lay a cobble pavement, and the execution of the contract in pursuance of the grant. Of course two weeks' notice of the application of the contractors for the work that was actually done was physically impossible. Let it be presumed that *some* notice was published, as required by the ordinance of 1862. If it described the work as a cobble pavement, the defendant was not bound by it, for such a pavement was prohibited by the ordinance of the 12th of June, 1868. If the notice described the work as a rubble pavement, the defendant could not be required to pay for that which was actually laid, for that was a cobble pavement. The facts prove affirmatively that the legal requisites of such a contract between the city and the contractors, as would create an obligation on the defendant to pay, were not fulfilled. There is no room for the application of the maxim *omnia præsumuntur rite esse acta*, for that principle heals only apparent irregularities or omissions, where jurisdiction or power over the subject-matter is clearly vested: (SHARSWOOD, J., in Pittsburgh *v.* Walter, 19 P. F. S. 365.) The irregularities here upturn the very foundation of the jurisdiction.

In view of the good faith in which the contract was entered into, and with which the work has been done by the contractors, it has been with reluctance that this conclusion has been reached. But this is not a question between the city and the contractors, nor between the contractors and the property owners who employed them. It arises between the city and the defendant. The latter had assumed no duty expressly, or by implication. He can be made subject to a legal obligation only where the power conferred on the municipal authorities has been legally exercised. Like The City *v.* Lea (5 Phila. 77), this is "a case depending wholly on the forms and requisitions of law, and in no degree on consent or contract, in which one of the forms, one of the conditions which the law itself has imposed, is wholly wanting." It is within the principle of the City *v.* Reilly (10 P. F. S. 467), of the City *v.* Stewart (1 WEEKLY NOTES, 242), and of Pittsburgh *v.* Walker, *supra.* The city could have waived irregularities and defects of form. The property owners who entered into the agreement with the contractors, by leaving the authority they had conferred unrevoked, could not make those irregularities and defects subjects of complaint. But jurisdiction over the defendant and his property could be obtained only by pursuing rules prescribed by law, and the record proves that these rules could not possibly have been observed.

The judgment is reversed.

Opinion by WOODWARD, J. WILLIAMS, J., absent.

[*Cf.* Wistar *v.* City of Philadelphia, *ante*, 124; City to use, etc.. *v.* Patterson, *post*, 273.]

Oct. and Nov. '76, 36. Oct. 11.

Manufacturers' and Merchants' Insurance Co. v. O'Maley et ux. to use, etc.

Fire insurance—Execution clause in policy construed—What constitutes a levy within the meaning of such clause.

A clause in a policy of fire insurance provided as follows: "This policy shall cease at and from the time that the property hereby insured shall be levied on or taken into possession or custody under any proceeding in law or equity." A mechanics' lien was filed against the house insured, judgment obtained, and a writ of *levari facias* placed in the sheriff's hands. Just before

Digitized by Google

the date at which the property was advertised to be sold under the writ, it was destroyed by fire:

Held (affirming the judgment of the Court below), that the policy was not defeated.

Per STERRETT, P. J. (Approved PER CURIAM). The condition has special, if not exclusive reference to personal property, which when levied upon is usually seized in fact and remains, until sold, in the custody of the sheriff and his employees, who cannot be expected to guard it with the same degree of care that the owner would.

The phrase "levied on" does not mean a technical levy unaccompanied by actual seizure and change of possession, and has no application ordinarily to proceedings by writ of *levari facias* for the sale of real estate.

Error to Common Pleas No. 1 of Allegheny County.

Covenant by John O'Maley and wife to the use of Mellon Bros. against the Manufacturer' and Merchants' Insurance Co. on a fire insurance policy for $1000 upon the plaintiffs' house in Mansfield. The pleas were covenants performed, *absque hoc* with leave, etc.

On the trial the plaintiffs offered in evidence a policy for one year from April 4, 1874, containing *inter alia* the following condition :—

XI. The insurance by this policy shall cease at and from the time that the property hereby insured shall be levied on, or taken into possession or custody, under any proceeding in law or equity ; and in case of sale of the property insured, or cessation of the risk otherwise than by fire, a return premium will be made, if applied for within thirty days thereafter, the company retaining the short period rate of premium for the expired time ; provided, however, that no premium shall be returned for a less period than one month.

It appeared that in September, 1874, judgment was entered against the plaintiffs in proceedings on a *scire facias* sur mechanics' claim, which had been filed against the insured premises after the policy was issued, that in October, 1874, a *levari facias* was issued on the judgment and placed in the hands of the sheriff by whom the property was advertised to be sold on the 7th of December, 1874. Just before the latter date the insured property was destroyed by fire.

The Court instructed the jury to find for the plaintiff subject to the opinion of the Court in banc on the following point reserved, viz: "whether under the 11th condition of the policy (recited *supra*) the insurance ceased, and the liability of the company was ended before the loss occurred by reason of the proceedings had on the mechanics' lien."

Verdict accordingly for plaintiffs for $1041. Subsequently the Court entered judgment for the plaintiffs on the point reserved, STERRETT, P. J., in delivering the opinion, saying : "The company received the ordinary premium for the risk assumed. The building was occupied by tho insured and her family all the time, without any interference with her possession by the sheriff or any one else. No lack of good faith is, in any manner, imputed to her, and nothing whatever was done to increase the risk. Why, then, should the company, with the plaintiff's money in their treasury, be absolved from their obligation to make good the loss? We are answered, simply because an execution on the mechanics' lien was issued and the sheriff advertised the property for sale.

Such a construction, having no practical bearing on, or connection with the risk, surely could not have been intended, and should not be given unless there is no escape from it. If the condition is construed as having in view a loss attended with an actual seizure and interference with the possession of the insured, whereby the risk might be increased, we can at once recognize its wisdom and propriety ; and doubtless it was this that was intended and nothing more.

The condition in question has special if not exclusive reference to personal property, which when levied on is usually seized in fact and remains in the custody ana possession of the sheriff until it is sold. This works an involuntary change of possession—takes the property out of the owner's contro and leaves it in charge of the sheriff and hi employees, who cannot be expected to guard it with the same degree of care that the owner would. Hence, a levy and actual seizure necessarily increase the risk, and it is this that the condition is designed to guard against but it has no applicability in the case of a technical seizure, unattended by change of possession or increased risk.

We conclude, therefore, that the phrase "levied on," as employed in the policy, does not mean a technical levy, unaccompanied by actual seizure and change of possession, and has no application, ordinarily, to proceedings by writ of *levari facias* for the sale of real estate.

In The Commonwealth Insurance Co. *v.* Berger, *et al.* (6 Wright, 285), a condition precisely the same as that before us was construed by the Supreme Court. In that case, after the policy was issued and before the fire occurred, an execution was placed in the hands of the sheriff, and a levy was made on the goods of the insured, but they were not taken into the custody of the officers, or left in charge of a watchman, nor was the actual possession of the insured disturbed. While this condition of affairs existed the goods were destroyed by fire, and the insurance company defended against payment of the loss on the ground that the insurance ceased when the levy was made. The Court held that the levy did not terminate the risk and that the company was liable. The principles of this case, rule the one before us ; the fact that the levy was on personal property can not change the principle of construction. If there is any difference the reason would be still stronger

Digitized by Google

in the case of a levy on real estate which is always a mere technical seizure without any interference with the possession—at least until after the sale. The plaintiff is therefore entitled to judgment."

The defendant took this writ assigning for error the entry of judgment for the plaintiffs on the point reserved.

W. L. Chanfant, for the plaintiff in error.

The law of the relation between insurer and insured is the policy. By its clauses, conditions, and stipulations their mutual rights and liabilities are to be defined, whether such provisions be material to the risk or not.

But in the present case the risk was increased, for it is a fair presumption that the insured did not take the same care of the property as formerly. when about to be dispossessed by the sheriff's vendee. This is recognized in Brown *v.* Ins. Co, (5 Wr. 187).

W. H. Sutton & Son, contra.

The principle that in a policy capable of two interpretations equally reasonable, the one most favorable to the insured must be adopted, has been applied to the identical condition in question.

Ins. Co. *v.* Berger, 6 Wr. 285.

Oct. 16. THE COURT. The judgment of the Court below is sufficiently sustained in the opinion of Judge Sterrett.

Judgment affirmed.

PER CURIAM. WILLIAMS, J., absent.

July, '75, 71 & 72. March 2.

Penn Mutual Ins. Co. v. Anna Maria Snyder.
Same v. Lewis Wilson Snyder.

Errors and appeals—Charge of Court upon facts—When sufficient—Omission to refer to certain portions of the evidence—When not ground for reversal.

Where a reversal of a judgment is sought upon the ground that the charge of the Court below was one-sided or calculated to mislead the jury, such error must clearly appear. Hence mere omissions of portions of the evidence, and even slight mis-statements, that evidently have not controlled the verdict, are not grounds for reversal.

It is not the duty of the Court, in charging the jury, to follow counsel in an elaborate presentation of the evidence, according to their different theories. It is sufficient if the Court presents the leading features of the evidence on each side fairly, so as to recall to the mind of the jury the respective suppositions of counsel.

Error to the Common Pleas of Monroe County.

These were two amicable actions of covenant against the Penn Mutual Insurance Company upon policies of insurance on the life of Monroe Snyder. One action was brought by the widow of decedent upon a policy for $5000, and the other by the son of decedent upon a policy for $10,000. The suits were originally brought in Carbon County, but the record was afterwards removed to Monroe County, where they were tried. It was undisputed that Monroe Snyder had been found drowned in Monocacy Creek on Feb. 22, 1873. Defendants contended that he had committed suicide, and that there could be therefore no recovery on the policies. Plaintiffs, on the other hand, contended that he had been murdered. A large amount of circumstantial evidence was given on each side. After a trial lasting five days the Court below (DREHER, P. J.) reviewed the evidence in a charge filling fifteen printed pages of plaintiff in error's paper-book, and which concluded as follows:—

"I have endeavored, gentlemen of the jury, to call your attention to the circumstances relied upon by the plaintiff and by the defendant each to prove their different theories. All these facts and circumstances have been so fully and ably discussed and reviewed by counsel on both sides that they must be fresh in your recollection. You must take this case, because it is a case for you entirely; and giving to every circumstance and fact that has been proven in it the weight that you think it deserves, come to such a verdict or finding as your consciences and your judgments as men and impartial jurors lead you to under the evidence in the case. . . . . As you settle the question whether Monroe Snyder committed suicide you will have settled your verdict. If the defendant has succeeded in satisfying your minds that Monroe Snyder killed himself, then your verdict in both cases should be in favor of the defendant. If it has not carried conviction to your minds that he did kill himself, then your verdict should be in favor of the plaintiffs," etc.

Defendants excepted to this charge, and requested that it be reduced to writing and filed of record for review by the Supreme Court, which was accordingly done. Verdict for Anna Maria Snyder for $5486.66, and for Lewis Wilson Snyder for $10,973.33. Defendants took this writ of error. All the assignments of error related to the charge of the Court, and were to the effect that the charge was not a full, complete, or fair presentation of the disputed questions of fact, and that the learned Judge omitted to refer to some of the most important facts and theories on which the defendant relied, and failed to comment as fully as he should upon certain portions of defendant's evidence.

Edward Harvey and *R. E. Wright & Son*, for plaintiffs in error.

It is a misconception of judicial duty for a Judge to charge on the facts of a case. He is apt to present them in a narrow and limited way. Hence our Courts have ruled that they will carefully scrutinize the whole charge and will reverse

Digitized by Google

if the Judge is convicted of misdirection or if his charge is calculated to mislead the jury.

Bailey v. Fairplay, 6 B. 456.
Bank v. Forster, 8 W. 304.
Hersheaum v. Hocker, 9 W. 455.
Parker v. Donaldson, 6. W. & S. 132.
Nieman v. Ward, 1 W. & S. 68.
Garrett v. Gonter, 6 Wr. 143.
Heilbruner v. Wayte, 1 Sm. 259.
Gregg Twp. v. Jamison, 5 Sm. 468.
Pa. R. R. v. Berry, 18 Sm. 272.

The present case depended upon circumstantial evidence. A great variety of circumstances, each of itself insufficient, but when combined, of great power, was submitted to the jury. We presented our hypothesis, and arranged the facts to prove it. But the learned Judge took no notice of this. It is true he said to the jury that we must prove that Monroe Snyder took his life, but he did not arrange our evidence in its proper order so as to give force and effect to our theory. In his statement of facts he omits some of the most important, and states others in a way calculated to mislead the jury. He makes no reference to many important items of our evidence, and his comments upon others were not fair to the defendant.

Edward J. Fox and *Henry Green*, contra.

An inaccurate or erroneous statement of facts in a charge is no ground for reversal.

Burd v. Dansdale, 2 B. 89.
Graham v. Graham, 1 S. & R. 333.
Poorman v. Smith's Ex'rs, 2 S. & R. 467.
Henwood v. Cheeseman, 3 S. & R. 500.
Riddle v. Murphy, 7 S. & R. 237.
Dennis v. Alexander, 3 Barr, 51.
Hammett v. Dundas, 4 Barr, 178.
Kauffman v. Griesemer, 2 C. 407.
Garrett v. Jackson, 8 H. 336.
Bitner v. Bitner, 15 Sm. 363.

But in this case the Judge has not mis-stated any fact, nor has he stated them inaccurately, nor is there any real ground even for suspicion that the jury were misled. It will be almost impossible for this Court to decide whether most of the assignments of errors are well founded unless they read the 497 pages of evidence taken; but a perusal of the charge will show that the Court below presented the points in dispute fully and fairly.

March 30. THE COURT. Though some of the members of this Court incline strongly to the belief that this was a case of suicide, yet none of them see how it is possible to reverse this judgment. The question whether Monroe Snyder died by his own hand or was murdered, was one of fact dependent upon many circumstances, and necessarily fell within the province of the jury In such a case, the theories or suppositions of the case were matters to be elaborated by the counsel on each side, on whom fell the burthen of marshalling the facts. It is not the duty of the Court to follow the counsel with an elaborate presentation of the evidence according to the different theories, and arrange the different circumstances so as to present every one in the precise order that the counsel advocating the particular theory may think will exhibit it best. It is sufficient if the Court presents the leading features of the evidence on each side fairly, so as to bring the respective suppositions before the mind of the jury, leaving them to fill out the outlines with the minuter details of the evidence, brought into review by the arguments of counsel. On a careful reading of this charge, we cannot discover any evidence of undue feeling or bias. The Judge seems to have laid the case before the jury in a spirit of ordinary fairness, though perhaps not with entire fulness. He did not call up every fact and circumstance having a bearing on each branch of the case, and it would be remarkable if, in a cause pregnant with so many circumstances, he could do so. When a charge is manifestly one-sided, or when it misleads a jury by turning away their attention from the important and essential aspects of the case to those which are immaterial and indecisive, and thus leads to an unjust and erroneous verdict, this Court will reverse. The cases cited abundantly show this. But such an error must be clear to our minds before we set aside a trial. Hence mere omissions of portions of the evidence, and even slight misstatements, that evidently have not controlled the verdict, are not regarded as a ground of reversal. We must feel convinced that the charge as a whole has led the jury astray. We do not see that in these cases.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

[*Cf.* Blair Iron and Coal Co. v. Lloyd, *ante*, 103, and cases referred to in note.]

Common Pleas—Equity.

C. P. No. 3. **Saul v. Turnpike Co.** Dec. 14.

Equitable jurisdiction—Right of property owner along a turnpike to access to the road—Obstruction may be removed, though a similar one existed for sixty years and loss of tolls results to the company.

Sur exceptions to Master's Report.

The bill, filed in 1874 by James Saul against the Frankford and Bristol Turnpike Company, set forth that in 1873, the plaintiff purchased a

Digitized by Google

tract of land with a hotel thereon erected, at the corner of the defendant corporation's road and the Bustleton turnpike; that the defendant maintained a toll-gate and house near the said corner, and had inclosed a strip of its road, as a garden for the gate-keeper, adjacent to the toll-house, 191 feet long and directly in front of the complainant's property, and had built from the further end of the garden a fence to the end of the wing wall of a bridge over Tacony Creek, one boundary of the complainant's property, thus obstructing for the distance of 475 feet the complainant's access to the road of the defendant; that to obviate this obstruction the complainant had recently opened a road from his hotel to the defendant's turnpike, at a point below the garden, in order to give travellers to and from the city a means of approach to his hotel; but that the defendant had built a new fence across the opening; that this fence was a nuisance and injured the value of his property; and prayed (by the prayer as amended) for an injunction requiring the defendant to remove the fence, and to restrain him from obstructing plaintiff's access to the road.

The defendant demurred, because there was n adequate remedy at law, and no equitable jurisdiction to give the relief prayed for; and also answered, *inter alia*, that under its charter it was authorized to lay out a road, to erect bridges, to fix gates and collect tolls from persons using the road, and it had the right to do all the acts complained of; that about sixty years before the filing of the bill, the toll-house therein mentioned had been erected, about 80 feet from the junction of the Frankford and Bustleton turnpikes, and also a gate; that the garden is necessary for the accommodation of the toll-gatherer, used solely by him, and is inclosed in a manner not to obstruct the roadway of the turnpike; that the fence connecting the garden with the bridge had been built about the same time as a safeguard for the protection of passers-by against danger, there being a declivity towards the creek; that the complainant's predecessors had not complained of the obstruction; that in opening his roadway the complainant had torn down part of the garden fence and cut down trees, and that the defendant had rightfully repaired the fence; that the complainant was not in fact prevented from entering his land, as there was a foot passage; but that his object in making the roadway was to induce people to come to his hotel by enabling them to drive round behind the toll-gate; and that during the few days the road had remained open many people had so evaded their tolls; that, moreover, access to the hotel from the turnpike could be obtained between the toll-gate and the Bustleton road, there being a vacant strip of 80 feet along that pike; and that the land obstructed was used merely for grazing purposes.

The cause was referred to a Master (C. Stuart Patterson), who held that it was not a case for the exercise of equitable jurisdiction. A mandatory injunction to abate a nuisance is matter of grace, and will only be exercised in cases of immediate and irreparable mischief. (Mayor *v.* Spring Garden, 7 Barr, 366; Gray *v.* R. R. Company, 1 Grant, 412; Att'y Gen. *v.* Nicholls, 16 Ves. 342; Neal *v.* Gallagher, 1 WEEKLY NOTES, 99; Rhoades *v.* Dunbar, 7 Sm. 287; Richards' Appeal, Id. 105; Hackenstein's Appeal, 20 Sm. 107.) The complainant having free access to the road for eighty feet, the obstruction of a portion of his front by the defendant's user of a strip of its own roadway, for a legitimate purpose under its charter, could be compensated in damages. Moreover, the obstruction had existed for sixty years, and had been acquiesced in by the complainant and his predecessors in title; and the injunction, if granted, would result in great injury to the defendant, and very little present benefit to the complainant.

To this report the complainant excepted, founding his reasons upon a denial of the conclusions of the Master.

Letchworth, for the exceptions.

The complainant had a right to the convenient use of his property. The bill was filed to determine whether there can be a right to block up 475 feet of a man's property. No action at law would remove the fence. Under the Master's finding it would be the duty of property holders adjacent to turnpike gates to assist the company in collecting their tolls. There is no such duty.

John G. Johnson, contra.

The complainant cannot come into a Court of Equity without damage and ask for what would be a great injury to us. There is a remedy at law, let him indict us for the nuisance.

Hammersly *v.* The Germantown and Perkiomen Turnpike Co., 8 Phila. Rep. 314.

Letchworth, in reply.

There was no injury to the Turnpike Company unless the damage was malicious, which it has not been shown to be.

Dec. 30. THE COURT (after stating the facts): We cannot agree with the learned Master. The plaintiff has an undoubted right of egress and ingress at every point of his front upon this public highway, subordinate only to the defendants' right to maintain the toll-house, and to erect a barrier to prevent travellers from falling over any embankment upon which this road may be laid. To the extent that the fence is erected beyond the toll-house garden, where it is not necessary for the protection of travellers, it is in contravention of the plaintiff's rights.

It is not forgotten that there was an old fence in or near the ground upon which the new one

Digitized by Google

is erected. It does not appear who built or maintained it. If built by the company for any other purpose than one authorized by its charter, such as to protect travellers, it would not be lawful, and we are averse to deciding that an unlawful barrier, serving no corporate purpose, along the front of a man's property, maintained by a company, can become lawful by lapse of time. It appears, however, that the plaintiff and his predecessors in the title had free access over this part of his front through the old fence.

Had the learned Master found that the road opened by the plaintiff was opened to enable travellers to evade the payment of tolls due, and had there not been a plain mistake in that finding, the decree asked for should be refused. The Master finds that the defendant will lose tolls, and thereby will suffer more damage than the plaintiff will by the maintenance of the fence. The defendant can collect tolls at any point on its road; it can call to its aid the punitory provisions of its own charter, and of the general turnpike road law; but we cannot decide that it has the right of blocking up almost the entire front of an owner of land bounding upon its road.

We decide in this case that the defendant cannot control the plaintiff in what he thinks is convenient use of his own land; that the plaintiff's right to pass to and from the highway at any point of his front is absolute, and that, notwithstanding the finding of the Master, he is entitled to relief, and that a court of equity should afford it.

And now, December 30th, 1876, the amended prayer of plaintiff granted, so far as the said fence below the garden is not necessary to insure the safety of travellers; and the case is referred to C. Stuart Patterson, Esq., to report how much of said fence between said garden and the wing walls of the bridge may be removed without endangering the lives, limbs, and property of travellers upon the turnpike road.

Opinion by YERKES, J. LUDLOW, P. J., dissents.

Common Pleas—Law.

C. P. No. 2. **Snyder v. Richardson.** Dec. 16.

Affidavit of defence — Book entries—Practice where accuracy of copy of entries is disputed.

Rule for judgment.

Assumpsit on a book account. The copy filed was headed—

"Mr. F. Richardson bought of M. K. Snyder," etc.

It was not averred to be a copy of original entries, except by endorsement of counsel on the back of the paper filed. The affidavit suggested that the copy filed was insufficient: (1) Because it nowhere appears that the said copy is a copy of plaintiff's book account (except by the statement of counsel), . . . and deponent suggests that it should appear positively and affirmatively on the copy filed that the same is a copy of plaintiff's book account; (2) Because there is a variance between plaintiff's book account and the copy filed.

Croasdale, for the rule.

THE COURT. The proper practice is to rule plaintiff to produce his book of orignal entries, and then take advantage of a variance.

Rule absolute.

C. P. No. 2. Dec. 19.

Krauss v. McGlone and Taggart.

Practice—Joint and several obligation—Contract of suretyship on lease—Surety cannot be sued jointly with lessee.

Rule for a new trial.

Covenant by Krauss agaist McGlone and Taggart on a lease made by plaintiff to the defendant, McGlone, for a store and dwelling house. McGlone covenanted to pay rent at the rate of $30 per month, and Taggart, by a separate contract on the same paper, became surety for defendant, McGlone. A verdict was found for the plaintiff for $130.68.

Manderson, for the rule, argued that Taggart's contract was distinct, and he should have been sued separately.

Kingston, contra, cited—

Kleckner v. Klapp, 2 W. & S. 44.
Craddock v. Armor, 10 W. 258.
Leith v. Bush, 11 Sm. 395.

Dec. 21. Rule absolute.

C. P. No. 2. **Shallcross v. Kohl.** Nov. 25.

Practice—Assumpsit—Statement in place of narr.—Copy under affidavit of defence law, when not sufficient.

Rule to show cause why rule to plead should not be stricken from the record.

Assumpsit on a promissory note. The plaintiff filed a copy of the note, and defendant filed an affidavit of defence; a rule for judgment for want of a sufficient affidavit was discharged; plaintiff then entered a rule to plead, notifying defendant of his election to treat the copy filed as a narr., and of the rule to plead.

Edw. R. Worrell, for the plaintiff, contended that the copy filed was a sufficient statement in lieu of a narr., citing—

Digitized by Google

Epler *v.* Funk, 8 Barr, 469.
Thompson *v.* Gifford, 12 S. & R. 74.
Doerle *v.* Johnson, 7 Phila. Rep. 393.
Gibbons *v.* McGuigan, 6 Id. 108.
Nathans *v.* Cummings, 1 WEEKLY NOTES, 416.
Ellis *v.* Penington, 2 Id. 29.
Bush *v.* Monteith, 2 Id. 112.

W. C. Hannis, for the rule, was not called upon.

THE COURT. A statement of the plaintiff's claim can take the place of a formal declaration only by virtue of the Act of Assembly of 1806, and must be strictly within the Act. The copy filed in the present case fails *inter alia* to specify "the amount which plaintiff believes is justly due to him from the defendant."

Rule absolute.

[*Cf.* Levy *v.* Mustin, *ante*, 220.]

C. P. No. 2. **Paul v. Casselberry.** Dec. 20.

Rule for new trial—Practice—Depositions required.

This was a rule for a new trial based partly on new and after discovered evidence.

Murphy, for the rule, produced the affidavit of Paul.

THE COURT. Motions for a new trial on the ground of new or after discovered evidence should be based on an affidavit, but for the argument of the rule depositions should be taken.

Rich, contra.

Depositions ordered.

C. P. No. 2. **Johnson v. Kolb.** Dec. 19.

Act of April 1, 1797, *for sale of loaf bread by the pound avoirdupois, still in force.*

Rule to strike off non-suit.

This was an action in assumpsit to recover damages. The defendant, a baker, agreed to furnish plaintiff daily with sufficient bread to establish a new route for supplying bread to customers. Defendant also agreed that he would not disturb plaintiff's route, but would continue the supply as long as the defendant remained in business. The bread was to be supplied to plaintiff at five cents *per loaf*, which the defendant was to retail at six cents per loaf. After complying with this contract for three months the defendant stopped the supply of bread and took possession of the route himself.

The declaration contained three counts, viz: (1) Breach of contract whereby plaintiff suffered damage, to wit, one cent profit on each loaf sold by him. (2) Breach of contract and damages for inability of plaintiff to keep up his route because of the failure of defendant to supply bread as per contract. (3) Deforcement and usurpation of route by defendant.

On the trial the Judge (PRATT, J.) non-suited the plaintiff on the ground that the evidence showed that the bread was sold by the loaf, whereas the Act of April 1, 1797 (3 Sm. L. 295; Purd. Dig. 175) requires that "all loaf bread made for sale within this Commonwealth shall be sold by the pound avoirdupois," and avoids contracts made for the sale of bread in any other way than by weight.

John I. Rogers, for the rule, argued that conceding that the Act barred a recovery for bread sold in any way except by weight, it did not apply to the causes of action supported by the 2d and 3d counts of the declaration, which claimed damages *ex delicto*, 1st, for destruction of plaintiff's route by the failure to supply bread as per contract, no matter whether the bread was to be sold by weight or otherwise; and 2dly, for deforcement and usurpation of an established route which defendant had agreed not to disturb. That the action of assumpsit is a special action on the case and will support damages *ex delicto*.

Diehl, contra, cited—

Burkholder *v.* Beetem's Admr's, 15 Sm. 496.

THE COURT. The declaration is not in tort but in assumpsit. The foundation of the action is contract, and that the Act of 1797 makes void.

Rule discharged.

C. P. No. 4. Nov. 4, 1876.

City to use of Dickenson v. Patterson

Municipal claim—Act of April 5, 1870 (*for paving of Market Street*)—*Paving contract—Work improperly done—Defences by property owner under Act of April* 19, 1843.

Rule for judgment for want of a sufficient affidavit of defence.

Sci. fa. sur municipal claim filed May 28, 1875, for paving roadway of premises situate on Market Street, at the corner of Fifty-third Street. The affidavit of defence set forth (1) that in pursuance of the Act of April 5, 1870 (P. L. 890)—which Act provided as follows, viz.:—

"It shall be the duty of the Chief Commissioner of Highways to proceed by giving due notice to property owners along the line of said Market Street, from Forty-third Street to the eastern end of Cobb's Creek, on Sixty-third Street, and by all other requisite proceedings, to open said street between the points named, to the full width as laid down in the plan of the city, and to grade said street, and to enter into a contract with a competent paver to curb and pave the same, said contractor to collect the cost thereof, except the paving of intersection, from the property owners, as is now by law and ordinances provided,"—

the Chief Commissioner of Highways, on November 24, 1872, contracted with Dickenson, the use plaintiff, to grade, curb and pave said

Digitized by Google

street in a good and workmanlike manner, and to find all material necessary for the same, the grading and filling to be done of the established grade, the paving stone to be good rubble stone, and the excavation made by the grading to be filled with fourteen inches of gravel, the stone to be perpendicularly bedded thereon, to be rammed three times, and covered with gravel; (2) That by the ordinance of June 12, 1868 (Dig. of Ord. 313), it is provided that all streets in West Philadelphia, thereafter paved, shall be laid with rubble pavement, of stone regular in shape, being in depth six to nine inches, in length five to twelve inches, and in width, not exceeding four inches, with a flat top surface. (3) That the paving has not been done in accordance with the contract or with law, in that a mixture of clay, loam, and mica, was used instead of gravel, and of a depth not exceeding ten inches from the top of the paving-stones; that the paving-stones are not of the requisite dimensions; that the pavement has been improperly laid, and the work done in an unworkmanlike manner, by reason whereof the pavement has fallen into great disrepair; and that the price charged is greater than the value of the work.

Joseph R. Rhoads and *David W. Sellers*, for the rule.

The defendant cannot set up the terms of the contract, or the ordinance, that being a matter concerning only the city and her contractors, and which the city can waive.

City of Philadelphia *v.* Burgin, 14 Wright, 539.
City to use of Dyer *et al.* *v.* Brooke, 2 WEEKLY NOTES, 537.

The doctrine that the actual cost only should be charged has been exploded, and the plaintiffs are entitled to the amount of their claim in full.

City to use, etc. *v.* Miller, 2 WEEKLY NOTES, 302.
Lea *v.* City, Id. 254.
City *v.* Sellers, 6 Phila. Rep. 253.
Stroud *v.* The City of Philada., 11 Sm. 255.

In the case of City of Philadelphia to use *v.* Edwards (28 Sm. 62; S. C., 2 WEEKLY NOTES, 102), doubts were expressed as to whether the Act of 1843, under which City *v.* Burgin and other cases above cited were decided, applied to City of Philadelphia since consolidation, but these doubts are set at rest by the late decision of the Supreme Court in—

Fell *v.* The City of Philadelphia, 33 Leg. Int. 305; S. C., *ante*, p. 261.

Theodore C. Patterson and *C. Stuart Patterson*, contra.

The plaintiff was bound by the Act of April 5, 1870 (*supra*), the ordinance of June 12, 1868, and the terms of the contract. If, under the Act of 1870, the commissioner could pave, without regard to the restrictions imposed by general laws and ordinances, it must logically follow that he might pave with gold, and charge property owners $1,000,000 per foot front—*Reductio ad absurdum.*

The Act of 1870 empowers the contractor to collect the cost of paving from property owners, "*as is now by law and ordinance provided*," and thereby authorizes defendant to make every defence provided by "law and ordinance." The Act of April 19, 1843 (P. L. 342), requires plaintiff to prove that the work was done, or the materials furnished, and the just value thereof, and allows defendant to prove the contrary, and to show that the price charged is greater than the value of the work.

Even if, under the Act of 1870, the commissioner's powers were unlimited, he has exercised his discretion, and entered into a contract with plaintiff, the terms of which have been violated, and plaintiff, therefore, cannot recover.

C. A. V.

Nov. 6. Rule discharged.

[See Fell *v.* City of Phila., *ante*, 261.]

C. P. No. 4. Dec. 16.

Hewer et al. v. Richardson et al., Defendants, and Heinle, Garnishee.

Attachment execution—What may be attached—Money due on a municipal claim, to a city contractor, may be attached in the hands of the debtor.

Sur rule for judgment against garnishee.

The plaintiffs obtained a judgment against Richardson & Son, and under it issued an attachment execution against Heinle, as garnishee, and filed interrogatories.

The answer of the garnishee admitted his indebtedness to B. F. Richardson, one of the defendants, in the sum of $27, for the construction of a culvert in front of his premises; but set out that the work was performed by the defendant as a contractor for the city of Philadelphia, and submitted to the Court whether a debt of this nature was the proper subject of an attachment under the Act 16 June, 1836, § 32 (Purd. Dig. 639, pl. 32).

Joseph Savidge, for rule.

The city has no interest in this debt; the contractor is the equitable owner of the same, although the bills are made out in the name of the city; and where it becomes necessary to file claims for these debts, they are always filed to the use of the contractor.

A. A. Grace, contra.

Rule absolute for amount admitted to be due.

Digitized by Google

C. P. No. 4. **Donly v. Brcwn et al.** Dec. 30.

Promissory note—Bona fide holder—Set-off—A note passed after maturity does not pass subject to the defence of a set-off against the transferror.

Rule for judgment for want of sufficient affidavit of defence.

Assumpsit on a promissory note by endorsee against maker. The affidavit of defence alleged that after the note sued on fell due, it was held by the firm of Moodie, Gross & Co., which firm was indebted to the defendants on account of a certain other promissory note; and the defendants claimed to set off the amount of the Moodie, Gross & Co. note against the note sued upon.

J. H. Sloan showed cause. The note was transferred after maturity, and is therefore subject to any defence in the hands of the transferee that it would have been in the hands of the transferror.

[THAYER, P. J. Except the defence of set-off. A note passed after maturity is subject to an equity, but not to a defence of set-off.]

S. E. Megargee, for the rule, was not heard.

Rule absolute.

[*Cf.* Young *v.* Shriner, 2 WEEKLY NOTES, 393.

C. P. No. 4. Dec. 9.

Bailey et al. v. Waterhouse.

Affidavit of defence—Caveat emptor—Warranty—Representation—Insufficient allegation of fraud.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a book account.

The account filed set forth—

"To 1 diamond ring . . . $150"

The affidavit alleged that the defendant purchased the said ring "under the representation that it was worth $150; that after the purchase he ascertained from parties who were judges that it was not worth more than $75;" that immediately the defendant called upon the plaintiffs and tendered them the ring, which they refused to take, and that at the time of the representation the plaintiffs knew the ring to be worth no more than $75.

G. S Keene, for the rule.

Manderson, contra.

[THAYER, P. J. Value is a relative term. Representation of value does not amount to a warranty. There is no allegation of fraud.]

Rule absolute.

[See Ladomus *v.* Dash, 2 WEEKLY NOTES, 111.]

C. P. No. 4. Dec. 8

Murray et al. v. Yard, Ex'r, et al.

Will—Lapsed devise—Heir-at-law—A lapsed devise descends to the heirs-at-law of the testator, unless a contrary intention is expressed in the residuary clause of the will.

Rules for a new trial and for judgment on reserved point *non obstante veredicto.*

This was an action of ejectment brought by certain of the heirs-at-law of Mary P. Loxley, deceased, against her executor and residuary devisees, to recover one-half of certain premises devised by her will.

On the trial, before ELCOCK, J., the following facts appeared: The premises in question were acquired by Mary P. Loxley, from one Ashman, by deed dated July 3, 1854, recorded July 6, 1854. On the 6th of February, 1860, Mary P. Loxley made a will, by which she devised to John Yard, Jr., the premises in question. The will also contained the following residuary clause:—

"*Item.* It is my mind and will, and I do hereby direct, authorize, and empower my executors hereinafter named, and the survivor of them, and the heirs, executors, and administrators of such survivor, in pursuance and under the express power and authority which I have hereinafter given them, to sell and convert into money all the rest, residue, and remainder of my estate, real, personal, and mixed, of which I may die seized, possessed, or entitled to, and to part and divide the net proceeds thereof . . . . into three even and equal parts or shares," which shares were bequeathed to the residuary legatees.

On the 6th of August, 1866, the testatrix published a codicil which recognized the foregoing bequest and devise. After the date of the codicil, but before the death of the testatrix, John Yard, Jr., died. At the time of her death, Mary P. Loxley left no near kin, except four second cousins of the whole blood, viz., Charles Goodrich, Mary Ann Clark, Eliza Murray, and Mary A. Jackson; the two latter died after the testatrix, leaving each four children, who were the plaintiffs in the present case.

Under these facts, the defendants' counsel requested the Judge to charge that the verdict must be for the defendants. The learned Judge refused to so charge, and directed the jury to find for the plaintiffs, subject to the following reserved point: "Whether by reason of the death of John Yard, Jr., subsequent to the date of the last codicil, but prior to the death of the testatrix, the premises in question, which were specifically devised to him, descended, by reason of the lapse, to the heirs-at-law of the testatrix, or passed with the residuary estate to her residuary legatees and devisees."

The jury found for plaintiffs, in accordance with the direction of the Court.

J. C. Longstreth, for the rules.

There is a difference between the residuary

Digitized by Google

clause in this case and that in the ordinary form. Here the meaning plainly is, all that the testatrix has not succeeded in disposing of in the former part of the will. By the lapse, she *died seized and possessed* of the premises in question. In Pennsylvania the distinction between a lapsed and void devise, with regard to its devolution into the residuum, no longer exists since the Statute of Wills of 1833.

Patterson *v.* Swallow, 8 Wr. 487, recognized in—Williams *v.* Neff, 2 Sm. 327.

And a devise, whether lapsed or void, will fall into the residuum if the residuary clause be sufficiently clear and comprehensive.

J. G. Johnson, contra.

A *void* devise may fall into the residuum, a *lapsed* devise never.

3 Washburn, Real Property, *391.

Patterson *v.* Swallow (*supra*) was the case of a void devise, and the remarks of WOODWARD, J., applying the same rule to a lapsed devise, are mere *dicta*. C. A. V.

Jan. 6. THE COURT. The plaintiffs are the heirs-at-law of Mary P. Loxley, deceased, and the defendants the residuary legatees and devisees under her will. This action is ejectment for the premises Thirty-fourth and Bridge Streets, specifically devised under her will to John Yard, Jr., his heirs and assigns. John Yard, Jr., died subsequent to the date of the last codicil, but prior to the death of the testator. The devise having thus lapsed, the point reserved upon the trial was whether it descended to the heirs-at-law or the residuary devisees and legatees of the testatrix.

A devise at common law always lapses if the devisee dies before the testator (1 Jarman on Wills, 301, n.); and by I. Vict. c. 20, §§ 25, 26, 32, and 33, if the devise be to children or other issue of the devisor, and issue of the devisee be alive, the devise shall not lapse if no such intention appears in the will. This is practically covered in Pennsylvania by our Statute of Wills (Act of 8th of April, 1833, § 12); and also extended by Act of 6th of May, 1844, § 2, in favor of a brother and sister, or the children of a deceased brother and sister of the testator. The language of the residuary clause of the will of Mary P. Loxley is simply a direction to her executors to sell and convert into money all the rest, residue, and remainder of her estate, real, personal, and mixed, of which she might die seized, possessed, or entitled to, and to part and divide the same into three equal shares. There is, therefore, clearly no provision to prevent a lapse of any of the devises previously specified, it being a mere general residuary clause.

It required the aid of the statute in such cases to save the devise in favor of children and brothers and sisters, and what the statute does not cover must remain as it did at common law. In 3 Washburn on Real Property, *691, the rule is stated to be "that a devise which falls by lapsing does not go to the residuary devisee, but to the heir-at-law of the testator, on the ground that the intent of the testator is to be taken as things stood when the will was made, and that he is not to be presumed to have intended to give his residuary devisee what he had already given to one whom he expected to survive him, and what he would have taken if the will had taken effect at its date." For this doctrine numerous cases are cited, and it has become customary to refer to Van Kleeck *v.* Reformed Dutch Church (6 Paige, 600, and 20 Wendell, 472), as containing all the learning upon the subject. It has received high approval from our Supreme Court, and it has not been qualified by any subsequent rulings in our sister State.

As against this principle, Patterson *v.* Swallow (8 Wr. 487) and Neff's Appeal (2 P. F. Sm. 337) have been cited to us in the argument, but they do not appear to us in any way to affect it; for in Patterson *v.* Swallow, which raised a question under the will of Mrs. Sarah Burd, the devise was in blank, and thus became a void devise, and being as if not specified or named in the will, became part of the residuary estate. There is thus a vast difference between a lapsed and a void legacy; one being an intended disposition of particular property and a failure by death of the beneficiary, and the other no disposition whatever of the particular property arising from mistake or failure to express a lawful intention. And in Neff's Appeal, the judgment of the Court carried out the doctrine here determined, for there the devise of the residue was to four sons of the testator. On the death of any of them, his share went to the heirs-at-law and next of kin of testator, because there was no survivorship, the devise not being given to the sons as a class, but to each in his own name.

The law does not favor intestacy, but a will must clearly show the object of the testator's bounty before the statute directing descents can be set aside. Lord Hardwicke, in Sibley *v.* Cook (3 Atk. 572), concisely and forcibly states the rule to be "that if one devise real or personal estate, and manifests an intention that the devise shall not lapse, this is not sufficient to exclude the heir or next of kin, unless he had nominated another legatee."

Upon a careful consideration of the numerous authorities, we are of opinion that a lapsed devise descends to the heirs-at-law of the testator, unless there is an intention expressed in the residuary clause of the will to cover the particular devise.

The rule for a new trial is discharged, and judgment entered for plaintiffs on the point reserved.

Opinion by ELCOCK, J.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, JAN.* 25, 1877. [No. 17.

Supreme Court.

RULES OF COURT

Adopted for the Return and Hearing of Writs of Error in Capital Cases.

IN THE SUPREME COURT OF PENNSYLANIA, NOW SITTING IN THE EASTERN DISTRICT THEREOF:

And now, January 15th, 1877, the following Rules are adopted for the return and hearing of writs of error in capital cases in the several districts of this Court.

1. The first Monday of each month shall be a special return day in each district for all writs of error and certiorari in cases of conviction and sentence of death for murder in the first degree. The fifth Monday after the issuing of the writ shall be assigned for the argument thereof: Provided the Court shall then be in session in any district. If then in session in a district other than that in which the writ issued, the prothonotary issuing such writ, shall certify the record to the district in which the Court shall be sitting. If the Court shall not be in session at that time, the case shall be certified to the district in which the next term shall be held.

2. Capital cases shall be placed at the head of the list for argument.

3. The writs of error and certiorari issued between the publication of these rules and the first day of February next, shall be made returnable on first day of March, 1877.

4. The plaintiff in error shall serve his paper-book on the proper district attorney ten days before the day assigned for the hearing, and the defendant in error shall serve his three days before the hearing.

The prothonotary is directed to publish these rules once a week for four weeks, in the legal papers of Philadelphia and Pittsburgh, and in two newspapers at Harrisburg, at the expense of the respective counties.

PER CURIAM. DANIEL AGNEW,
Chief Justice.

I, Benjamin E. Fletcher, Prothonotary of the Supreme Court in and for the Eastern District of Pennsylvania, do certify the above to be a true and correct copy of the rules adopted by said Court at Philadelphia, January 15, A. D. 1877.

Witness my hand and seal of said Court at Philadelphia, January 15, A. D. 1877.

[Seal of the Court.] B. E. FLETCHER,
Prothonotary.

Jan. '76 June 1, 1876.

Insur nce Company v. Delpeuch.

Life insurance—Suicide—Evidence of suicidal intent—Presumption against suicide—Belief in Spiritualism as tending to show a reason for suicide—Evidence—Res gestæ—Declarations of insured preceding death by drowning in an unknown manner—Declarations by wife—Expert evidence as to course of currents in river—Practice—Agreement to try a single issue waives prior defects in service and formal proceedings.

S., being insured under a life policy, which stipulated against liability in case of death by suicide, left home on horseback on a dark night, avowedly to procure a physician for his sick daughter. His dead body was found next morning in a shallow eddy of a river, near a ford, which lay in his road to the physician's house. In an action on the policy in which, by agreement, suicide was the only issue, the company defendant showed that the insured was a believer in spiritualism, and produced testimony of declarations by the deceased shortly before his death, tending to show some intention of suicide by drowning.

The defendants then offered to show that there had been a suicidal tendency in the decedent's family; that a day or two before his death he pointed out his personal property in a barn as distinguished from that of a tenant; that he had recently procured an additional policy of accident insurance; that the currents of the river would have floated his body from the ford in a different direction from that in which it was found; and that his wife had made certain declarations before and at the time of finding the corpse indicating a fear on her part of suicide. These offers were rejected.

Held (affirming the judgment of the Court below), that in the case of drowning in an unknown manner the presumption is against suicide, which presumption is not rebutted by proof of a belief in spiritualism

Held further, that under the issue of suicide, the above offers of evidence were properly excluded.

Held further, that the agreement to try on the issue of suicide waived previous alleged defects of service and other proceedings in the cause.

Error to Common Pleas of Bradford County.

Assumpsit by William J. Delpeuch, executor of Valentine Smith, deceased, against The Continental Life Insurance Co. of Hartford, Conn., on a policy for $10,000 upon the life of the said Valentine Smith.

The summons issued April 2, 1874, out of the Common Pleas of Bradford County, and was directed to the sheriff of Philadelphia County, with instructions to "serve the same on D. S. Burnham, General Agent and Attorney for said Company, 430 Walnut Street, Philadelphia." It was returned "served on D. S. Burnham, General Agent of said Company, by making known to him the contents thereof," accompanied by an affidavit of the truth of the statement from one Edgar, not the deputy sheriff who served it.

Digitized by Google

After the filing of the statement and narr., *Smith* and *Montayne* entered their appearance *d. b. e.*, and on their motion a rule was granted to show cause why the proceedings should not be quashed: upon argument the rule was discharged. (First assignment of error.) On August 12, 1874, a rule to arbitrate was entered by plaintiff and returned on oath served on *Smith* and *Montayne*, attorneys for said company. September 18, award of arbitrators in favor of plaintiff filed. On October 5, 1874, defendant appealed; on December 8, a rule to strike off the appeal was made absolute. (Second assignment of error.) January 18, 1875, on motion of defendant's attorney, a rule was granted to show cause why recognizance to appeal should not be perfected. During the pendency of the rule, counsel on both sides entered into an agreement in writing which was filed, by which it was provided that the decree striking off the appeal should be annulled, and the appeal be perfected; and it was further provided that there should be a jury trial and that the defendant *would not "maintain any defence except that said Valentine Smith came to his death by an act of suicide."* The policy contained a clause that it should be void if the assured died by his own hand, whether "sane o insane."

On the trial, in September, 1875, before MORROW, P. J., the undisputed facts were as follows: About 10 o'clock on the evening of September 16, 1873, it being dark and foggy, the deceased started on horseback from his house in Sheshequin Township, distant somewhat less than a mile from the Susquehanna River, ostensibly for the purpose of obtaining a physician from Ulster, on the other side of the river, to visit his sick daughter, and he did not return. Some time after midnight his horse was found, wet up to the neck, and early the next morning his dead body was found, without marks of violence, in an eddy of the river about eighteen inches deep, on the Sheshequin side, forty or fifty yards below the fordway, and about sixty feet from a gravel bar which ran along the river. There was some evidence that tracks of the horse's feet were found leading to a deep part of the river, some little distance from the ford.

Upon the trial the defendant offered to prove by several witnesses that decedent was a believer in spiritualism, and immediately before his death and at other times had talked of drowning as the easiest method of dying, after which, he said, a man could, in his spiritual existence, have communication with his family and conduct his personal affairs the same as before death. Objected to. Admitted only as to the conversations immediately preceding his death and as to the fact of his being what was called a spiritualist. Exception for defendant. Under this ruling testimony was given, *inter alia*, of the decedent's belief in spiritualism, and of declarations by him to the effect that he was in debt, but that he had his life insured for $10,000; that he had always beat the insurance companies, and was going to beat this one too, and he would show how he was going to do it; that the only way to beat life insurance companies was *to die*.

The following offers of evidence on behalf of the defendants were rejected—for the most part on the ground that they were irrelevant to the single issue of suicide, viz.: (10) that the decedent formerly had a brother who had committed suicide forty years ago, and that there was a suicidal tendency in the family, which facts had not been disclosed in the application; (6) that a day or two before his death the decedent pointed out to his wife certain personal property of his in a barn, distinguishing it from that of a tenant; (7) that several months before his death, when boring for coal, he said, that if he did not find it, he would "go over the river, and never come back;" (13, 14) that about five weeks before his death, he procured, or attempted to procure, an accident policy on his life for one year, payable on death only (the p licy was not produced). The defendant also offe ed to prove (12, 16) certain declarations by decedent's wife, before and after his death, to the effect, that she wanted to raise money to pay premium on life insurance, as her husband would not live long, and this life insurance was their only salvation; (9) that in 1861 she requested a person to accompany her to the barn, as her husband was just going in there, having threatened to hang himself; (15) that decedent informed her a week before his death that he had taken out an accident policy for $5000, which amount she had recei ed since his death. These offers were excluded.

The defendant also offered to show by several witnesses, as experts, without, however, showing their special capacity as such: (5) that from their examinatio. of the *locus in quo*, a boat or a dead body would be carried by the current from a point near the lower side of the ford to the shore opposite to that where decedent's body was found; (8) that it was physically impossible for a body being in the water on September 16, 1873, either on or below the rift, to float to the point indicated on the map where Smith's body was found. Excluded.

The defendant requested the Court to charge, (20) that, "it being an admitted fact that the decedent was a swimmer, and that his dead body was found in water only seventeen inches in depth, and without any marks of violence upon it, the presumption of law is that his death was by suicide." *Refused.*

The plaintiff presented the following point: (19) "That, the defendant having put in the de-

Digitized by Google

fence that the decedent came to his death by suicide, the presumption of law is, that when death is either by accident or suicidal, that he came to his death by accident." *Affirmed.*

(The preceding numbers refer to the assignments of error.)

The Court (MORROW, P. J.) charged, in substance, that under the agreement filed the only question was, did Valentine Smith come to his death by an act of suicide? The burden of proof is on the defendant to show by satisfactory evidence the fact of suicide; the presumption is that the drowning was accidental. We cannot say that a belief in what is called spiritualism excites to self-murder, or tends thereto. The evidence that Smith was a spiritualist was admitted because his declarations relating to short life, violent, sudden death, etc., were in connection with the belief, and because death by drowning followed so soon after these declarations were made. No one fact proved by the defendant makes out the defence; but it is claimed that all their evidence taken together establishes the fact of suicide; and yet may not all these facts be true, and yet Smith's death have occurred by accidental drowning? This is a matter for your consideration.

Verdict and judgment for plaintiff for $11,000.

The defendants took this writ, assigning for error (in twenty specifications numbered as above indicated) the refusal of the Court below to quash the return to the writ, and to allow an appeal from the award of arbitrators; the rejection of the defendants' offers of evidence above referred to; and the answers to the points above quoted.

Smith and *Montayne* (with whom was *McCandless*), for plaintiff in error.

It was error to reject evidence of the deceased's conversations about death and drowning, and his preparation for death by taking out additional policies, because they might well show a morbid frame of mind, and a predisposition to seek happiness in death. And had the defendants been permitted to show the course of the currents, they might have convinced the jury of the fallacy of plaintiff's theory of accidental drowning. The presumption of law follows that of medicine, and where a person is found in shallow water face downwards, and with no marks of violence, it is, medically speaking, a presumption of suicide.

Patrick, and *Davies & Carnochan* (with whom was *H. Peut*), contra.

The plaintiff in error waived all defects of service by proceeding to appeal from the award without withdrawing the appearance, and then waived any error in refusing to grant the appeal by entering into the agreement to go to trial on the simple question of suicide. A spiritualistic belief, which led him to regard death as a happy existence in a future world, is no more evidence of suicidal intent than would be a hope of immortality and happiness enjoyed by a Christian.

Gibson *v.* Am. Mut Life Ins. Co, 37 N. Y. 580.

As to the theory of Smith's deliberately lying down in seventeen inches of water and drowning himself, at the time when he knew that his sick daughter was awaiting his return with a physician, it was clearly for the jury to determine whether the presumption was that of suicide. The proposed tests to show the currents were unfair, and were properly excluded.

Oct. 9. THE COURT. If originally the rulings covered by the first and second assignments were erroneous, they were cured by the subsequent agreement. It stipulated that upon the trial of said cause, said defendant shall not set up nor attempt to maintain any defence, except that the said Valentine Smith came to his death by an act of suicide. The plaintiff in error cannot now allege a defective service of the summons, nor any irregular award of arbitrators. In an attempt to appeal from the award the company had neglected to give the bail absolute which the Act of Assembly requires from a foreign corporation. The time fixed by the statute for perfecting the appeal had expired. A rule to show cause why the appeal should be stricken off had been made absolute. It is true, more than a month thereafter the Court granted a rule to show cause why the recognizance on the appeal from the award should not be perfected. Whether the Court had then any power to grant the relief asked for it is not necessary now to decide. Without waiting for a decision of the Court, the parties by agreement in writing filed stipulated that the judgment and decree of the Court by which the appeal had been stricken off be annulled, the bail be perfected, and the case be tried under the limitations and restrictions stated in the agreement. It confined the defence to proof of suicide only. It was by virtue of that agreement only that the plaintiff in error acquired a right of trial in the Common Pleas. Having accepted its benefits, and enjoyed the rights thereby given, the company cannot now repudiate a part of the agreement. It contravened no rule or policy of law. All the stipulations therein are binding on the parties. It was too late for the company to allege that the agreement was entered into through ignorance or misapprehension of fact connected with the issuing of the policy. The same reasons require the dismissal of the tenth and eleventh assignments. We are unable to discover any error in the rejection of the evidence covered by the ninth, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth assignments. An opinion expressed by Mrs. Smith in the lifetime and in the absence of her husband, cannot affect the right of action in this case. Her declaration

Digitized by Google

could not affect the insured, for she was not authorized to act for him in the transaction. It cannot affect her, because she then had no interest in the matter. (1 Green. Ev. § 179.) Nor can her declarations be proved where they will affect the rights of other persons interested in the estate. The others did not derive any interest from her, each has a separate and distinct interest in the fund. Their rights cannot be destroyed by her admissions or declarations (Boyd *v.* Eby, 8 Watts, 66.) Hence it was irrelevant to show that after her husband's death she had settled the loss on an accident policy, and had received the money; nor was it admissible to prove by parol the contents of another policy issued to Smith, no notice having been given to produce it. Nor was it relevant to show that Smith wanted to procure from an insurance agent an accident policy for one year, to be paid in case of death only. This offer does not aver any time when the alleged conversation was held, nor propose to follow it by showing the policy was procured.

Any error made in the rejection of evidence covered by the fifth assignment was subsequently cured. The plaintiff in error afterwards, without objection, proved by several witnesses that from the ford-way the current of water flowed towards the side of the river opposite to where the body was found. This fact was not controverted. The evidence objected to in the seventeenth assignment was not in conflict with it. The two facts were consistent with each other. The theory of the plaintiff in error was, that if Smith had fallen into the waters at the ford-way the body would have floated to the Ulster side of the river. The company, therefore, assumed that Smith was not drowned in attempting to cross at the ford-way. Hence it contended he had intentionally drowned himself at or near the place where the body was found The defendant in error, conceding the current of water from the ford-way to be as claimed by the opposite party, contends that Smith did not fall into the water at that crossing, but several rods below, where the water was deep. The fact that the water was deep a few rods below the ford-way is not controverted. The night was dark and foggy. Some evidence was given of the tracks of the horse, showing that he entered the water at this lower point. As tending to prove the horse had been in deep water, it was shown he was wet on his neck under his mane. It was therefore entirely pertinent to show that a body getting into the water at this lower point would float to the spot where the body of Smith was found.

Sufficient ground had not been laid to sustain the eighth assignment. The witness was not shown to be an expert in regard to the action of water. All the facts on which his opinion was predicated had been proved; the witness was not shown to be any more competent than the jury to draw an inference from these facts. There was, therefore, no error in rejecting evidence of his opinion. The order in which testimony may be admitted depends much on the discretion of the Court. (Richardson *v.* Stewart, 4 Binn. 200; Curren *v.* Conway, 5 Id. 489; Deval *v.* Bushbridge, 6 W. & S. 529; Luns *v.* Van Buskirk, 4 Barr, 310.) The Court therefore committed no error in permitting the defendant in error to more fully examine Mrs. Smith as to conversations to which she had testified when called and cross-examined by the plaintiff in error. The eighteenth assignment is not sustained.

We see no error in the third and fourth assignments. The policy on which this action was brought issued on 20th December, 1870. Smith was drowned the 16th September, 1873. No allegation is made that any intent to commit suicide existed when the policy was procured. The Court was very liberal in admitting evidence of acts and declarations of Smith for many months preceding his death, bearing on the question of suicide. Some of the evidence was very remote. We are unable to see that his belief in Spiritualism, or the fact that he believed he would enjoy all the pleasures of this life after death, was evidence of suicide; to conclude otherwise is to assume that the expectation of greater enjoyments in a future life than in this creates a suicidal desire. If this reasoning be correct, it would follow that a devout Christian who believes in a blessed immortality is more likely to commit suicide than one who believes in no God and in no resurrection. The desire of self-preservation is firmly imbedded in human nature. A legal conclusion of suicide ought not to be drawn from the mere fact of a belief in spiritualism. The offer contained in the sixth assignment may not be weaker than some evidence which was admitted. At first we were inclined to think its rejection was error; a more careful consideration has failed to make the error so clear as to call for a reversal. The mere fact that Smith pointed out to his wife what property was his tenant's, has no natural connection with an intention to commit suicide. It would be unreasonable to give it that effect. The act is entirely consistent with the conduct which usually characterizes persons engaged in his occupation. It did not tend to prove the crime alleged. It was therefore properly withheld from the jury. If the rejection was an immaterial error, working no injury to the plaintiff in error, it is no ground for reversal. (Hulings *v.* Guthrie, 4 Barr, 123.)

We see no error in the nineteenth and twentieth assignments; the party alleging suicide must prove it. The mere fact of death in an unknown manner creates no legal presumption of suicide. Upon evenly balanced testimony the law

Digitized by Google

assumes innocence rather than crime. Preponderating evidence is necessary to establish the latter. Nor does the fact that the body was found without any marks of violence on it create a legal presumption of suicide. The condition in which the body was found was submitted to the jury under an accurate charge. The learned Judge called their attention to the facts proved and the conclusions sought to be deduced therefrom. The case was fairly tried on its merits. We see no sufficient ground to disturb the judgment.

Judgment affirmed.

Opinion by MERCUR, J. WILLIAMS, J., absent.

Jan. '72, 53. Feb. 29.

Danville, Hazleton & Wilkesbarre Railroad Company v. Ashton.

Equity proceedings—Agreement for reference—Conclusiveness of referee's report—Decree against one not a party in the suit—Errors and appeals—Alleged errors in master's finding of fact.

The parties to an equity suit agreed to refer all matters in controversy to a referee whose report should be final and conclusive. The referee filed his report, recommending a decree that the defendant deliver to plaintiff certain coupons, and that the plaintiff, *or one K* (not a party to the suit) should pay defendant a sum of money. Plaintiffs excepted to the referee's findings of fact and to the decree, which exceptions were dismissed by the Court below:

Held, that the reference was not under the Act of 16 June, 1836, but must be treated as an amicable reference to a master.

Held further (without deciding whether the plaintiff had precluded themselves from filing exceptions), that, the testimony not having been furnished to the Appellate Court, they would not pass upon the alleged errors of fact.

Held further, that the decree against K., who was not a party to the suit, was erroneous, and would be stricken out as mere surplusage.

Certificate from the Nisi Prius.

Bill in equity filed by the Danville, Hazleton & Wilkesbarre Railroad Company against Ashton, setting out various transactions in stocks, bonds, and notes, between S. P. Kase and the defendant, and averring that these contracts were made by Kase for the account and use of the plaintiffs. The bill prayed that the defendant might be compelled to deliver to the plaintiffs certain notes and bonds upon the payment to him of what might be found to be due to him on account of the said notes.

An answer was filed and then there was entered of record the following agreement signed by the parties to the suit.

"It is hereby agreed to refer the matter in controversy in the above entitled suit to Thompson Bond, Esq., of Pittsburg, as referee, and his award shall be final and conclusive upon the parties hereto. It is expressly understood and agreed that said referee shall report the facts, and his conclusions thereon, and a decree may be entered therein in accordance with such conclusions."

In accordance with this agreement the referee reported the facts (which, under the disposition made of the case, need not be given here) and recommended a decree "that Samuel K. Ashton shall deliver to the Danville, Hazleton & Wilkesbarre Railroad Company the coupons of the bonds of said company, amounting to $6258, according to the account as stated, and that at the same time the said railroad company *or Simon P. Kase* shall pay to Samuel K. Ashton $1272.35 in cash, with interest from December 1, 1873."

The plaintiff, reserving the right to object to the reference as not authorized by law, filed exceptions to various findings of facts by the referee, and to the decree reported by him. The Court overruled the exceptions and entered the decree reported; whereupon the plaintiffs certified the case into the Court in banc, assigning for error the overruling of their exceptions and the decree of the Court.

Jas. Ross Snowden and *S. G. Thompson*, for the plaintiffs.

The decree is manifestly an error, being in the alternative form. Kase is no party to the record, and yet there is a decree that he pay Ashton $1272.35. If he do so pay, is he to receive the coupons? Clearly not, for they are the property of the company; therefore, if he pays, what is he to receive for such payment?

The report and decree are not final and conclusive. The case is practically in the condition of a report of a master with exceptions thereto.

Cotton *v.* Babcock, 14 Sm. 462.

N. B. Thompson and *M. Hampton Todd*, for defendant in error, argued that the reference was final, because, in general, actions at law and suits in equity may be the subjects of arbitration.

Cotton *v.* Babcock, *supra*.

Stephen's Nisi Prius, 54.

The very point is ruled by Dick *v.* Milligan (2 Vesey, Jr. 24). The agreement for reference contravened no statute, and such agreements should be liberally construed as tending to avoid litigation.

March 13. THE COURT. The parties to the proceeding in equity chose to take the unusual course of referring by agreement in writing all "matters in controversy to Thompson Bell, Esq., of Pittsburg, as referee, and his award to be final and conclusive." It was to report the facts and his conclusions thereon, and a decree to be entered thereon in accordance with such conclusions. The referee made such a report, and a decree was entered accordingly, from which this

Digitized by Google

appeal has been taken. It is certainly true that this was not a reference under any of the provisions of the Act of June 16, 1836 (P. L. 717), but it was undoubtedly an amicable reference to a master, and must be treated as such. (Cotton v. Babcock, 14 Sm. 462.) The exceptions below are to alleged errors of fact, and, without stopping to inquire whether the appellants are not precluded by their agreement from taking such exceptions, it is enough to say that we have not been furnished with the proofs. There is undoubtedly an error on the face of the decree, as reported by the referee and entered below, in directing the railroad company or Simon P. Kase to pay the defendant the sum of money. Kase was no party to the suit. But no reason exists why this as well as any other decree may not be corrected by striking out what is palpably erroneous and mere surplusage.

PER CURIAM. Ordered that the decree below be modified by striking therefrom the words "or Simon P. Kase," and that so modified the decree be affirmed and the appeal dismissed at the costs of the appellants.

AGNEW, C. J., and WILLIAMS, J., absent.

Oct. & Nov '76, 154. Oct. 31.

Schmidt and Friday's Appeal.

Judgment—Attorney's commissions, when a part of—Right of plaintiff to receive the same out of the proceeds of an execution, as against a subsequent lien creditor.

Where, under the terms of a judgment note, judgment is entered for the amount of the debt, "and an attorney's commission of five per cent.," such commission is part of the judgment, and is payable to the plaintiff out of the proceeds of an execution as against a subsequent judgment creditor.

In accordance with the terms of a judgment note, the prothonotary entered judgment for $6000, with costs of suit, "and an attorney's commission of five per cent." An execution was issued for $6000 and costs, and the sum of $300, attorney's commissions, was included with the costs on the back of the *fi. fa.* In a contest as to the distribution of the proceeds of defendant's real estate sold under the execution:

Held (reversing the judgment of the Court below), that the plaintiff was entitled to receive, in addition to his debt and costs, the $300 attorney's commissions.

McAllister's Appeal, 9 Sm. 204, distinguished.

Appeal from the Common Pleas No. 2, of Allegheny County.

This was an appeal from the decree of the Court sustaining exceptions to a sheriff's return to a *fi. fa.*, and correcting the distribution of the fund. The record showed the following facts: Schmidt and Friday were the holders of a judgment note of Marker Rush, which they filed with the prothonotary, who, in accordance with the terms of the note, entered the following judgment:—

"And now, May 13, 1875, a single bill filed, dated May 12, 1875, payable one day after date, and judgment entered thereon against the defendant for the sum of six thousand dollars, with costs of suit, and an attorney's commission of five per cent., waiving inquisition, condemnation, and exemption."

A *fi. fa.* was issued for $6000 and costs. Endorsed on the back of the *fi. fa.* among the items of costs was "Atty's com. 5 per cent., $300." Under the *fi. fa.*, the sheriff sold defendant's real estate for $8100, and made a special return, showing his application of the purchase-money. His return contained the following entry: "To costs on this writ (which includes an atty's com. of $300) $398.70." To this return William Suiram, a lien creditor of defendant, upon a judgment subsequent to the plaintiff's, filed exception, on the ground that the $300 commissions should not have been paid out of the proceeds of sale. The Court below (J. W. F. WHITE, A. L. J., delivering the opinion), upon the authority of McAllister's Appeal (9 Sm. 204), sustained the exceptions, and decreed a distribution of the fund without any allowance of the $300 commissions. Schmidt and Friday appealed, assigning for error the sustaining of the exceptions, and the decree of the Court.

A. M Brown (with whom was *John S. Lambie*), for appellants.

The decree of the Court below is not only not supported by McAllister's Appeal (9 Sm. 204), which recognizes the right of a contract for attorneys' commissions in such cases, but is at variance with the uniform practice in the Courts of the State. In McAllister's Appeal, the plaintiff's attorney claimed a decree in his favor for $400, without assignment, or other evidence of title, and it was held he had no standing in Court—a decision which does not affect the present case. Here there had been no trial, as in Mahoning County Bank's Appeal (8 Casey, 158). Had defendant paid the debt before execution, no commission would have been earned or collected, but failing to pay, plaintiffs employed attorneys, and proceeded to collect their debt, and the execution went out with the commission liquidated at $300, as part of the judgment, and not as costs. It is true, that the sheriff connected the costs and attorney's commissions in making his special return, but this was simply an irregularity, and could not defeat the legal rights of the plaintiffs.

David Reed, contra.

The appellee, when the real estate of Marker Rush was advertised to be sold by the sheriff, ascertained from a certificate of liens against

Digitized by Google

Rush that it would require the property to sell for $8100 to cover the judgment. There was nothing on the judgment docket to notify appellee that the judgment was for more than $6000, or that there was a claim for commissions.

The judgment was entered D. S. B. by the prothonotary under the Act of February 24, 1806 (Purd. Dig. 826, pl. 32), which provides that the defendant shall not be compelled to pay any costs or fee to the plaintiff's attorney, when judgment is so entered. This would prevent the sheriff from collecting, as costs, any fee or compensation for the plaintiff's attorney. The authority given by Rush was to confess *judgment for the debt and commissions*, but instead of liquidating the commissions as part of the judgment, they were taxed as costs upon the writ.

This case is ruled by the Mahoning County Bank's Appeal (8 Casey, 158). There, as here, the attorney's commissions were endorsed upon the writ; they formed no part of the judgment. The Court held that the judgment could not exist in distinct parts at one and the same time, so as to enforce the collection of these commissions by execution when they were only thus endorsed.

It is ruled in McAllister's Appeal (9 Sm. 204), that the attorney's commissions being no part of the judgment in favor of the plaintiff, there was no power to enter a separate judgment in favor of the attorney. In that case, as in the one now before the Court, judgment was confessed for the debt, with attorney's commissions, and these commissions were endorsed on the writ of execution.

Nov. 13. THE COURT. This record presents the single question whether the appellants were entitled to receive, out of the proceeds of the real estate sold under their execution, the sum of three hundred dollars, attorney's commissions, as against a subsequent lien creditor.

The judgment of the appellants was entered by the prothonotary for the sum of $6000 real debt, with costs of suit, and an attorney's commission of five per cent. The execution of the appellants was issued for $6000, interest and costs, and "attorney's commission, five per cent., $300" The latter was endorsed upon the back of the writ. The learned Judge of the Court below, upon the authority of McAllister's Appeal (9 P. F. Sm. 204) held that the appellants were not entitled to the $300, and awarded it to the appellees, who were the next lien creditors. The appeal in the case cited, was taken by the attorney to the decree of the Court disallowing the attorney's commissions. It was held by this Court that he had no standing; that the commissions were included in the judgment of his client, and that the appellant had no authority to confess a separate judgment for the commissions, and had in fact confessed no such judgment. He had no assignment or order from the plaintiff in the judgment, and therefore no title to any portion of its fruits. This was the scope of the decision in McAllister's Appeal. The doctrine was there asserted upon the authority of Mahoning County Bank's Appeal (8 Casey, 158), that the attorney's commissions could not be collected as part of the costs. In that case the judgment had been liquidated upon a *scire facias* to revive, and the attorney's commissions were not included in the judgment. The Court said they might have included them, but did not; an attempt was then made to collect the commissions by indorsing them on the back of the execution as a part of the costs. This, the Court said, could not be done. Here the attorney's commissions are a part of the judgment. It is true, they are not embraced in the body of the execution, but they are as much a part of the judgment as the interest, and as easily computed. Their endorsement on the writ, while informal, is not material. The real estate was sold in satisfaction of the judgment of which the commissions formed a part. No good reason has been shown why they should not be paid out of the proceeds.

It is proper to say that no question in relation to the judgment docket was before the Court. Whether this judgment was so entered therein as to amount to notice to subsequent lien creditors of the attorney's commission is a question that was not raised upon this record.

We think, therefore, that the learned Judge erred in decreeing the $300 for attorney's commissions to the judgment of the appellees. It should have been awarded to the appellants.

The decree is reversed at the cost of the appellees, and the record remitted for further proceedings.

Opinion by PAXSON, J. WILLIAMS, J., absent.

Oct. & Nov. '75. **Clarke's Estate.** Nov. 1.

Appeal of C. J. Clarke and William Hersh, Trustees.

Will—Construction of—When it speaks from the death of the testator—Bequest for after-born grandchildren.

Testator, by his will, directed his executors to hold for each of his then living grandchildren (naming them) 100 shares of Pennsylvania Railroad stock, and 100 shares of the stock of the Union Railroad and Transportation Company. He then directed his executors to provide and procure for each grandchild, born subsequently to the date of the will, "stocks of the same amount and value (viz., ten thousand dollars)" as those bequeathed for his grandchildren above named. In an amicable proceeding to deter-

Digitized by Google

mine whether the after-born grandchildren were entitled only to the stocks to the value of $10,000, or to stocks of the same value as those specifically bequeathed:

Held (reversing the judgment of the Court below), that the after-born grandchildren, as they come into being, should have set aside for them, respectively, stocks of the same market value as the stocks specifically bequeathed were at the date of the will.

The general rule that a will speaks from the death of testator, does not apply where its language by fair construction indicates a contrary intention.

Appeal from the Orphans' Court of Allegheny County.

This was an amicable proceeding brought in the Court below by a petition of two of the trustees under the will of the late Thomas S. Clarke, in order to have a judicial construction put upon certain terms of the will, with regard to which there was among them a difference of opinion. The facts, as set forth by the petition, were as follows:

By article VI. of his will, testator directed his executors to hold certain stock thereinafter specifically mentioned in trust for the sole benefit and use of his grandchildren, the children of his son, Charles J. Clarke, and the children of his daughter, Agnes S. Kennedy. He then specifically devised for each of his then living grandchildren, by name, 100 shares of stock of the Pennsylvania Railroad Company, and 100 shares of stock of the Union Railroad and Transportation Company; and then provided as follows:—

"Art. VI., Sec. 2. And further, it is my will, and I do hereby order and direct, that the executors or trustees aforesaid, or the survivor or survivors of them, shall provide or procure out of my residuary estate for each and every child that may be born of my said son, Charles J. Clarke, and my daughter, Agnes S. Kennedy, after the date of this my last will and testament, and before the noon of the 4th day of April, 1883, stocks of the same amount and value (viz., ten thousand dollars) as those herein bequeathed for the use of the grandchildren above named."

Testator further gave to his executors full power to change any of the before-mentioned stocks into other stocks, or other securities, and directed them to invest the dividends arising from said stocks or securities in securities of the United States, or of the State of Pennsylvania, and further directed that the stocks or other securities, with the accrued dividends, should be "delivered" to each of his said grandchildren who might be living at the time of his death, or who might be born before April 4, 1883, as each should arrive at the age of twenty-one years, and that if any of his grandchildren, before reaching such age, should die without leaving lawful issue, the stocks and accrued dividends bequeathed to such deceased should be equally divided among the survivors of said grandchildren.

The will was dated May 30, 1867. Mr. Clarke died on the 19th of the following October.

Several children were born to Charles J. Clarke and Agnes S. Kennedy after the testator's death, for each of whom, except the last, the executors procured the same number of shares of the same stocks as designated by the testator in his bequest to his living grandchildren. Preceding the birth of the last child, James King Clarke, the Union Railroad and Transportation Company was dissolved, and its affairs were at that time in process of liquidation. Its stock, however, had a known value.

The petitioners, being two of the three executors, contended in the Court below that under the provisions of the will in question, the executors were bound to provide for the last born child, stocks of the same amount and value as those procured for the other children, that is the equivalent of 100 shares of Union Railroad and Transportation Company stock, with 100 shares of Pennsylvania Railroad stock, or its equivalent. The remaining executor contended that the child was entitled only to stocks to the amount and value of $10,000.

After argument, the Court below (HAWKINS, P. J.) was of the opinion that the value of the gift had been fixed by the donor at $10,000, and those appointed to carry out the intentions of the testator could not exceed the limit fixed; and accordingly decreed that the executors invest in first-class stock, to be selected by them, in place of the stock of the *Union Railroad and Transportation Company*, the sum of $5,000 for each and every child that might be born of Charles J. Clarke and Agnes S. Kennedy, after the date when said Union Railroad and Transportation Company went into liquidation, and before noon of the 4th of April, 1883.

Thereupon the petitioners appealed, assigning for error the above decree.

John Dalzell (with whom was *John H. Hampton*), for appellants.

It was evidently the intention of the testator that his grandchildren, both those born, and those to be born, should stand on an equality. All but the last have specific stocks given them worth more than $10,000. By giving the last only $10,000 in stocks, this equality is destroyed, and the wish of the testator defeated. It is preserved, on the other hand, by making these special provisions of the will take effect at the death of the testator, and by providing and procuring the legacies for unborn grandchildren out of the residuary estate at that time.

The par value of the specific stocks given the other children was $10,000, though of much greater market value, and the clause in parenthesis "(viz., ten thousand dollars)" should be construed to refer to par value, and to be there-

Digitized by Google

fore simply a designation of the value of the stocks specifically named.

We contend that the trustees named in Article VI. of Thomas S. Clarke's will, took, immediately at his death, for each of his grandchildren then living, a vested legacy, and for those to be thereafter born a legacy to vest immediately at birth, and that all the legacies were equal in amount and value, that amount and value being then fixed by that of the legacies given to the grandchildren, called by name in the will.

Geo. Shiras, Jr., contra.

In the will, we find in the first place a legacy of $10,000 to each grandchild born within the prescribed limits, and in the second place, a direction to the executors of the mode or kind of investment. The testator could not have been sure that these stocks would be procurable when wanted, or that they might not rise in value, so that the procuring them would work injustice to the residuary lgatees, nor that they might. become greatly depreciated, or even worthless, so he fixed the amount to be invested in stocks at $10,000.

Nov. 13. THE COURT. In studying the will of the testator, Thomas S. Clarke, in order to arrive at his meaning in the second section of Article VI., which has given rise to the controversy presented for decision in this case, it is evident that we must consider the whole scope of the instrument in reference particularly to the bequests to his grandchildren.

Two primary intentions, we think, are very manifest. The first is that he meant to give legacies to his grandchildren, not in money, but specifically in stocks. As to such of his grandchildren as were in being at the date of his will, he ordered and directed that his executors should hold certain stocks thereinafter specifically mentioned, in trust for their sole benefit and use, and then he proceeds to specify for each of his then living grandchildren by name; one hundred shares of stock in the Pennsylvania Railroad Company, and one hundred shares of stock in the Union Railroad and Transportation Company. He then orders and directs his executors to provide or procure out of his residuary estate for each and every child that might be born of his son Charles J. Clarke, and his daughter Agnes S. Kennedy, after the date of his last will and testament, and before the noon of the fourth day of April, 1883, stocks of the same amount and value (viz., ten thousand dollars) as those already bequeathed for the use and benefit of the grandchildren before named. In further prosecution of the same primary intention he provides in the next section that his executors shall have full power and authority at any time, and at all times, to change any or all of the said before mentioned stocks into other stocks, or into other securities which they may consider good or safe, whenever they may deem the said change or conversion to be expedient, and for the best interests of his said grandchildren, and the executors are directed to invest the dividends or profits arising from the said stocks or securities, in securities of the United States, or of the State of Pennsylvania, at the expiration of every six months, or within a reasonable time after receiving the same, for the use and benefit of his said grandchildren, and that the stocks or other securities, together with the accrued dividends which may be received, shall be *delivered* (not converted into money and paid, but *delivered*) by the executors or trustees to each of his said grandchildren who may be living at the time of his death, or who may be born of his said son and daughter before the fourth day of April, 1883, as each and every of them respectively shall arrive at the age of twenty-one years, and, after a proviso unnecessary to be here referred to, he finally directs that if any of his grandchildren should die before arriving at the age of twenty-one years, without leaving lawful issue, the shares of stock or other securities, with accrued profits bequeathed to such deceased, should be equally divided among the survivors of the said grandchildren

It is evident from these provisions of the will that the testator intended that stocks should be set aside for each grandchild separately, and should be held in that form or in the form of other securities into which they might be changed or converted by the executors under the power expressly given to them for that purpose, and that the dividends or profits arising from said stocks or securities, should be invested only in securities of the United States, or of the State of Pennsylvania, the whole to be delivered over to each grandchild on arriving at the age of twenty-one years.

But there was another primary intention, equally if not more important and prominent in the mind of the testator. This was that the legacies to his grandchildren should be equal in amount and value. He makes no distinction between those then living at the date of his will, each having set aside an equal number of shares of the same stock, and as to those after born he expressly declares that they shall be of the same amount and value as those bequeathed to his living grandchildren. These last were not necessarily to be stocks of the same companies, for he explicitly declares that his executors should *provide* or *procure* (not *shall hold*, which is the language used as to the stocks specially named in the preceding section) out of his residuary estate for each and every grandchild born after the date of his will—not the same stocks or stocks of the same companies—but stock—any stocks—of the same amount and value.

Digitized by Google

If the will had stopped here it is apprehended that there would be no difficulty in coming to the conclusion at whicl we have arrived, that the after-born grandchildren would be entitled to have set aside for them, to be provided or procured out of the residuary estate, stock which should be of the same amount and value as one hundred shares of stock in the Pennsylvania Railroad Company, and one hundred shares of stock in the Union Railroad and Transportation Company. The questions would then remain, what did the testator mean by value, and as such stocks are fluctuating in price, as of what date is that value to be ascertained?

The testator has added in the clause before us to the expression "stocks of the same amount and value," these words in a parenthesis, "viz: ten thousand dollars." It is contended that this parenthetical clause means that the executors are to take from the residuary estate the sum of ten thousand dollars in money and invest that amount for each o· his after-born grandchildren as they come into being. But we think this construction is clearly inadmissible. It violates both primary intentions of the testator It is in effect a bequest originally of money not of stocks, and it makes the legacies to the grandchildren unequal, it may be grossly so It is clear that ten thousand dollars may not be sufficient to procure or provide stocks of the same amount and value as those bequeathed to the living grandchildren, if the market value of those stocks at the time of procurement has much appreciated above that in the contemplation of the testator when he made his will. On the other hand, if they have much depreciated, the amount would be much greater, though the value of the increased amount might be the same as that of the less amount. In either event the shares of the grandchildren would evidently be unequal, depending upon the fluctuating character of such property. It is not then a bequest of ten thousand dollars to be invested in stocks. That is not indeed the proper grammatical construction of the clause. The words "viz: ten thousand dollars," describe the amount and value of the stocks he had before bequeathed to his living grandchildren, that, is that their nominal amount and par value was ten thousand dollars, and this was in fact strictly true. But surely the testator did not mean that the executors should provide or procure out of his residuary estate for his after-born grandchildren, any stocks of the nominal amount and par value of ten thousand dollars. Whatever confidence he might have that his executors would act justly and impartially, it is not to be supposed that he meant to invest them with a power and discretion which might entirely frustrate one of the great objects of his will, equality among the objects of his bounty. By value he must have meant market value. It is said, however, that conceding that value meant market value, the testator intended to declare what that value was at the date of his will. There is considerable plausibility in this contention and it very much simplifies the duties of the executors. This appears to have been the view of the learned Judge of the Orphans' Court. It was entirely competent, no doubt, for the testator to put any value he chose upon his property with a view to equalization, but, is there enough in this short parenthesis to enable us to say that he meant to do so? Suppose he was mistaken, ought this his declaration of what he thought their market value was at the date of his will to be conclusive? We think not. It falls within the principle of the familiar maxim *Falsa demonstratia non nocet*, or as it is otherwise expressed in an excellent standard work, "as soon as there is an adequate and sufficient definition with convenient certainty of what is intended to pass by the particular instrument, a subsequent erroneous addition will not vitiate it." (Broom's Legal Maxims, 630.) That by value was meant market value, and that market value at the date of the will, we think, abundantly clear from a subsequent provision made applicable by him to all the bequests without exception. "I direct," says the testator, in Article X., "that in the event of the sale of any of the securities or property herein named by me during my lifetime the full equivalent, *at the value realized by me*, shall be paid to the person or party to whom the same may have been bequeathed herein." We regard this as a key which easily unlocks the difficulty of the clause now in question.

It establishes this rule of construction for this will, that it is to speak as of its date, and that, so far as the interest of the beneficiaries was concerned, it was to be considered as vesting at that time. While it is undoubtedly true, that, as a general rule, a will speaks from the death of the testator, yet it is otherwise where its language by fair construction indicates the contrary intention. (1 Redfield on Wills, 379, and cases there cited.)

After what has been said, it will scarcely be necessary to consider what has been so urgently pressed by the learned counsel of the appellants, that the legacies to the after-born grandchildren vested at the death of the testator, and that it was the duty of the executors at that time to set aside stocks for the grandchildren who should afterwards be born. How can legacies for unborn children who may never come *in esse* be vested? And how could the executors set aside stocks for them without knowing how many there would be, if indeed there would be any? If the whole residuary estate is locked up until April 4, 1883, it is a necessary result of the provisions of the will by which the amount to be appropriated out of that estate is made to depend upon contingencies which may indeed hap-

Digitized by Google

pen before, by the death of Charles J. Clarke and Agnes S. Kennedy, but cannot be postponed beyond it.

The appellants in their petition to the Court below ask that an appropriation be made to James King Clarke—the after-born grandchild in question—out of the residuary estate of the equivalent of one hundred shares of Pennsylvania Railroad stock and one hundred shares of Union Railroad and Transportation Company's stock—that is, as we understand it, at the present market values of those stocks.

We agree entirely with the learned Judge of the Orphans' Court, that this is not admissible, for a change in the market value of the stocks might exhaust the estate to the prejudice of other beneficiaries, or the stocks might have become utterly worthless, and thus all equality have been defeated. Had the executors with wise foresight sold the stocks set apart for the living grandchildren and invested the proceeds in other and safe stocks, and the stocks first set aside had become worthless, what would have been the condition of the after-born grandchildren under such a construction? It is true that the stocks have much appreciated since the date of the will, and the after-born grandchildren will not receive what those then living now have. But that result is unavoidable. From the time these stocks were set apart the legatees are to be regarded as their owners and entitled to all the advantages of their appreciation. Had the executors converted them into other stocks which had doubled in value, it could not be contended that the after-born grandchildren would be entitled to stocks equal in value to such subsequent investment. Neither ought they to suffer by their depreciation.

We are of opinion, then, that the after-born grandchildren as they come into being should have set aside for them respectively stocks of the same market value as one hundred shares of stock in the Pennsylvania Railroad Company and one hundred shares of stock in the Union Railroad and Transportation Company were on the thirtieth day of May, 1867, the date of the will of Thomas S. Clarke, deceased.

Decree of the Orphans' Court reversed

And now, November 13th, 1876, it is ordered and decreed, that the executors of Thomas S. Clarke, deceased, set aside from the residuary estate, or invest in stocks to be selected or bought by them, for each and every child of Charles J. Clarke and Agnes S. Kennedy that has been or may be born after May 30, 1867, and before April 4, 1883, such an amount as will be equivalent to the market value of one hundred shares of stock in the Pennsylvania Railroad Company, and one hundred shares of stock in the Union Railroad and Transportation Company on the thirtieth day of May, 1867.

And it is further ordered that the costs in the Court below and in this Court be paid out of the residuary estate of the said Thomas S. Clarke.

Opinion by SHARSWOOD, J. WILLIAMS, J, absent.

Oct. & Nov. '75, 251 & 252. Oct. 5 & 6.

Craige v. Gregg et al.
Houston v. Same.

Practice — Parties to action — Stockholder's remedy for injuries caused by negligence of the directors of a corporation in the management thereof — Whether the stockholders can bring individual suits.

A. and B., stockholders of a corporation, brought individual actions on the case against the directors thereof, to recover damages for injuries caused by negligence of the latter:

Held, that the suits were not well brought, because the remedy of the stockholders should be in a form to protect the interests of the corporation as trustee for all its stockholders and its creditors.

Error to the Common Pleas No. 2, of Allegheny County.

These were two actions on the case brought respectively by Mary A. Craig and Harriet Houston against D. Gregg, Jas. T. Brady, and ten others, the directors of the Security Safe Deposit, Trust, and Guarantee Co., to recover damages for injuries to the plaintiffs caused by negligence of the defendants in the discharge of their duties as directors. Plea, Not guilty.

The Security Safe Deposit, Trust, and Guarantee Co. was a corporation organized under an Act of Assembly of April 12, 1866, and various supplements thereto. It carried on a banking business in the City of Pittsburgh from January, 1872, to September, 1873, when it made an assignment to G. A. Berry for the benefit of its creditors. On settling up the affairs of the concern it appeared that the entire capital stock had been lost, and that the assets were insufficient to meet the liabilities. The plaintiffs, stockholders of the company, thereupon brought this action against the directors to recover the amount paid in on the stock which they held.

At the trial the plaintiffs produced evidence to show that the organization of this company was owing principally to Jas. T. Brady, who induced the defendants to become stockholders and directors; that Brady assumed the entire control of the institution, the defendants allowing him to issue circulars and advertisements flagrantly false and misleading, and to borrow the funds of the company without giving security, and, in fact, neglecting in a very marked degree their duties as directors; and that Brady became insolvent, owing

Digitized by Google

the company large sums, which was the immediate cause of its suspension.

The Court ordered a non-suit to be entered, with leave to the plaintiffs to move the Court in banc to strike it off. The plaintiffs accordingly made a motion to that effect, which was refused, J. W. F. WHITE, J., delivering the following opinion: "This is a common law action for negligence against the directors of the bank—the negligence charged is a neglect of duty by which the entire capital of the company was lost, and the institution became insolvent. The plaintiffs charge no act of negligence by which they were specially injured. The acts charged affect alike the defendants and all other stockholders and all the creditors of the institution. The principle which would allow a common law action against the directors by each stockholder, for a total loss of his stock, would sustain such an action for a partial loss or for a depreciation in the market price. If such is the law, who will act as a director? But further, the creditors of the bank have a prior claim to the stockholders; for the stockholders elected the directors as their agents. If those agents have lost the funds of the stockholders, and also of innocent parties entrusted with them as the agents of the stockholders, these innocent parties should be paid first. Yet, if each stockholder can maintain his individual action against the directors, a few of them might bankrupt the directors, and leave nothing for the creditors or for the other stockholders.

"The only way, I conceive, to do justice in such a case, and work out the equities of the various parties, would be by a bill in equity, or a common law action in the name of the corporation."

The plaintiff thereupon took this writ, assigning for error the judgment of non-suit, and the refusal of the Court to strike it off.

Archibald Blakeley, for plaintiffs in error.

Case is the proper remedy for injuries to a stockholder of a corporation resulting from misconduct or negligence of the directors, and it is not necessary that all the stockholders should join in the action, or that it should be brought in the name of the corporation.

Slaymaker *v.* Bank, 10 Barr, 375.
Dock Co. *v.* Heron, 2 Sm. 280.
Railway Co. *v.* Stutler, 4 Id. 379
Coleman *v.* Oil Co, 1 Id. 74.
Reese *v.* Bank, 7 Cas. 78.
Crook *v.* Jewett, 12 Howard's Pr. 19.
Butts *v.* Woods, 37 N. Y. Appeals, 317.

M. W. Acheson (with him *R. B. Carnahan* and *E. S. Golden*), and *W. H. & A. N. Sutton*, contra.

In a case such as this the individual stockholders cannot maintain separate actions at common law. The proper remedy is an action in the name of the corporation against the directors, or a bill in equity against both the corporation and the directors. In either of these ways complete justice can be done to all the parties in interest, viz., the creditors, the corporation, and the individual stockholders.

Oct. 16. THE COURT. We are of opinion that the alleged injury to the plaintiffs, as individual stockholders, in these cases cannot be redressed by an action at law for negligence against the directors of the bank. The remedy must be in a form to protect the interests of the corporation as the trustee for all the stockholders and the creditors. Whether it should be by an action in the name of the corporation against the negligent directors, or a bill in equity against both, it is not necessary to decide as the case is now presented.

PER CURIAM. Judgment affirmed.

Jan. 6, 1877.

The Kersey Oil Co. v. The Oil Creek and Allegheny Railroad Co.

New Constitution—Transfer of the business of the Court of Nisi Prius under § 21 of the Schedule—Equity cases within the rule—Original jurisdiction of the Supreme Court under Art. V., Sec. 3, in cases of injunction against corporation—Practice.

Motion to fix a time for hearing on exceptions to Master's report.

This was a bill in equity, filed in the Supreme Court under the Act of 16 June, 1836 (Purd. Dig. 1350, pl. 18), giving the Court original jurisdiction in certain cases. The bill prayed for the delivery up of certain property held by the defendants; a Master having been appointed, exceptions were filed to his report, pending the disposition of which, the New Constitution of 1874 was adopted. Complainants made this motion on the ground that the Supreme Court still had jurisdiction of the cause, notwithstanding the 21st Section of the Schedule, which provides as follows:—

"The causes and proceedings pending in the Court of *Nisi Prius*, Court of Common Pleas, and District Court in Philadelphia, shall be tried and disposed of in the Court of Common Pleas. The records and dockets of said Courts shall be transferred to the prothonotary's office of said county."

W. H. Armstrong, for the motion, contended also that under Art. V., Sec. 3, of the New Constitution, giving to the Supreme Court original jurisdiction in cases of injunction when a corporation is a party defendant, the Court should take cognizance of this case, since a mandatory decree or injunction is asked for, and the Court has jurisdiction in such cases as well as in those of prohibiting injunctions. Also, that this case was brought in the Supreme Court under the original

Digitized by Google

jurisdiction given by the Act of 1836, and not in the Court of Nisi Prius, so as to be affected by § 21 of the Schedule.

[SHARSWOOD, J. All Nisi Prius cases were brought in the Supreme Court, and it was merely provided that issues of fact should be tried and preliminary steps should be taken before the Judge at Nisi Prius.]

S. G. Thompson, contra.

All the proceedings in this case have been before the Judge at Nisi Prius, agreeably to the Act of 26 July, 1842, relating to the Court of Nisi Prius, and the case was pending in the Court of Nisi Prius within the provision of the Schedule.

Hottenstein *v.* Clement (5 Wr. 502), and Eby's Appeal (20 Sm. 311), decided that equity cases brought in the Supreme Court were cases at Nisi Prius, and there is nothing to make this cause an exception to the rule, or to prevent its transfer to the Court of Common Pleas.

Nor is this an *injunction bill* within the meaning of Art. V., Sec. 3, of the New Constitution, in which this Court could now take original jurisdiction.

THE COURT. And now, January 8, 1877, rule taken to fix time for the hearing of this case discharged, and it is ordered that the case being one pending in Nisi Prius on the 31 Dec. 1875, be transferred to the Court of Common Pleas of the city and county of Philadelphia, by a duly certified copy of transcript, pursuant to the provisions of the Act of 14 May, 1874.

PER CURIAM. WILLIAMS, J., absent.

Common Pleas—Law.

C. P. No. 1. Dec. 29.

Moore et al. v. Forrest Mansion Hotel Company.

Mechanic's lien—Apportionment—A joint claim may be filed against adjoining buildings which are partly new and partly old, when they are used for a conmon purpose—Precision such as the nature of the case admits of sufficient in setting out work and material in a claim.

Rule to strike off mechanic's claim.

In this case a joint claim was filed by the plaintiff, Sept. 8, 1876, for work done and material furnished within six months last past, in and about the erection and construction of a Music Hall, and for and about alterations and additions to an adjoining three-story brown-stone front double house (commonly known as the Forrest Mansion) and the ground covered by both, and so much other ground adjacent thereto as might be necessary for the ordinary purposes of the same as a hotel and concert garden. A full description of the location of the property was included in the claim.

The items of the claim as filed were set forth in the following form and order :—

Forrest Mansion Hotel Company, To G. & G. H. Moore.	DR.
To measurer's account of bricks laid in Concert Hall, Broad and Master Sts., 204,403, at $4.75 per thousand, and furnishing lime, sand, and labor, the work ending May 5, 1876, . . .	$970.91
Extra Work in Concert Hall.	
Bricklayers, $4.00 per day; Laborers, $2.50 per day.	
March 8, 1876. To 4 bricklayers 3 hrs., 12 hrs., ...	4.80
. . . . .	.
Extra Work in Hotel.	
April 28, 1876. To bricklayers, 11 hrs., laborers, 6 hrs., ...	5.90
. . . . .	.
Extra Work in Concert Hall and Garden.	
May 18, 1876. To bricklayers, 25 hrs., laborers, 10 hrs., .	12.50
mortar in extra work,	48.00

W. J. Budd, for the rule, contended that the lien should be stricken off for the following reasons: There is no law that authorizes the filing of a joint lien for material furnished and work done in the erection and construction of a new building, and for the addition, alteration, or repair of an old building. The claim does not show the time when the mortar in the "extra work" was furnished, nor whether it was furnished to the new building or to the old one. The claim does not specify the quantity of mortar furnished, and amount of work done to and for the new building and the old one.

S. Dickson, contra.

THE COURT. The principle upon which Nelson *v.* Campbell (4 Casey, 156) was based, and its subsequent recognition by the Supreme Court, is decisive of the motion to strike from the record the claims which have been filed for work done and material furnished, in the erection of the Music Hall and in the alterations and additions to Forrest Mansion, adapting both buildings to a common purpose.

In Nelson *v.* Campbell the premises, which had been injured by fire, were enlarged by tearing down a one-story building, and rebuilding it two stories in height on Broad Street, and by rebuilding the two-story part on Callowhill Street. Portions of the old foundation and floors were retained, and the wings were connected with the old building by communicating doors. The Court held, that it was not necessary that the new building should be distinct from older buildings, to sustain the claim. Where there is in

Digitized by Google

part a new erection, in connection with an old building, the lien attaches to the whole building and lot of ground upon which it is erected, and which is necessary to its employment. In Lauman's Appeal (8 Barr, 477) it was held, that a claim filed against the Mansion house, barn, wagon house, etc., on a farm was good, without apportionment. This case was decided prior to the Act giving a lien for alterations and repairs, but the principle is applicable, as the law now stands, to a claim for work and materials, whether the buildings be all new, or whether they are partly new and partly old, if they are upon the same lot of ground, and adapted to a common use. In the claims before us these principles find a direct application; the buildings were connected and used for the same purpose. It would be as practically impossible to apportion the claim as it is unnecessary to do so; and, as the buildings altered or erected comprise the several parts of the same establishment, the claims as filed must be regarded, in this respect, as good in law.

Nor is the objection well taken, that the bill of particulars does not show whether the mortar used in the "extra work" was applied to the new or to the old building, and that it does not appear how much the mortar was in quantity, nor the time when furnished. The answer to these exceptions to the sufficiency of the claim is, that, like many other kinds of work and material, such as painting and plastering, it is not susceptible of particular specification, other than that which is given. We have the days specified on which the extra brickwork was done; the item of charge for mortar must be taken as furnished upon these days which are designated in the claim. It constitutes a portion of the extra work, and cannot be separated from it. The bill of particulars we also regard as sufficiently specific.

Rule discharged.

Oral opinion by ALLISON, P. J.

[See Fitzpatrick *v.* Allen, 2 WEEKLY NOTES, 265; Armbrust *v.* Galloway, Id. 585; Rush *v.* The Bank, Id. 263.]

C. P. No. 1. **Bank v. Myers.** Dec. 9.

Affidavit of defence—Promissory note—Parol stipulations to vary written instrument.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note by payee against maker. The affidavit of defence set forth that in 1874 William T. Rose forged defendant's name to a promissory note for $553, and had the same discounted by the Third National Bank. When the note fell due the defendant, in order to save Rose from exposure, gave the bank his own note for $503, Rose paying the bank $50, the difference between the new and the forged note; that the President of the bank was at that time informed that defendant had received no benefit whatever from the forged note, and that the new note for $503 was without consideration and solely for the accommodation of Rose, and that defendant would be responsible thereon only to the extent to which Rose would supply defendant's father with groceries. The amount of the forged note was afterwards reduced from time to time by renewals and payments on account, as the groceries were supplied, to $128. It was upon a note given to the bank for this balance that the present suit was brought.

Osbourn, for the rule. The written instrument cannot be varied by parol. The allegation that the original note was a forgery is no defence to a new note for a new consideration, viz., the debt of Rose.

McHugh *v.* County of Schuylkill, 17 Sm. 391.
Chamberlain *v.* M'Clurg, 8 W. & S. 36.

Myers, Jr., contra.

THE COURT. A verbal stipulation cannot be allowed to modify an absolute written promise to pay.

Rule absolute.

C. P. No. 2. **Eichert v. Eichert.** Dec. 30.

Divorce—What constitutes desertion—Two years allowed as locus penitentiæ—Bigamy of libellant a bar.

Rule for a decree of divorce *a vinculo matrimonii.*

This was an action of divorce brought by the husband on the ground of the wife's alleged desertion. The testimony showed that the parties were married in Washington in 1862, and lived together in that city till 1868. The husband then removed to Philadelphia, his wife refusing to accompany him. She came, however, twice subsequently, but remained only for a short time on each occasion. Her last visit was made about January, 1872, when she passed three days with her husband, but, refusing to live in the house he had rented, she returned to Washington. In the summer of 1873 he openly married a second wife, with whom he has been residing ever since. In 1875 he began this action.

Dolman, for the rule.

The desertion of the respondent has been clearly proved, and no evidence has been adduced that such desertion was the result of any wrong conduct on the part of the libellant. After the lapse of two years, the offer of the erring party to return is no bar to an action of divorce for desertion.

Bishop on Divorce, 521.

Where the libel is for desertion it is no bar that

Digitized by Google

the libellant committed adultery after the desertion occurred.

Ristine *v.* Ristine, 4 R. 460.

W. H. Browne, contra.

A wife is not bound to follow her husband wherever he may direct, if she have good reason to believe that his movements were made to force her to desert him, and thus make a case of divorce for him.

Angier *v.* Angier, 13 Sm. 450.

The desertion must be malicious, and the malice contemplated by the statute is not malice in law, but malice in fact. There must be enmity of heart.

Ingersoll *v.* Ingersoll, 13 Wr. 249.

The law allows the erring party two years as a *locus penitentiæ*, even where the original withdrawal was without intention to return. The cohabitation of the parties in January, 1872, was a condonation of the previous alleged desertion. Before two years had elapsed from that date, the bigamy of the libellant offered an effectual bar to the respondent's return. He became the head of a new family, where his legal wife could have no place. He is not therefore *rectus in curia.*

Boyd's Appeal, 2 Wr. 245.
Angier *v.* Angier, 13 Sm. 458
Bishop on Divorce, 530.

C. A. V.

THE COURT. The case of Ristine *v.* Ristine establishes that adultery after the desertion is not a bar to libellant, but it does not go so far as to say that an open celebration of a second marriage will not be. By such an act the husband places an obstacle to the return of his wife, which does away with the presumption of his willingness to receive her.

Rule discharged.

C. P. No. 2. **Volkmar v. Ervin.** Jan. 2.

Affidavit of defence—Signing paper without reading it, on the faith of representations as to its contents.

Rule for judgment for want of a sufficient affidavit of defence.

Sci. fa. sur mortgage.

The affidavit of the defendant set forth as a defence to a part of the plaintiff's claim, that he purchased the property described in the mortgage sued on from the plaintiff, who sold it to him for $5500 upon the terms that defendant should pay him $2500 and give him his bond secured by a mortgage of the premises for $3000, the mortgage to contain the usual thirty-day clause relating to the payment of interest, and no other special stipulation; that plaintiff showed him an old bond and mortgage which he had executed when he purchased the property from William S. Albu, in the year 1866, which had been satisfied, as containing the terms and conditions of the bond and mortgage which defendant was to execute to plaintiff for the said three thousand dollars of the purchase money. That said old bond and mortgage did not contain a provision or stipulation that the mortgagor should pay three per cent., or any other percentage or expense for collecting the mortgage debt in any event; that plaintiff had the bond and mortgage for $3000 drawn, the mortgage being that sued on in this case, and when plaintiff presented them to the defendant for execution he represented to him that they were drawn in the same terms as the old bond and mortgage, which plaintiff had shown defendant; that defendant, upon the faith of said representations of plaintiff, executed the same without reading the same or having them read to him; that at the same time plaintiff handed the defendant the said old bond and mortgage and told him to keep it; that plaintiff knew that said mortgage sued upon contained, in addition to the terms of the old mortgage, the stipulation for the payment of three per cent. commissions for collecting the debt, and that he fraudulently concealed that fact from defendant, and that defendant had no knowledge or information that the said stipulation was in the mortgage sued on, until the writ of *scire facias* was served on him, and that he would not have executed the mortgage if he had known such clause was in it.

Dedrick, for the rule.

Rule discharged.

[See Penna. R. R. Co. *v.* Shay, *ante*, 45.]

C. P. No. 4. **James v. Frick.** Dec. 8.

Justice of Peace—Jurisdiction—Amount of claim exceeding $100—Set-off—Plaintiff cannot, without the assent of defendant, apply a counter-claim of defendant, so as to reduce his own claim within the Justice's jurisdiction—And if he has done so, the error is not cured by an appeal to the Common Pleas.

Rule to take off non-suit.

This case was brought into this Court by an appeal from the judgment of a magistrate

On the trial, the plaintiff swore that the defendant originally owed him $119; that he had paid $11, and that the plaintiff agreed to take from the defendant a certain amount of wood and coal, and to allow him therefor "what was right." That he afterwards credited him with $8.50, on account of the wood and coal, thus reducing the claim to $99.50, for which suit was brought in the Magistrate's Court.

Digitized by Google

ELCOCK, J., regarding the credit on account of the wood and coal as a set-off, and not as a payment, entered a non-suit.

S. N. Rich showed cause.

Jurisdiction cannot be given by reduction, if a claim originally exceeded $100, except by direct payment on account.

Stroh *v.* Uhrich, 1 W. & S. 57.
Bowles *v.* McCormick, 23 Sm. 429.
Peter *v.* Schlossen, 3 WEEKLY NOTES, 47.

This was not a payment, but a sale to the plaintiff.

[THAYER, P. J. Whether this was payment, depends on what passed between the parties. I don't think it could be called payment until the amount is adjusted between the parties. The defendant could not be bound by the plaintiff's allowance.]

Jennison, for the rule. C. A. V.

Jan. 7. THE COURT. The plaintiff's claim was for board, etc., amounting to $119. Upon account of this defendant had paid $11 in cash, and had delivered to plaintiff an amount of wood and coal, for which, according to the testimony, plaintiff was to allow what was right. Plaintiff allowed defendant for wood and coal, $8.50, thus reducing the claim to $99.50, for which suit was brought before a justice of the peace. On appeal, it came before us for trial.

The plaintiff cannot voluntarily reduce his claim below $100, so as to bring it within the jurisdiction of the justice. (Bower *v.* McCormick, 23 P. F. Sm. 437.) It must be reduced by payments, and as the justice had not jurisdiction, an appeal will not remedy it. In the case just cited, the plaintiff was allowed to claim less than the value of his goods, and, as he was barred from any further recovery, his right to maintain the action was sustained; but he could not sue for parts, or allow a set-off to bring it below the sum of $100.

The only point upon which a doubt can be raised in the present case is whether the receipt by plaintiff of the wood and coal, under agreement to allow for it what was right, can be regarded as payment or set-off.

Payment is the discharge of a stipulated and settled sum upon a debt due. It must be of such certainty that defendant cannot have a further action or adjudication in regard to the amount of it. Mutual demands do not extinguish each other, and as the amount of the credit allowed here does not appear to have received the assent or sanction of the defendant, it becomes in his right as simply a set-off. Set-off is allowed by the Statute 2 Geo. II. c. 22; and as it is made solely for the benefit of the defendant, it is not compulsory. (Humes *v.* Barnetz, 8 Watts, 39.) The defendant can waive his right, and bring his cross action against plaintiff for such sum as might be determined to be the rightful value of the wood and coal, and not being compelled to plead his claim against plaintiff's demand, and plaintiff having no right except by assent, to apply a sum as payment, we must regard plaintiff's claim as actually $108, and not being within the jurisdiction of the justice, the non-suit was properly entered.

Rule discharged.

Opinion by ELCOCK, J.

C. P. No. 4. Dec. 30.

City to use of Miller v. Lydia Peterson, owner, etc.

Affidavit of defence law—Practice—Affidavit must be made by defendant—Affidavit of third party insufficient, even though the facts were peculiarly within his knowledge.

Rule for judgment for want of sufficient affidavit of defence.

In this case a municipal lien for paving had been filed, and a *sci. fa.* issued against Lydia Peterson, owner or reputed owner, and Joseph S. Pratt, registered and real owner.

The affidavit of defence, made by one Warren, set forth that he was the tenant and occupier of the premises described in the *sci. fa.*, and was at one time owner of said premises, on which he resided at the time the paving was done; that the paving was so badly done that it gave way in less than a week; that the contractor had failed to gravel the bed of the cartway as required by law; that the price was exorbitant; and that although the deponent had complained to Miller, the contractor, of the character of the work, no repairs were made. The affidavit likewise suggested the death of Lydia Peterson, as a defence.

J. M. Pile, for the rule.

An affidavit by one not a party to the record, who gives no sufficient reason for his intervention, is insufficient.

Stolaker *v.* Lardner, 1 WEEKLY NOTES, 169.
City *v.* Gross, 2 Id. 429.

As to Mrs. Peterson, she has parted with her interest, and the use of her name is merely nominal.

T. J. Diehl, contra.

The affiant shows that the facts alleged are peculiarly within his knowledge.

[THAYER, P. J. We have never admitted that as a reason for allowing a person not a party to make an affidavit. The oath must be by the party.]

It was then stated that the defendant was ill.

THE COURT. Let the case stand over one week, on account of the defendant's illness, otherwise there should have been judgment.

[See City *v.* Devine, 1 WEEKLY NOTES, 358; Russel *v.* Foran, Id. 470.]

Digitized by Google

Weekly Notes of Cases

VOL. III.] THURSDAY, FEB. 1, 1877. [No. 18.

Supreme Court.

Oct. & Nov. '76, 12. Nov. 20.

Shamburg et al. v. Ruggles.

Partnership—Banking association—Dormant partners—Stockholders in an unincorporated bank—When liable as ordinary copartners—Liability of such stockholders after withdrawal without notice—What constitutes an assumption of antecedent debts by incoming partner.

The stockholders of a banking association doing business under ordinary articles of copartnership are not dormant partners, although only the name of the bank is disclosed to the public, and not the names of he individual partners. Such stockholders are each equally responsible for the obligations of the association until notice is given of their withdrawal from it.

Where, after a new partner had joined a banking association, there was a continuance of business without discrimination between past and future profits, and no separation of past from future effects and liabilities:

Held, that the incoming partner was not liable for the antecedent debts of the association, unless expressly assumed by him, and that he was not bound to inquire whether all the property in its possession had been paid for.

Held further, that the payment of interest on an antecedent deposit, made with the knowledge of the new partner, was not of itself such an assumption of the liability for the deposit as would justify a verdict against him.

Babcock *v.* Stewart, 8 Sm. 179, affirmed.

Error to the Common Pleas of Crawford Co.

Assumpsit by Ruggles against Shamburg and others, doing business as the Citizens' Bank, to recover money deposited with the bank. Plea, by all of the defendants, non-assumpsit, and by Shamburg, specially, that he was not a partner with the other defendants as to the subject matter of this suit.

Upon the trial (before LOWRIE, P. J.), it appeared that in September, 1870, an unincorporated association doing business as the Citizens' Bank of Titusville, was organized by certain of the defendants who constituted its original stockholders. In June, 1871, the defendant, Shamburg, bought some $2000 worth of the bank-stock, which he held until December, 1872, when he sold it. Early in 1872 he had been elected a director, and he continued to be advertised as such until June, 1873, although, shortly after the sale of his stock, he had required that his name should be withdrawn from the advertisement, and had had no connection with the bank after that time.

Plaintiff's first deposit of $700 was made Jan. 19, 1871 (*before* Shamburg became a stockholder), for which a certificate was given, and payments of interest made Jan. 19, 1872, June 4, and Oct. 4, 1873. His second deposit of $300 was made Jan. 4, 1873 (*after* Shamburg had ceased to be a stockholder), for which also a certificate was given and interest paid Oct. 4, 1873. The bank suspended payment about Nov. 1, 1873.

The defendant, Shamburg, presented the following points: (1) If the jury believe that the defendant did not become a partner in the Citizens' Bank until May or June, 1871, and that the certificate of deposit for seven hundred dollars was issued Jan. 19, 1871, for money thus deposited, and before the defendant became a copartner, there can be no recovery against him for this sum. *Refused.* (2) If the jury believe from the evidence that the plaintiff had no business transactions with the defendant copartnership from Jan. 19, 1871, to Jan. 4, 1873, before which last date Shamburg had ceased to be a partner in fact, and that the plaintiff at no time knew of Shamburg's connection with the bank, there can be no recovery against him for the sum named in the certificate dated Jan. 4, 1873. *Refused.* (3) To charge one as a partner, who is not so in fact, and solely on the ground that he has so represented himself to be, it must be proved either that he represented himself as a partner to the plaintiff, or has made such a public representation of himself in that character as to raise the presumption that the plaintiff, knowing of that representation, and believing the defendant to be a partner, gave credit on that belief. Such presumption may be overthrown by evidence; and if the jury believe that the plaintiff at no time prior to giving credit knew of Shamburg's connection with the bank, there can be no recovery against him in this case. *Refused.*

The Court charged the jury as follows: "It seems fair to infer that these defendants, buying stock in the bank as it stood without any separation of past from future effects and liabilities, and continuance of the business without any discrimination between past and future profits, and paying (it may be presumed) debts and depositors, and interest on this very claim; it is fair to imply that they assumed the payment of the $700. The other, if made while Shamburg was still published as a partner, must be considered as a debt contracted by themselves severally."

Verdict for plaintiff for $1079, and judgment thereon. Defendants took this writ, assigning for error the refusal of the Court to affirm these points, and the charge of the Court.

Digitized by Google

Roger Sherman, for plaintiff in error.

There is no presumption of law that an incoming partner assumes the pre-existing liabilities of a firm.

Story on Part. §§ 152, 153, 159.
Collyer on Part. §§ 520, 524.
Babcock *v* Stewart, 8 Sm. 179.

Nor is the payment of interest upon such liabilities by the new firm sufficient to hold the incoming partner, the presumption being that he did not assume and did not know of interest being paid.

Collyer on Part. (*supra*).
Kirwan *v.* Kirwan, 2 Cromp. & M. 617.
Ex parte Peele, 6 Vesey, 602.

The name "Citizens' Bank" disclosed no individual liability. The defendant was simply a dormant partner. No credit was in fact given on his account, and under the principles governing dormant partners, his liability ceased as it began, notice of his retirement being unnecessary.

Story on Part. § 160.
Collyer on Part. § 120.
Armstrong *v.* Hussey, 12 S. & R. 315.
Mitchell *v.* Dale, 2 Harr. & Gill, 172.
Deford *v.* Reynolds, 12 C. 325.

Hence no reason could exist for holding him liable for debts contracted by others.

Waugh *v.* Carver, 1 Sm. Lead. Cas. 1290 (Notes).
Bowie *v.* Madden, 29 Ga. 285.
Carter *v.* Whalley *et al.*, 1 B. & A. 11.

And he cannot be held responsible for the unauthorized publication of his name as director; his former partners were no longer his agents, and the publication of his name as director only raised a presumption of partnership capable of being overthrown by evidence.

Newsome *v.* Coles, 2 Campbell, 617.

S. T. Neill, and *J. B. Brawley* (with whom was *J. A. Neill*), for defendant in error.

The payment of interest on a debt, or a knowledge that the new firm pays the interest, would warrant a jury in finding an assumption of the old debt by an incoming partner.

Parsons on Part. 433.
Story on Part. sec. 152.

In Kirwan *v.* Kirwan (*supra*), cited by plaintiff in error, the question only arose collaterally, and was in no way decided. And the case of Babcock *v.* Stewart (*supra*) applies to adventurers only, to whom a more rigid rule applies than in commercial partnerships.

Collyer on Partnership, sec. 527.

The liability of Shamburg, considering him as a stockholder in a joint stock company, is at least no less unlimited than that of an ordinary corporation; probably more so.

Keasley *v.* Codd, 2 C. & P. 408.
Carlen *v.* Drury, 1 Ves. & Bea. 157.
Tappan *v.* Bailey, 4 Met. 536.
Hess *v.* Werts, 4 S. & R. 367.

The Court was clearly right in saying to the jury that they might under the evidence imply that the defendant Shamburg had assumed to pay the debt of $700.

Parsons on Part. 435–6.
Ex parte Jackson, 1 Ves., Jr. 131.

If Shamburg was a dormant partner at the time he claimed to have retired, who were the ostensible partners?

He seeks to limit his liability, and restrict it to the actual liabilities or debts, incurred while he was the owner of his stock. This is contrary to the rule governing a stockholder's liability, whether he be an original stockholder, or became one by purchase. The true rule is stated by Judge DRUMMOND in National Park Bank *v.* Nichols *et al.* (2 Bissell Rep. 146), that such stockholders, in legal effect, become partners by relation to the date of the articles of association.

Generally speaking, when a man comes in as a purchaser of shares in a joint stock company, he takes them with all their rights and liabilities.

Add. on Cont. sec. 1328.
1 Pars. on Cont. 144.

Jan. 2, 1877. THE COURT. A dormant partner is one who is unknown as such to those doing business with the firm; hence he is one who lends no credit to the partnership. If A., B. and C. enter into articles of association, and agree that the business shall be conducted by A., and in his name alone, B. and C., in such case, are dormant partners, and though liable for the debts and obligations of the firm during its continuance, are not so liable for debts contracted after its dissolution, although notice of such dissolution may not have been given to the public or those previously dealing with it; for it is to be presumed that credit was given upon the responsibility of A. alone, and not upon that of B. and C. If, however, the business be conducted in the name of A. & Co., a different presumption arises, for then it is supposed that credit is not given to A. alone, but to all those comprising the company; in other words, to the firm and not to any one individual of it. In such case, if B. or C. retire, notice must be given to those dealing with the firm, or he will continue to be liable for the debts thereof subsequently contracted with former creditors who may be ignorant of the dissolution. (Deford & Co. *v.* Reynolds, 12 Cas. 325.)

STRONG, J., in this case, remarks: "The only object which such a one can have in remaining dormant or secret, is that credit may be given to the ostensible partners alone and not to him. With such an object or purpose, doing business under the name of one partner and 'company,' is inconsistent. It can be nothing less than an invitation to the public to give credit to more than the single partner named." Shamburg and his copartners did business under the name of 'The Citizens' Bank,' and surely it would be

Digitized by Google

understood that credit given to it would not be given to a mere name, but to the persons who formed the association. If Shamburg was a dormant partner, so were all his associates, for they were, like himself, but shareholders of the stock of this partnership; hence, if the argument set up for him be correct, it will apply equally to every member of this banking association, and we shall have the anomaly of a partnership composed wholly of irresponsible members. As this cannot be, we must take it that all who were engaged in the banking business under the name of the 'Citizens' Bank' were equally responsible for the obligations of the firm. Under this view of the case, Shamburg would be liable for the deposit of Ruggles on the 4th of January, 1873, though at the time he was not a member of the firm, for not only had Ruggles no notice of the withdrawal of Shamburg, but his name continued to appear as one of the directors of the bank. We consider the instructions of the Court below on this branch of the case as unexceptionable.

On the other point, however, we cannot see where the evidence was found to bind Shamburg for the deposit of January 19, 1871, for, as we have not the articles of association before us, we must deal with this as an ordinary partnership, and in such case the defendant would not be liable for a debt contracted before he became a member of the firm. As was said by Justice SHARSWOOD, in the case of Babcock *v.* Stewart (8 Sm. 179), "the credit of the new member of the firm did not enter into the consideration of those contracting with the original partners, and it would be manifestly unjust to hold him liable to them." The evidence produced to fasten this debt upon Shamburg is as follows: The certificate of deposit of 19th of January, 1871, indorsed interest paid to January 19, 1872; interest paid to January 4, 1873; interest paid to October 4, 1873; that Shamburg became a stockholder by purchase, in May or June, 1871, and that he sold his stock in December, 1872; that he was a director of the bank during the year 1872, and that this fact was advertised from February 16, 1872, until June 8, 1873. But in this there is no evidence of the assumption of this debt by Shamburg. Suppose the case to be as the learned Judge puts it to the jury, that there was "no separation of past from future effects and liabilities, and a continuance of business without discrimination between past and future profits," may not all this be predicated of any partnership? Yet ordinarily such a state of facts would not make the incoming partner liable for the debts of the firm. As was held in the case above cited, he was not bound to inquire whether all the property in the possession of the firm had been paid for. Those who sold, or delivered goods, or did work on the credit of the original partners, having by law no lien, parted with all their interest in the effects, and could only look personally to those with whom they contracted. But, we apprehend, a debt originating in a contract for the deposit of a loan of money is of no higher grade than one arising from the sale of goods; and there is, therefore, nothing to exempt it from the general rule. It is true that the payment of interest on this deposit, if made with Shamburg's knowledge and assent, may have been some evidence of an assumption, but even this would amount to so little, that without something else of a more definite character it ought not to be submitted as the ground of a verdict, for, from the very nature of the association, if it were to continue the business of banking, Shamburg could not prevent its paying interest on its former deposits. We must also recollect that this was not a new firm, but the old firm with a new member, and that it must needs, as long as it was solvent, go on paying off its old liabilities until they were extinguished; and I cannot see how the fact that it did so could make the new partner liable for debts not contracted on his credit, and which he never assumed to pay.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by GORDON, J. AGNEW, C. J., doubts. WILLIAMS and MERCUR, JJ., absent.

May '76, 90. **Lightner's Appeal.** June 9.

Lightner Association, etc., v. First National Bank of Strasburg et al

Equitable assignment—What amounts to—Parol agreement to transfer stock—Power of attorney to transfer stock made in pursuance of such agreement—When not revoked by the death of the attorney.

A verbal agreement by a debtor to transfer stock to his creditor as security for the debt, followed by the execution of an irrevocable power of attorney to an agent of the creditor to transfer the stock, amounts to an equitable assignment of the stock to the creditor; and the power of attorney, being thus coupled with an interest, is not revoked by the death of the attorney before having executed it.

A., the owner of stock in a bank, being indebted to the bank in an amount exceeding the value of the stock, agreed by parol to transfer his stock to the bank as security for the debt, and, for the purpose of carrying out this agreement, executed and delivered to the cashier, in 1873, an irrevocable power of attorney to transfer the stock. The cashier died without executing the power, and the stock remained in A.'s name on the books of the bank until 1875, when A. was adjudicated a bankrupt. In a bill filed by his assignee in bankruptcy to prevent the bank from disposing of the stock:

Held, that the parol agreement to transfer the stock operated as an equitable assignment of it to the bank, and that the unexecuted power of attorney, being

Digitized by Google

coupled with an interest, was not revoked by the death of the cashier.

Appeal from the Common Pleas of Lancaster County.

Bill in equity by Joel L. Lightner, assignee in bankruptcy of Frank J. Herr, against the First National Bank of Strasburg and its President and Cashier, averring that upon a petition filed June 2, 1875, said Herr had been adjudicated a bankrupt, and complainant had been subsequently appointed his assignee; that said Herr, at the date of said assignment, was, and had been for a long time, the owner of sixty-three shares of the capital stock of the corporation respondent, on which he had drawn the dividends as they accrued, up to the commencement of the bankruptcy proceedings; that by virtue of those proceedings the title to said stock had vested in complainant for the benefit of the bankrupt's estate; that the respondents claimed to hold said stock by virtue of an alleged transfer as collateral security for an indebtedness of Herr, and that in pursuance of their claim they had directed the stock to be immediately sold at public or private sale; that complainant denied that the stock had ever been transferred to respondents, or that they were entitled to or had any interest in it.

The bill prayed for an injunction to restrain respondents from selling or transferring it, and for an order on them to permit complainant to transfer it to such persons as might seem to him proper.

The respondents in their answer admitted that the bankrupt had, at some time prior to his bankruptcy, been the owner of the stock in question, and had drawn the dividends as they accrued, but averred that the respondents had, on October 1, 1873, before the commencement of the bankruptcy proceedings, become the beneficial owners of the stock, as security for an indebtedness of Herr's to them, by virtue of a power of attorney, irrevocable, of that date, executed and delivered under his hand and seal by Herr to one Eberman, in trust for the respondents, and that an indebtedness far exceeding the value of the stock still remained due and unpaid.

Before the examiner the defendants put in evidence the following power of attorney:—

"KNOW ALL MEN by these presents, that I, the undersigned, for value received, do hereby irrevocably constitute and appoint E. M. Eberman to be my true and lawful attorney for me, and in my name and behalf to sell, assign, and transfer unto the First National Bank of Strasburg, or any other person or persons, sixty-three shares of the capital stock of the First National Bank of Strasburg. And further, one or more persons to substitute with like power. In witness whereof, I have hereunto set my hand and seal this first day of October, 1873.

Witnesses present: FRANK J. HERR. [SEAL.]
H. A. MOWERY,
GEO. W. HERSEL, JR."

It was admitted by counsel on both sides that the power of attorney was delivered on the day of its date to the bank, and had remained in its custody since. It was also admitted that there was never any actual transfer of the stock made on the books of the bank, but that the stock still stood in Herr's name, and that Eberman, the attorney named in the power, had died in November or December, 1874. The testimony further disclosed that Herr was indebted to the bank to a greater extent than the value of the stock in question, which indebtedness was incurred before the giving of the power of attorney, and consisted of notes given by Herr and of notes endorsed by him for others; that said indebtedness still remained unpaid, and that the bank had no claim upon the stock except under this power of attorney.

The Court below, without delivering any opinion, entered a decree, refusing an injunction, and dismissing the bill. Complainant appealed, assigning as error the entering of this decree.

When the case was first called for argument in the Supreme Court, in May, 1876, the Court referred it back to the examiner, R. M. Agnew, Esq., as master, to take further testimony, and to report as to whether the power of attorney was executed to Eberman for the use of the bank.

In pursuance of this, the master took additional testimony, and reported substantially the following facts:—

Frank J. Herr was, on October 1, 1873, indebted to the bank in an amount exceeding $10,000, which indebtedness is still unpaid. He was at that time a director of the bank. At a meeting of the board of directors, the subject of his indebtedness was discussed, and it was suggested and assented to by him that he should transfer his stock to the bank as collateral security for said indebtedness. In pursuance of this suggestion and arrangement the bank instructed the cashier, Mr. Eberman, to have a power of attorney drawn up and executed by Herr for the transfer of his stock to the bank, and in pursuance of this instruction and to carry out the arrangement agreed upon, the power of attorney above set forth was given. Eberman deposited the power of attorney in the vault of the bank along with other valuable papers of the bank, but died in November or December, 1874, without executing the power. No transfer was made on the books of the bank, and the stock still remains in the name of said Herr.

The master found that said power of attorney "was given by Frank J. Herr to Mr. Eberman, in trust, for the benefit of the bank, to be executed by him, in trust for its benefit, as collateral security for the payment of said Herr's indebtedness;" and "that the sole object of the transac-

Digitized by Google

tion was to transfer the sixty-three shares of stock to the bank, to be held by it as a pledge for the payment of Herr's indebtedness."

To this report no exceptions were taken by either side.

D. G. Eshleman, for the appellant.

The testimony fails to support the defendant's answer, in that it discloses that no transfer of the shares in question had ever been made by Eberman to the bank, but that it still remained in Herr's name on the books. The power of attorney was not given to Eberman in trust for the bank. This is evident from its terms "to sell and transfer" to the bank, "*or any other person or persons.*"

But whatever the power be, naked, or coupled with an interest, it is revoked by the death of the donee.

Story on Agency, § 488.

The power of attorney did not in itself operate as an equitable assignment of the stock to the bank.

Bispham on Eq. § 874.
Beans *v.* Bullitt, 7 Sm. 221.

In Hunt *v.* Rousmanier (8 Wheaton, 174), it was doubted whether the mere power itself, although irrevocable, could so operate. It certainly cannot where the intent of the donor is otherwise. A contrary intent is manifested here, as Herr collected the dividends on the stocks after executing the power.

G. M. Kline and *W. U. Hensel*, contra.

The power of attorney amounted to an equitable assignment of the stock to the bank, notwithstanding its non-execution by Eberman.

Bispham's Eq. 174.
People *v.* Tioga, 19 Wend. 74.

The power to sell and transfer the stock was given to Eberman, the cashier, to secure some of Herr's paper, held by the bank, and was delivered on the day of its execution to the *Bank*, thus showing them to be the intended beneficiaries.

The power to Eberman, being coupled with an interest in the bank, was not revoked by the death of the donee.

Smyth *v.* Craig, 3 W. & S. 20.
Bancroft *v.* Ashhurst, 2 Gr. 520.
Blackstone *v.* Buttermore, 3 Sm. 267.

Hunt *v.* Rousmanier, *supra*, holds that such a power survives the donor, and is enforceable after his death. Besides, this power is expressly made irrevocable by the donor himself.

[AGNEW, C. J. How do you propose to execute the power?]

The Court below could appoint some one to execute it, or compel Herr to do so.

Oct. 10. THE COURT. From the report of the master, it appears that Frank J. Herr, being indebted to the First National Bank of Strasburg in a sum much larger than the value of his stock in the bank, was required to give additional security to keep his paper afloat. It was agreed between the bank and Herr that he should transfer sixty-three shares of stock in the bank, as collateral security for his indebtedness; and Mr. Eberman, the cashier, was instructed by the bank to have a power of attorney drawn up and executed by Herr for this purpose. A power was drawn in which Herr, for value received, irrevocably appointed and constituted Eberman his true and lawful attorney for him, and in his own name and behalf, to sell, assign, and transfer to the bank, or any other person, sixty-three shares of the stock of the bank, with power to appoint a substitute. Eberman, the attorney, having died, the question is, whether the power given under these circumstances has fallen? We think it has not. It was not only by its own terms irrevocable for value received, but it was so by the legal operation of the agreement which induced it. It is a power coupled with an interest, and was made and executed for the very purpose of carrying the agreement into performance. When a power of attorney is thus adopted by the parties, as the means of carrying out their valid agreement made upon sufficient consideration, its operation must be sustained upon the nature and purpose of the contract, to which it is ancillary and which it is intended to effectuate. If the effect of the contract *inter partes* is, as here, to give a right of property or interest in the subject-matter itself, of the agreement, to the party for whose benefit the execution of the power is intended, the power follows the estate or interest thus agreed to be transferred, and becomes irrevocable by operation of law. A Court of equity will not suffer the main purpose or intent to fail, even though a minor purpose may fail. Thus the power to transfer the stock will stand, though the minor purpose, that the transfer should be made by a particular person, fails by his death. The owner of the stock, having on a sufficient consideration parted with his stock in equity, has no special interest that his power to carry out his sale should be executed by the person named in the power, who will not be his trustee of the proceeds, as he would be if the stock were not equitably transferred. Here the main intent was the security of the bank by means of the ownership of the stock, with the right to apply it to Herr's indebtedness. The intent that this should be done through Eberman, who was the known agent of the bank, was but a minor one; and was really for the benefit of the bank. The act of transfer could be done as well by any other person, for the bank, being the depository of the stock, is the only one who could object; and she of course could not object to a transfer to herself, to carry out the agreement. The bank is clearly the party in interest. She was not bound to carry Herr's debt longer than

Digitized by Google

the term of the paper then running called for, and she stipulated for the security of the stock as the consideration of permitting Herr's paper to keep afloat. Herr having agreed to this, his power of attorney was but the contract instrumentality to carry out the stipulation. The agreement operated as an assignment of the stock in equity, which the power was intended to perfect. We see no difficulty, therefore, in supporting the contract and power of attorney against the assignee in bankruptcy, there being no allegation of any fraud upon the bankrupt law being perpetrated. The assignee in bankruptcy rests his claims solely upon the supposed failure of the power by reason of the death of the attorney. But in such a case *actio Dei nemini facit injuriam.* The property being personal, the agreement meets no barrier in the statute of frauds by reason of its being by parol. There is nothing to prevent a Court of equity from compelling specific performance, if it be refused.

This subject was very thoroughly examined and discussed by Chief Justice MARSHALL, in the case of Hunt *v.* Rousmanier (8 Wheaton, 174). We may add, Hartley and Minor's Appeal (3 P. F. Smith, 212); Blackstone *v.* Buttermore (Ibid. 266); Smyth *v.* Craig (3 W. & S. 20); Bancroft *v.* Ashhurst (2 Grant, 520); Bank of Commerce Appeal (23 P. F. Smith, 59).

The decree of the Common Pleas dismissing the bill is affirmed, and it is ordered that the appellant pay the costs.

Opinion by AGNEW, C. J. WILLIAMS and SHARSWOOD, JJ., absent.

[See Phœnix Iron Co. *v.* City of Phila., 2 WEEKLY NOTES, 596; MacEuen's Estate, Id. 307; 3 Id. 158. Note to Ray *v.* Simmons, 15 Am. Law Reg., N. S. 701.]

Jan. '76. **Boud v. Bronson.** Jan. 18, 1876.

Non-suit— Possession — Delivery— Replevin— What evidence is sufficient to be submitted to the jury, where bona fides as to creditors is an element of the issue.

In replevin, the plaintiff showed that he had employed one R. to build him a wagon; that it was delivered to him in an incomplete state, and that afterwards he returned it to R. for completion. The wagon had been paid for, and was still in R.'s possession, when it was levied on as R.'s property and sold to B. against whom plaintiff brought replevin. The Court below entered a non-suit:

Held (reversing the judgment of the Court below), that the possession by R. was not legal fraud, and that the evidence should have been submitted to the jury, for them to pass on the question of good faith in the whole transaction, under proper instructions from the Court.

Error to the Common Pleas of Montgomery County.

Replevin by William H. Boud against Bronson to recover a wagon purchased by the latter at a constable's sale as the property of one Roudenbush. Pleas, *non-cepit*, and property, with leave etc.

The facts appearing from the plaintiff's testimony, as stated in the opinion of the Supreme Court, were as follows: "In 1869 Roudenbush resided in Montgomery County, he was indebted to the plaintiff and also to the plaintiff's father [James Boud]. An agreement was entered into between the plaintiff and Roudenbush by which the latter was to make the wagon. Before it was finished Roudenbush moved to Chester County. On leaving he delivered the running gears to the plaintiff. Not long afterwards the plaintiff also bought from him the bed of the wagon. After the plaintiff had retained all these parts of the wagon in his possession for several months, and procured other materials, he made a new contract with Roudenbush for its completion, at a stipulated price for the whole cost of the wagon. He thereupon took to the shop of Roudenbush, near Valley Forge, the "running gears, body, iron work, and materials for trimmings and cover." As a part of the consideration, the plaintiff was to pay the debt which his father had against Roudenbush. The plaintiff further testified that about the 20th of February, 1871, he settled with Roudenbush for the wagon, and that there was due on account of it a less sum than the debt due to his father, and that he subsequently paid the residue to his father, but had not taken the wagon from the shop when it was levied on."

The plaintiff offered the record of a suit before a justice of the peace, by James Boud against Rodenbush, defendant, and this plaintiff, garnishee, for the purpose of showing that before the sale of the wagon, whatever the plaintiff owed the defendant thereon was attached in his hands by legal process. Objected to, and ruled out. Exception to the plaintiff (First assignment).

The plaintiff then offered to prove that the defendant, when the sheriff came to replevy the wagon, ran it into Chester County, and that it was produced only after the defendant was arrested on the charge of eloigning it. Objected to; rejected, and exception to the plaintiff. (Second assignment).

Ross, P. J., entered judgment of non-suit, which the Court afterwards refused to take off (third, fourth and fifth assignments), whereupon the plaintiff took this writ of error.

George M. Corson, for the plaintiff in error.

The record of the suit before the justice was material, for it contained a receipt in law and fact

Digitized by Google

of the whole balance due from W. H. Bond to Roudenbush for the carriage.

[SHARSWOOD, J. You should have set out, then, the record of the suit in full—such is our practice.]

The evidence contained in the second assignment was offered to prove a collusion between Roudenbush and the defendant, and indicated the good or bad faith of the transaction as much as the fleeing of a felon from the scene of a murder indicates the murderer.

Now, although the act authorizing the entry of a non-suit has stood since 1836, it is utterly unconstitutional and void, being against the section of the Bill of Rights which guarantees trial by jury.

[SHARSWOOD, J. How do you distinguish between the entry of a non-suit and the undoubted right of a judge to direct a verdict, where the plaintiff's evidence does not sustain his claim?]

That is about the same thing. But at all events the evidence in this case would justify neither proceeding. The wagon belonged to the plaintiff. It had been partially completed, and he had it in his possession six months, and the evidence was, that it was paid for, repairs and all, before the sale to the defendant by the constable. Even if it had not been paid for, the delivery of the wagon to the mechanic to be repaired or finished, did not change its ownership. It was a bailment for a proper purpose, and should be protected from the bailee's creditor.

Billingsly *v.* White, 9 Sm. 469.

Charles Hunsicker (with whom was *H. B. Dickinson*), contra.

The first assignment relates entirely to *res inter alios acta*, and the second assignment proves no collusion. As for the sufficiency of evidence, that point is ruled by Prichett *v.* Jones (4 Rawle, 260). The contract here was executory and did not pass the property.

[SHARSWOOD, J. Prichett *v.* Jones differs from this case, because here there was evidence that the materials belonged to the purchaser.]

Possession is always a badge of ownership; in this case the plaintiff had no possession.

March 13. THE COURT. In this case the Court below ordered a non-suit. The question now arising is, should the evidence have been submitted to the jury?

The defendant contends that the evidence shows the transaction was substantially an agreement by which Roudenbush, a wheelwright, was to make and deliver to the plaintiff, at a price stipulated, the wagon in question; but when the defendant purchased it at constable's sale as the property of Roudenbush, it was unfinished, and the plaintiff had neither paid for it nor obtained possession of it. If these were the facts, and Roudenbush had furnished the materials, it is very clear that the Court committed no error in ordering the non-suit.

We think, however, this is not the only view presented by the evidence. The testimony is not very clearly stated in the paper-books, but as we understand it, there is some evidence going to establish this state of facts, to wit: (Here the learned Judge recited the facts as above quoted.)

If the jury should find the alleged statement of facts to be true, we think it takes the question of legal fraud out of the case. There had been such an exclusive and long-continued possession of the property in the plaintiff that his title could only be affected by actual fraud. There had been an open, visible change of the possession of the property. When Roudenbush removed out of the county, the plaintiff had accepted it. After retaining it in his exclusive possession for some six months, the fact that under a new contract, the plaintiff placed the unfinished wagon in the possession of the former owner, to be finished, is no fraud in law on the creditors of Roudenbush. The jury should be permitted to pass on the good faith of the whole transaction under proper instructions from the Court. (Dunlap *v.* Bournonville, 2 Casey, 72; McMarlan *v.* English, 24 P. F. Smith, 296.) The third, fourth, and fifth assignments are sustained. As we are not furnished with a copy of the record referred to in the first assignment, we are not able to say there was error in its rejection. The evidence covered by the second assignment is irrelevant..

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by MERCUR, J. WILLIAMS, J., absent.

[See Ins. Co. *v.* Bair & Shenk, *ante*, 126; *cf.* R. R. Co. *v.* Shay, *ante*, 45.]

Jan. '75, 8. June 7.

Commonwealth ex rel. Overseers of Porter v. Overseers of Jersey Shore.

Mandamus—Will lie against Overseers of Poor to compel maintenance of pauper—Jurisdiction of Common Pleas in such cases—Act of 14 *June*, 1836—*Poor Law—Act of* 13 *June*, 1836—*Statutory remedies—Act of* 21 *March*, 1806.

Mandamus will lie against the overseers of the poor of one district upon the petition of those of another, to compel the reception and maintenance of a pauper, under an order of removal made by justices of the peace under the Act of 13 June, 1836.

Courts of Common Pleas have jurisdiction in such cases.

The penalty prescribed by the Act of 13 June, 1836, for a refusal to receive paupers under an order of re-

Digitized by Google

moval is not such a statutory remedy as is contemplated by the Act of 21 March, 1806, refusing a common law remedy where one exists by statute.

Error to the Common Pleas of Lycoming County.

Petition for a mandamus filed by the Overseers of the Poor of Porter Township against the Overseers of the Borough of Jersey Shore, both of Lycoming County, setting forth that on November 20th, 1874, two justices of the peace of said county, after a hearing, granted an order under their hands and seals, authorizing and directing the petitioners to remove one Rebecca Deshera, a pauper, from the poor district of Porter to that of Jersey Shore, and requiring the Overseers of Jersey Shore to receive and provide for this pauper, whose place of settlement they adjudged to be in the latter place; that in pursuance of this order the petitioners on Nov. 21st, 1874, took the pauper to the Overseers of Jersey Shore, presented to them the order of removal, and demanded that they should take charge of and provide for her; that the respondents refused to receive the pauper or to make any provision for her support, and refused so to do, by reason whereof the petitioners had suffered damage, for which they had no specific legal remedy.

A rule was granted on the respondents to show cause why a mandamus should not be issued against them as prayed for. To this they made return to the effect that the Court had no jurisdiction in the case presented by the petition; that there was a specific statutory remedy which was exclusive of all others; that the Common Pleas had no jurisdiction in any case over overseers of the poor, such jurisdiction being vested by statute exclusively in the Quarter Sessions; that the pauper never had any legal settlement in Jersey Shore, and they averred that the sole object of the proceedings was to cast on the respondents the trouble of proving the legal settlement of the pauper.

The Court below (GAMBLE, P. J.) discharged the rule, holding, first, on the authority of Directors, etc. *v.* Malany (14 Sm. 144), and Delaware *v.* Greenwood (16 Sm. 63), that the Court of Quarter Sessions, under the Act of 1835, had exclusive jurisdiction of all cases between contending districts relating to the support of the poor; and secondly, that as the Act of 13 June, 1836, prescribed a remedy against offending overseers, that remedy was by the Act of 21 March, 1806, exclusive.

To this ruling the petitioners took this writ of error, assigning for error the discharge of the rule.

H. H. Martin and *R. P. Allen* (with them *James M. Gamble*), for plaintiffs in error.

The Act of 14 June, 1836 (Purd. Dig. 989, pl. 1), vests in the Common Pleas power "to issue writs of *mandamus* to all officers and magistrates" in their respective counties "or in and for any township, district, or place within said county." That overseers of the poor are within the terms of this act is unquestionable, they being township or borough officers.

The writ will be granted whenever the applicant shows a specific legal right and the absence of a specific legal remedy.

Com'th *v.* Rosseter, 2 Binn. 260.
James *v.* Bucks Co., 1 Harris, 76.

The penalty prescribed by the Act of 1836 is not a *remedy*, which may be defined to be the means of enforcing a right, but a punishment inflicted for the violation of the law.

Mandamus is the proper, and, in fact, the only adequate remedy for compelling the performance of a ministerial duty, such as the present.

High on Extraordinary Remedies, 230.

And this is so, although a penalty be prescribed by statute for a failure to perform it.

Thomas *v.* Com'th, 8 Casey, 222.
Hamilton *v.* Pittsburg, 10 Casey, 496.

H. C. Parsons (with him *P. D. Bricker*), contra.

Exclusive jurisdiction in all matters relating to the maintenance of paupers is vested by the Act of 1836, *supra*, in the Court of Quarter Sessions of the proper county. This was laid down in Nippenose *v.* Jersey Shore (12 Wr. 402), and followed in Directors *v.* Malany (14 Sm 148).

The penalty prescribed by this Act was recognized in Overseers of Sugarloaf *v.* Schuylkill County (8 Wr. 483) as the *sole* remedy for a violation of its provisions.

Under the Act of 21 March, 1806, *supra*, where a remedy is provided by statute, it alone can be pursued.

Crisswell *v.* Clugh, 3 Watts, 330.
Spigelmoyer *v.* Walter, 3 W. & S. 540.
Com'th *v.* Wellsboro & Tioga Co., 11 C. 152.

Oct. 10. THE COURT. The Court of Common Pleas has power to issue writs of mandamus ' to all officers and magistrates, elected or appointed in and for the respective county, or in or for any township, district, or place within such county, and to all corporations being or having their chief place of business within such county." (Act 14 June, 1836, § 18.) Overseers of the poor are officers elected in the several townships or districts for the poor, and are therefore subjects of this high power, unless special jurisdiction has been conferred upon the Court of Quarter Sessions in respect to the subject matter, or a special remedy has been provided by statute, or an adequate remedy otherwise exists. The Quarter Sessions has no power to enforce the acceptance of a pauper under an order of removal, that has not been appealed from. The provision of the poor

Digitized by Google

law imposing a penalty of twenty dollars under the 18th section, to be recovered before a magistrate under the 43d section, is not a *remedy* to enforce performance of the duty. It is but a *punishment* for non-performance. A remedy is that which is used to enforce a right or the performance of a duty, and unless it reaches the end intended, and actually compels performance of the duty, it is not adequate. The duty of maintenance being ascertained judicially, it is the right of the township procuring the order of removal to have it executed, and the duty of the township to which the removal is made, to receive and maintain the pauper. This duty must be enforced in the interests of humanity and justice. A penalty may punish the wrong of the officer, but does not enforce the duty of the township to receive and maintain. After payment of the penalty the duty still remains, otherwise the right of the removing township is without remedy, and the pauper is not maintained and cared for, and suffers in the inhuman contest. So remorseless often are avarice and meanness, they will pay the penalty to escape the heavier duty of continued support. It cannot be said, therefore, that the provision of the 18th section for a penalty is either an adequate remedy, or a statutory remedy which alone can be pursued, according to the Act of 1806.

It remains to inquire into the appropriateness of the remedy by *mandamus*. The law as to the exercise of the power to issue the writ is pretty well settled. There must be a *specific legal right* and the want of a *specific legal remedy*. Where the legal right has not been ascertained, or a remedy exists sufficient to enforce the right claimed, the writ of mandamus will not be granted. It is a high prerogative writ, to be used rather as a last resort than a common mode of redress. Hence the Court granting it will be careful to examine the circumstances, and will exercise a sound discretion in doing so. (See the following cases: Commonwealth *v.* Rosseter, 2 Binney, 360; Commonwealth *v.* Mitchell, Clark *et al.*, 2 Penna., 517; Hester's Case 2 W. & S. 416; Reading *v.* Commonwealth, 1 Jones, 196; James *v.* Bucks Co., 1 Harris, 72; Heffner *v.* Commonwealth, 4 Casey, 108.)

An examination of this case will show that the writ ought to have been granted. There was a regular warrant of removal granted by two justices, finding that the pauper had become chargeable upon Porter Township for temporary relief; that she had not gained a legal settlement therein; adjudging that her last place of legal settlement was the poor district of Jersey Shore, and commanding the Overseers of the Poor of Jersey Shore to receive and provide for her. These overseers refused to receive the pauper, but did not appeal from the order of removal; and in their answer to the petition for the mandamus make no denial of the facts, but in effect demur to the right to have the writ. But the overseers of the poor had no right to refuse to accept the pauper under a regular order of removal. The judgment of the justices was conclusive until regularly reversed on an appeal, and its effect was to relieve Porter Township from the duty of support. In the face of this order the Overseers of Porter could not continue to maintain the pauper. Humanity and justice, therefore, demanded that while the order continued in force, the duty of maintenance should fall upon Jersey Shore. If aggrieved, Jersey Shore had a remedy by appeal, the pauper was not to suffer meanwhile. The conclusiveness of the order is established by Sugar Loaf *v.* Directors of the Poor of Schuylkill (8 Wright, 481); Directors of Schuylkill *v.* Overseers of Montour (Ibid, 484); Overseers of Nippenose *v.* Overseers of Jersey Shore (12 Wright, 402). An action on the case would not lie on behalf of the pauper to enforce the order, and a verdict for damages would be no proper substitute; and what would become of the pauper in the mean time, or who would undertake her cause. The writ of *mandamus* is the only remedy left, and it is clearly applicable. (Commonwealth *ex rel.* Thomas *v.* Commissioners of Allegheny, 8 Casey, 222; Borough of Uniontown *v.* Commonwealth, 10 Casey, 293; Hamilton *v.* Pittsburgh, 10 Casey, 496; Howe *v.* Commissioners, 11 Wright, 361.)

We think the learned Judge below erred in refusing the mandamus, and that legal right, as well as justice and humanity, required him to compel the Overseers of the Poor of Jersey Shore, by mandamus, to perform the duty of receiving and maintaining the pauper cast upon them by the order of removal.

The judgment refusing the writ is therefore reversed, and a *procedendo* awarded; and the record is ordered to be remitted for this purpose.

Opinion by AGNEW, C. J. SHARSWOOD and WILLIAMS, JJ., absent.

Quarter Sessions.

Commonwealth v. Miller. Jan. 6.

Insolvent Laws—A discharge under the 47th Section of Act of June 16, 1836, *does not relieve from payment of weekly sum for support of bastard child under order of a Court of Quarter Sessions.*

Rule for an attachment.

The defendant was convicted in this Court of the offence of "fornication and bastardy," and

Digitized by Google

was sentenced to pay the costs of prosecution, the lying-in expenses of the woman, and the sum of $2 50 per week for the support of the child; to give security for the said weekly payments, and to stand committed until the sentence was complied with. He was thereupon committed to prison. He failed to comply with any part of the sentence.

Afterwards he was discharged from imprisonment by virtue of a proceeding under the insolvent laws of the State.

Upon November 29th, 1876, an affidavit was presented to the Court, setting forth the above facts, and further, that since defendant's discharge he had incurred an obligation to pay certain weekly sums accruing since. The Court thereupon granted an attachment, which upon Dec. 2d, 1876, was set aside and the present rule granted in its place.

Howell and *Mann*, for the rule.

Jermon, contra.

Jan. 13. THE COURT. The insolvent laws of this Commonwealth discharge the defendant from arrest as to any indebtedness accrued against him to the date of the assignment of his property. Prior to the Act of 16th June, 1836, § 47, a defendant imprisoned under sentence of a Court of Quarter Sessions for fornication and bastardy could not be discharged under the insolvent laws, and the relief thereby provided extended only to such as was granted to other insolvent debtors. He is obliged to make application and conform to all the provisions in relation to them.

The sentence of the Court is not to pay an accumulated sum, but simply a certain sum *per week* for the support of the child. This sentence cannot be compounded or capitalized, nor could a dividend from the insolvent estate be declared upon it, or an action maintained against defendant for the sums decreed to be paid in the future. It is, therefore, no more a discharge of the obligation imposed by the sentence, than it would be of the obligation or duty to support a child born in lawful wedlock.

In Newhouse *v.* The Commonwealth (5 Wharton, 82), which was a sentence that the defendant pay a certain sum per week for the support of his wife whom he had deserted, the Court said that the order of the Insolvent Court affected nothing but the payments then due, and did not discharge him prospectively from duties to accrue. For the latter he remained liable by force of the sentence as if he had not become an insolvent debtor. So in England it has been held in Davies *v.* Arnott (11 E. C. L. R. 83), that the obligors or sureties on a bastardy bond, discharged by the Insolvent Court, are still liable for money accruing subsequently.

When the law gave the Court of Quarter Sessions power to sentence the offender for the crime referred to, it never was intended that its sentence or the punishment thereby decreed, whilst sounding as a pecuniary penalty should be set aside by an appeal to another court, and a discharge perhaps without payment of any sum. If we were to hold the insolvent's discharge an extinguishment or revocation of the sentence—which is substantially what we are now asked to do—it would be giving the Insolvent Court power to revoke the sentence or judgment of the Quarter Sessions, which, not being the Appellate Court, it cannot do. To sustain such a doctrine would be to make a mockery of punishment, and to submit the sentence and decree of this tribunal to the voluntary action of the defendant.

The rule for the attachment is therefore made absolute.

Opinion by ELCOCK, J.

Common Pleas—Law.

C. P. No. 1. Jan. 13.

Buckman v. Jones, Chief of Police, et al.

Trover—Capias ad respondendum—Freeholder—Defective affidavit—Practice—Fine for improper issuing of writ against freeholder—Act of March 20, 1725.

Rule to abate writ of *capias ad respondendum.*

This was an action of trover, and the defendants, one of whom was chief of police, and the other a detective officer, had been arrested on a capias. The affidavit to hold to bail set forth that defendants had taken possession of certain goods and chattels in possession of plaintiff of the value of $500, and refused to deliver the same to plaintiff, but had converted them to their own use.

The defendant, Jones, appeared before the Court and proved himself to be a freeholder.

A plea of misnomer was entered on behalf of the other defendant, Umstead.

Shapley, for rule. The affidavit is insufficient, as it fails to state the circumstances under which the goods were taken and converted to defendant's use. Under the Act of March 20, 1725 (Purd. Dig. 48, pl. 45), the defendant being a freeholder is entitled to have the writ abated and be allowed 30 shillings costs.

W. H. Redheffer, contra.

THE COURT. Writ abated as to defendant Jones, with an allowance of 30 shillings costs, and defendant Umstead discharged on common bail.

Digitized by Google

C. P. No. 3. Dec. 12, 1876.

Commonwealth to the use of P. McLane et al. v. B. O. Severn, Adm'r of James Dugan, deceased.

Decedents' estates — Surety upon administration bond—Limitation of liability as against his heirs — In order to recover against the heirs of surety the action must be commenced, or a copy or written statement filed within five years after his death—Act of February 24, 1834—Statutes, of limitation when the Commonwealth is only nominal plaintiff.

Sur demurrer to replication.

In 1853 James Dugan became surety in the bond of the administratrix of Henry McLane's estate. In 1854 the account of the administratrix was confirmed and a certain sum was invested; the interest thereon to be paid to H. McLane for life, and upon her death the principal was to be distributed to the heirs of Henry McLane. In 1856 Dugan, the surety, died, and in 1869 McLane's widow died; default was made in the payment of the principal sum invested for the heirs; whereupon they brought suit upon the official bond in 1872 against the administrators of Dugan, the surety in the bond, and recovered a judgment in 1875. A *sci. fa.* was then issued against the heirs of Dugan to charge the real estate of Dugan, in the hands of his heirs, with this debt.

To this *sci. fa.* Mary Mullen, an heir of Dugan, pleaded: "That no action was brought on the said bond within five years after the decease of the said James Dugan, nor was any copy or particular written statement of said bond filed in the prothonotary's office of said county within the said period of five years from said decease."

To this the plaintiff replied: "The cause of action in said writ of *scire facias* did accrue to the said plaintiff within five years next before the issuing of said writ of scire facias," concluding to the country.

Defendant demurred, assigning, *inter alia*, the following reason: "The said plaintiff in his replication neither admits nor denies 'that no action was brought on said bond within five years after the decease of the said James Dugan, nor was any copy or particular written statement of said bond filed within the said five years' as set forth and alleged in defendant's plea."

Brightly, for the demurrer.

The Act of Feb 24, 1834, § 24 (Purd. Dig., 422, pl. 88), has not been complied with by plaintiff. No action was brought on the bond, nor was a copy or particular written statement filed.* This is fatal to plaintiff's claim.

Kerper *v.* Hoch, 1 W. 14.
Quigley *v.* Beatty, 4 Id. 22.
Commonwealth *v.* Pool, 6 Id. 32.
Bailey *v.* Bowman, 6 W. & S. 119.
Wallace's Appeal, 5 Penna. St. 103.
Loomis's Appeal, 29 Id. 237.

McIntyre, contra, cited—

Shearer *et al.* *v.* Brointey *et al.*, 26 Sm. 300.

And contended, further, that the suit, being in the name of the Commonwealth, cannot be barred by any statute of limitations.

C. A. V.

December 16, 1876. THE COURT (after stating the facts): It is not necessary, in our view of this case, to consider the contingent liability of the surety in the bond of the administratrix to be a "debt" strictly so called, and if the case turned upon this point alone, we would incline to the opinion that the terms of the statute did not apply until a judgment had been obtained in a suit upon the bond; but the language of the Act, in its concluding paragraph, requires us to give to it a broader construction, in order that we may reach its true meaning and intent.

Not only shall no *debt*, strictly so called, remain a lien, unless perpetuated in the mode indicated in the Act, but also no prospective claim, whether "upon bond, covenant, debt, or demand," when the same is not payable within five years.

It has been contended that an administrator's bond only at best creates a contingent liability, and that such a case does not fall within the meaning of the Act, but a covenant may or may not be broken, and debts and other demands may also be but contingent, so that, if the true construction narrows the terms of the Act to present liabilities payable in the future, then the word "debt," in the first paragraph of the law, would seem to cover every case intended to be reached by the law. The conclusion at once proves that the legislature intended something more than the existence of a present liability. When we consider that the object of this law was to destroy secret claims, which, after the lapse of years, might suddenly be produced, to the destruction of the heirs of an estate, and when, as was said by Chief Justice GIBSON, the heir, by reason of the expenditure of money upon improvements, etc., might be looked upon almost as an equitable purchaser for value of the estate, we can easily reach the conclusion that just such a debt as this has proved

* The section of the Act referred to is as follows: "No debts of a decedent, except they be secured by mortgage or judgment, shall remain a lien on the real estate of such decedent longer than five years after the decease of such debtor, unless an action for the recovery thereof shall be commenced and duly prosecuted against his heirs, executors, or administrators, within a period of five years after his decease, or a copy or particular written statement of any *bond*, covenant, debt or demand, where the same is not payable within the said period of five years, shall be filed within the said period of five years in the office of the prothonotary of the county where the real estate to be charged is situated; and then to be a lien only for the period of five years after said bond, covenant debt, or demand becomes due."

Digitized by Google

itself to be, though contingent, is within the meaning of the law, notice of the existence of which ought to have been given by filing a copy thereof within five years, as specified in the statute.

There is nothing unreasonable in the construction contended for, because the knowledge of contingent liabilities is presumed to be with those who may have a prospective claim upon the estate of a deceased man, of which his heirs and also purchasers may be entirely ignorant.

We have not overlooked the argument of counsel, based upon the fact that this suit is in the name of the Commonwealth, and therefore cannot be barred by any statute of limitations; that argument might be considered if the State had any beneficial interest in this suit, but when, in an official bond, the Commonwealth is simply the legal plaintiff, we will look at the rights of those who are the equitable, it is true, but also the real plaintiffs in the cause. If they are barred by the statute, the technical intervention of the Commonwealth cannot destroy the legal effect of her own statute.

Judgment for defendant on demurrer.

C. P. No. 3. Oct. 21, 1876.

Brooke v. Alexander, Bush & Atkinson.

Limited partnership—Insolvency—Creditors—Special partner—Act of March 21, 1836—Section 23, postponing special partner to creditors, can be invoked only by creditors themselves—In a suit by special partner against the firm to recover his contribution, the Act is no bar to judgment, notwithstanding creditors remain unpaid.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note made by defendants to the plaintiff. The affidavit of defence set forth that the late firm of Alexander, Bush & Atkinson was composed of the plaintiff, as special partner, and the defendants as general partners. The limited partnership was formed December 31, 1873, and was to continue for two years. In June, 1875, the partnership became insolvent, and the partners compromised with their creditors by giving notes. On September 23, 1875, they gave to plaintiff their notes, amounting to $12,660, in full settlement of his interest as special partner. He had contributed $20,000 to the capital. The notes given to their creditors they had met except one of about $1500, due September 15, 1876. To the special partner, on account of his notes, the defendants had paid $7700. When the note sued upon became due, defendants failed to meet it, being also unable to pay the instalments due their creditors.

The affidavit averred that under the law regulating limited partnerships, the plaintiff had no right to recover on this note until all the creditors of the partnership are first paid.

Walter J. Budd showed cause.

The Act of March 21, 1836, § 23 (Purd. Dig. 938, pl. 25), expressly provides that "in case of the insolvency or bankruptcy of the partnership, no special partner shall, *under any circumstance*, be *allowed to claim* as a creditor until the claims of all the other creditors of the partnership shall be satisfied."

F. Carroll Brewster, for the rule.

That Act protects the *creditors*, and if it is to be invoked against the plaintiff here, they must do it. The defendants have no defence to this note.

C. A. V.

Nov. 21, 1876. Rule absolute.

C. P. No. 4. Dec. 18.

Ledger Building Association v. Cook et ux.

Infant—Lunatic—Committee—Minority as a defence is a personal privilege, and as the committee of a lunatic is a personal representative, it may be made available by him.

Rule for a new trial.

This was an action of *scire facias* on a mortgage given by Henry C. Cook and Mary E. F. his wife, on the property of the wife. Judgment had been obtained in default of an appearance on two returns of *nihil*. It was afterwards discovered, under a commission *de lunatico inquirendo*, that the wife was lunatic; and her committee having caused himself to be substituted on the record, succeeded in having the judgment opened as to her, on the ground that Mrs. Cook, at the time of executing the mortgage, was a minor.

On the trial, before Briggs, J., the defendant offered to prove that Mary E. F. Cook, at the time of execution of the mortgage, was a minor. The plaintiff objected, on the ground that it was not competent for the committee of a lunatic to avoid the mortgage on the ground of minority, when the said lunatic before becoming *non compos mentis*, and after attaining full age, had never attempted to avoid the mortgage. Objection overruled and evidence admitted.

The plaintiff, on the trial, submitted *inter alia* the following points: (2) That if the jury find from the evidence that Mary E. F. Cook was not of full age when she executed the mortgage, that she became a lunatic after she attained the age of 21 years; and that, after she attained that age, and before she became a lunatic, she did nothing to avoid the mortgage, it is not competent for her committee to object to the validity of the mortgage on the ground that she was under the

Digitized by Google

age of 21 years at the time she executed it. *Refused.* (3) That if the jury believe from the evidence that Mary E. F. Cook, before she executed the mortgage, with a view to induce the plaintiff to loan the mortgage-money, made oath that she was of full age, and that she afterwards received the moneys of the plaintiff on the security of the mortgage, it is not competent for her committee to object to the validity of the mortgage on the ground that she was under the age of 21 years when she executed it. *Refused.*

There was a verdict for the defendant, Mary E. F. Cook.

G. W. Thorn (with whom was *John White*), for the rule.

J. A. Simpson, contra.

C. A. V.

Dec. 30. THE COURT. The question here is, can the committee of an infant lunatic plead the lunatic's infancy in avoidance of her mortgage made during infancy? It was ruled at the trial that he could.

It is held that the privilege of infancy is a personal privilege, of which the minor alone can take advantage (Kuns's Executors *v.* Young, 10 Casey, 62); or his personal representatives or privies in blood (Hussey *v* Hewett's Executors, 9 Mass. 100; Jefford's Adm'rs *v.* Ringgold, 6 Ala. 544). Surely the committee is a personal representative. The avoidance is pleaded in the lunatic's personal right, and it is held that actions for purposes of remedy merely, may be prosecuted and defended under the general authority of the committee. (Klohs *v.* Reifsnyder, 11 P. F. Smith, 243.)

Rule discharged.

Opinion by BRIGGS, J.

Orphans' Court.

Charlton's Estate. Nov. 22.

Husband and wife — Voluntary separation— Desertion—Act of May 4, 1855 —Husband, living apart from wife with her consent, may claim as distributee of her estate under the Intestate Act.

Sur exceptions to adjudication.

Upon the audit of the account of the administrator of Mary Ann Charlton, deceased, the following facts appeared: The decedent was originally married to one Bailey, by whom she had a daughter. After his death she lived and cohabited for a short time with Mr. Charlton, without being married, by whom she had a son. He then, at her request, left her, and went to live in Hollidaysburg, she giving him at the time $100. She resided in Philadelphia. Some years afterwards, in 1850, she went to Hollidaysburg and asked him to marry her, because her friends told her that unless he did "the boy would be no lawful heir." In pursuance of this request, he came to Philadelphia, and, a marriage ceremony having been performed, he lived with her about three months; and then, in 1851, returned to Hollidaysburg. With the exception of a visit to Philadelphia in 1873, when he saw the decedent and inquired about their son, he continued to reside apart from her in Hollidaysburg, and never contributed anything to her support.

Mrs. Charlton died in 1875, intestate, and Mr. Charlton now claimed his share of the personal estate of the decedent, under the intestate law. The auditing Judge disallowed this claim, holding that by the Act of May 4, 1855 (Purd. Dig. 1008, pl. 27), and its interpretation in Wilson *v.* Coursin (22 Sm. 306), his absence and neglect to provide for his wife's support deprived him of the right to claim any portion of her personal estate under the intestate law.

To this adjudication Mr. Charlton filed exceptions.

Pierce Archer, for the exceptant.

The Act of May 4, 1855 (*supra*), is unconstitutional, impairing the obligation of a contract of marriage.

Ayetsky *v.* Goery, 2 Brewster, 302.

H. T. Hepburn, contra.

That case was decided upon a question touching the realty, and is in direct conflict with the later decision of Wilson *v.* Coursin (22 Sm. 306).

THE COURT. We differ from the auditing Judge in thinking that the Act of May 4, 1855, excluded the exceptant from any share in the distribution of the estate of the decedent. There was apparently an amicable separation, and we fail to find any evidence of wilful neglect or cruelty. This should have been made to clearly appear, and in the absence of such proof Charlton must be admitted to share in the distribution.

Exceptions sustained. O'BRIEN, J., dissents.

[See Platt's Appeal, 2 WEEKLY NOTES, 501.]

Sudam's Estate. Dec. 18.

Jurisdiction of register, and Orphans' Court— Practice—Letters testamentary not revoked except on appeal from register.

Sur petition and citation to show cause why letters testamentary should not be revoked, and answer and plea thereto.

The petition filed by Wellington Sudam, surviving husband of Jane E. Sudam, the decedent

Digitized by Google

set forth that prior to and at the time of her death, which occurred in Philadelphia on February 4, 1876, her domicil was with the petitioner in Trenton, New Jersey, and that when she died she was merely visiting in Philadelphia; that the decedent was possessed of very little property in New Jersey, but that in Bucks County, Pennsylvania, she owned an estate of the value of $3000; that believing the decedent had died intestate, the register of wills of Bucks County, at the request of this petitioner, granted letters of administration to John M. Purdy; that on May 20, 1876, one John Dickson presented to the register of wills of Philadelphia County, a paper purporting to be the will of decedent, dated January 28, 1876, and letters testamentary were issued thereon to the said John Dickson, who was named therein as executor. The petition averred that under the 6th and 7th sections of the Act of March 15, 1832 (P. L. 135), the register of wills of Bucks County has exclusive jurisdiction of the probate of said alleged will, and prayed that the letters testamentary granted by the register of wills of Philadelphia, be revoked.

A citation having issued, the executor, John Dickson, and other interested parties filed answers, setting forth that the said will was duly made and proved, and that the decedent had not lived in Trenton since November, 1875, at which time she and her husband broke up housekeeping in Trenton.

On December 9, 1876, a plea to the jurisdiction of this Court was filed, averring that the granting of letters testamentary was a matter within the jurisdiction of the register of wills of Philadelphia County, from whose decision no appeal had been taken.

Titus, for the petitioner.

Grier, for respondents.

C. A. V.

January 6, 1877. THE COURT decreed "that the petition be dismissed, with leave to petitioner to appeal from the decision of the register of wills in admitting to probate the alleged last will and testament of said Jane E. Sudam, deceased."

[See Van Dyke's Estate, 1 WEEKLY NOTES, 171.]

O. C. **Brophy's Estate.** Dec. 30, 1876.

Practice before Examiner—Attachment for refusing to answer not granted until interlocutory report filed.

Sur petition for attachment.

A petition was filed in this case for a citation to show cause why an attachment against the widow of decedent should not issue for contempt in refusing to answer certain questions propounded to her before an examiner.

THE COURT. We think the proper way to proceed in this case is first for the examiner to file an interlocutory report reciting the questions which the widow refuses to answer and asking instruction from the Court. Petition refused.

Opinion by O'BRIEN, J.

[See Collins' Estate, 2 WEEKLY NOTES, 430; Hopple's Estate, *ante*, 79.]

O. C. **Loxley's Estate.** Oct. 16, 1876.

Will—Bequest, whether in joint tenancy or tenancy in common—Lapsed bequest—Act of March 31, 1812.

Sur exceptions to auditor's report.

Mary P. Loxley by her will bequeathed, *inter alia*, as follows:—

"Whereas I have given unto my friends John Yard Jr., and Charles Yard certain bequests . . . . I do therefore give, devise, and bequeath unto the said John Yard, Jr., and Charles Yard, all the City of Philadelphia loans of every description now standing in my name, amounting in all to the sum $116,300, or the equivalent of the same in money, should I dispose of the same or any part thereof during my lifetime," etc.

John Yard, Jr., died insolvent before the testatrix; Charles Yard survived. Upon the audit of the account of decedent's executors, the auditor reported that the legatees under this provision of the will were tenants in common of the bequest under the Act of March 31, 1812 (Purd. Dig. 815), and therefore that the share of John Yard, Jr., lapsed to the residuary estate. To this finding of the auditor exceptions were filed on behalf of the creditors of John Yard, Jr., and on behalf of the executor.

F. C. Brewster, for the excepting creditors.

Since the bequest was to tenants in common, one-half of it vested in John Yard, Jr., and upon his death, insolvent, belonged to his estate for the benefit of his creditors. The will took effect as to the joint tenancy from its date and the Act of 1812 affected the estate from the moment of its creation.

Longstreth, for the executor.

The whole bequest goes to the surviving joint tenant. It was a gift to John Yard, Jr., Charles Yard as partners in business, and was a unit in the mind of the testatrix. The bequest was to a class, "to my friends," and the members of the class living at the death of the testatrix, take the whole bequest to the class. In this case Charles Yard is the surviving member of the class.

G. W. Biddle and *E. S. Miller*, for the residuary legatees. Nothing ever vested in John Yard, Jr., as tenant in common, since the Acts preventing the lapse of legacies are only in favor of children. As to the claim in behalf of Charles Yard, as surviving joint tenant, Kennedy's Appeal (10 Sm. 511), and the Act of 1812 are conclusive.

Digitized by Google

Nov. 4, 1876. THE COURT. We fail to discover any error in the able and exhaustive report of the auditor, and are clearly of the opinion that the legacy to John Yard and Charles Yard, was to them individually as tenants in common; and that John Yard, Jr., having predeceased the testatrix, the legacy to him became lapsed and passed to the residuary legatees. The exceptions are therefore dismissed and the report confirmed.

Opinion by HANNA, J.

U. S. Circuit Court—Equity.

Oct. Sess. '76, 64. Jan. 6.

Centennial Board of Finance v. Joseph Patterson et al. and George Eyster, Assistant Treasurer of the United States.

Centennial Exhibition assets—Distribution of—Capital stock—Dividend—Profits—Rights of stockholders — Whether United States has priority—Acts of Congress providing for the Exhibition, and incorporating Centennial Board of Finance—Act of Feb. 16, 1876, *appropriating* $1,500,000—*Proviso for its return to the United States before any "dividend or percentage of the profits" shall be paid to the stockholders—Interpretation of—Capital stock to be first paid to stockholders.*

Hearing on bill and answers.

The bill in equity filed by the complainant, a corporation incorporated by Act of Congress, against Joseph Patterson *et al.*, citizens of Pennsylvania; John Gill, a citizen of New Jersey; the National State Bank of Camden, a corporation under the laws of New Jersey—stockholders in the corporation complainant—and the Assistant Treasurer of the United States at Philadelphia, set forth the following facts:—

By an Act of Congress of 3 March, 1871, entitled—

"An Act to provide for celebrating the One Hundredth Anniversary of American Independence, by holding an International Exhibition of Arts, Manufactures, and Products of the Soil and Mine, in the City of Philadelphia and State of Pennsylvania, in the year eighteen hundred and seventy-six,"

it was enacted that a commission should be appointed by the President of the United States, whose duty it should be to prepare and superintend the execution of a plan for holding an International Exhibition in Philadelphia. Provision was made for notice, by a proclamation of the President of the United States, to the diplomatic representatives of foreign nations, of the regulations that might be adopted by the commissioners, in order that the time and place of holding the exhibition, and the regulations therefor, might be published in their respective countries.

By a subseqnent Act of Congress of 1 June, 1872, entitled—

"An Act relative to the Centennial International Exhibition to be held in the City of Philadelphia, and State of Pennsylvania, in the year eighteen hundred seventy-six,"

certain persons, therein named, were created a body corporate, to be known by the name of The Centennial Board of Finance, with power to sue and be sued, etc., in the United States Courts. By this Act it was provided:—

"That the said corporation shall have authority, and is hereby empowered, to secure subscriptions of capital stock to an amount not exceeding ten million dollars, and to issue to the subscribers of said stock certificates therefor, under the corporate seal of said corporation. . . . The proceeds of said stock, together with the receipts from all other sources, shall be used by said corporation for the erection of suitable buildings, with their appropriate fixtures and appurtenances, and for all other expenditures required in carrying out the object of the said Act of Congress of 3 March, 1871, and which may be incident thereto."

By the tenth section it was provided:—

"That as soon as practicable after the said exhibition shall have been closed, it shall be the duty of said corporation to convert its property into cash, and, *after payment of all its liabilities, to divide its remaining assets among its stockholders pro rata, in full satisfaction and discharge of its capital stock.*"

By an Act of 16 February, 1876, it was provided that—

"The sum of one million five hundred thousand dollars, to complete the Centennial buildings and other preparations, be, and the same is hereby appropriated out of any moneys in the United States Treasury not otherwise appropriated, which shall be paid on the drafts of the President and Treasurer of the Centennial Board of Finance . . . . *Provided, that in the distribution of any moneys that may remain in the treasury of the Centennial Board of Finance, after the payment of its debts, as provided for by the tenth section of the Act of Congress approved June first, eighteen hundred and seventy-two, incorporating said Centennial Board of Finance, the appropriation hereinbefore made shall be paid in full into the Treasury of the United States, before any dividend or percentage of the profits shall be paid to the holders of the stock: Provided, also,* that the Government of the United States shall not, under any circumstances, be liable for any debt or obligation of the United States Centennial Commission or the Centennial Board of Finance, or any payment in addition to the foregoing sum."

"Section 2. That the money by this Act appropriated, shall be paid to the Treasurer of the Centennial Board of Finance, only after he and the President of the board shall have executed a bond in the sum of five hundred thousand dollars to the United States, with sufficient security, to be approved by the Secretary of the Treasury, for the safe keeping and faithful disbursement of the sum hereby appropriated."

Digitized by Google

The security as provided by this Act was duly entered, and the money appropriated paid to the Centennial Board of Finance as provided by this Act. The total amount of subscriptions received by the Centennial Board of Finance, and for which certificates of stock were issued, was about two million four hundred thousand dollars After payment of all the necessary and incidental expenses of conducting the Centennial Exhibition, which was held in Philadelphia from the 10th of May until the 10th of November, 1876, there remained for distribution, in the hands of the Centennial Board of Finance, about two million dollars. No *profits* had resulted from the exhibition, and the sum that remained for distribution was insufficient to repay the stockholders in full the amount subscribed by them, respectively.

The bill further averred that the Centennial Board of Finance, complainant, had no interest in the fund in controversy, or which remained in its hands for distribution; but that its stockholders insisted that the whole of the said sum of two millions of dollars remaining in the hands of the officers of the corporation after the close of the Exhibition and payment of its debts, as aforesaid, should be divided among its stockholders pro rata; while, on the other hand, the Assistant Treasurer of the United States insisted that the United States was entitled to the repayment of the amount appropriated by Congress, viz., the sum of one million five hundred thousand dollars, before anything was repaid to the stockholders.

The bill prayed that the Court would ascertain and decree the rights among themselves of the defendants, and that the defendants be ordered to interplead.

The State of New Jersey, and the International Exhibition Company, stockholders to a large amount, were allowed to intervene as parties defendant.

The answers of the various defendants admitted the averments of the bill, and asserted their several claims.

Wm. Henry Rawle and *B. Williamson*, for the stockholders, argued that the duties of the corporation in this matter were prescribed by the tenth section of the Act of 1872, *supra*. After payment of all its liabilities the corporation was bound to divide its remaining assets amongst its stockholders pro rata, in full satisfaction and discharge of its capital stock. The preamble to the Act of 16 February, 1876, had an important bearing upon the question at issue, and may properly be referred to in explanation of the meaning of the language of that Act, which was to be construed with reference to the Acts of 3 March, 1871, and of 1 June, 1872. It recites that the President of the United States, in compliance with the Joint Resolution of Congress, approved in June, 1874, had extended to foreign nations, in the name of the United States, an invitation to take part in the International Exhibition to be held at Philadelphia under the auspices of the Government, and that the nations so invited, to the number of thirty-eight, had accepted invitations, and had made extensive preparations to embrace the courtesy so extended to them, "thereby rendering proper arrangements for the coming ceremonies, on the part of the Government of the United States, a matter of honor and good faith;" and it would be impossible to suppose that by the succeeding language of that Act it was intended to repeal the requirements of the tenth section; that would certainly not be a matter of honor or of good faith, but a breach of the implied contract, entered into in the said tenth section, on the part of Congress.

[STRONG, J. "Does not the question come back after all to this—whether this was a gift or a loan; and, if it was intended to be a loan, might not Congress with propriety say that its loan should have a preference over payment to stockholders?"]

It could not be supposed that Congress intended, even though it had the power, to authorize a violation, by the directors of the company, of their duty to their stockholders under the original Act of incorporation, in agreeing to such a preference.

The Act of 1876 clearly means that, if, after the payment of all its liabilities by the corporation, there was a balance less than the amount of stock subscribed, which in this case was two millions four hundred thousand dollars — in other words, a deficiency of capital—the whole of the balance was to be divided pro rata among the stockholders. By the Act of 1872, if there was a surplus of profits, that is, if the amount to be distributed exceeded the amount subscribed, after the payment of the debts, the capital stock subscribed under the original Act would first have to be made good in full, and then the surplus divided pro rata; thus there would have been a full satisfaction and discharge of the capital stock. The meaning of the language of the Act of 1876 was, that after all the liabilities had been paid, and the capital stock restored to the subscribers, the United States should then be repaid its one million five hundred thousand dollars, before the payment of any profits or dividends to the stockholders. The meaning of the words "dividend or percentage of profits" was intended to designate an accrual over and above the whole principal.

Valentine (United States District Attorney), for the defendant, the Assistant United States Treasurer, argued, on behalf of the United States, that the appropriation by Congress had not been intended as a gift, otherwise the language of the proviso, which was to be construed by the Court,

Digitized by Google

would have no significance. If it had been the intention of Congress that the stockholders should be paid in full, as well as the creditors of the corporation, before the appropriation should be repaid, then there would have been an express exception to that effect. Why was it that it was expressly provided that the *debts* were to be repaid in full before the United States was to be repaid, while there was no such provision as to the repayment of the stockholders, if it was not intended by this to mark a difference between the two classes of claimants—the creditors and the stockholders. *Expressio unius est exclusio alterius.* The word "dividend" meant the whole sum to be distributed upon the final winding up. The meaning of the proviso was that, after the corporation had paid its debts, the appropriation made by the United States should be repaid in full before any part, or share, or percentage of profits should be paid to the holders of the stock. If this was not the meaning of the word "dividend," its use was tautological. All of the words must be given effect to. (United States *v.* Bassett, 2 Story, 389; Ogden *v.* Strong, 2 Paine, 584) By the tenth section of the Act of 1st June, 1872, after the close of the exhibition the corporation was first to pay all its liabilities before the division of its assets among its stockholders. This was certainly a liability, since provision had been made for its repayment. By the proviso to the Act of 1876, the corporation was required, "after the payment of its debts, as provided for by the tenth section" of the Act of 1872, to repay the appropriation of one million five hundred thousand, etc. But if it was intended that the stockholders should be repaid the amount of their subscription before the United States was repaid, the reference to the tenth section of the Act of 1st June, 1872, was inappropriate. It was true that the words "percentage of profits" rendered what otherwise would have been clear, somewhat obscure; but this expression meant the same as "dividend," and it was merely a repetition of the definition already given of that word. Besides, these words were not inappropriately applied when speaking of the pro rata distribution of the surplus money of the stockholders, which had been chiefly derived from the sale of tickets to the exhibition, and the sale of the buildings, etc., of the corporation after the close of the exhibition. All of the original funds had been consumed, and no part of the original funds subscribed remained to be distributed after the payment of debts. This fund might, after the payment of the debts of the corporation, be fairly spoken of as "profits." And see the eighth section of the Act of 1st June, 1872, which provided that the Board of Finance might borrow money, and secure the same amount by mortgage upon its property, and prospective income. The word "profits" was used in the proviso in the same sense as "income," in this section.

R. N. Willson, for the International Exhibition Company.

The Acts of Congress on this subject are *in pari materia*, and should be construed so as to make both operative, if possible. Adhering to the general rules for the construction of statutes, that words not ambiguous must be taken in their ordinary meaning, that the intention is to govern, and that a prior statute is not repealed by a subsequent general affirmative Act, unless the two relate to the same subject-matter, and are irreconcilable, there are no words in the Act of 1876 which either expressly, or by necessary implication, repeal the provisions of the Act of 1872 in favor of the stockholders. The word "dividend," when standing alone, and *à fortiori* in connection with the word "profits," and the phrase, "percentage of profits," signifies a division of *profits*, and not capital. If the word "dividend" is not to be regarded as limited and explained by the word "profits" in the expression "dividend or percentage of profits," then the expression "percentage of profits" is redundant and unnecessary. The language of the Act of 1876 compared with that of the 18th section of the Act of 1872 shows that the distribution in which the United States should get back the $1,500,000, was a distribution among the stockholders. If, then, it is admitted that the stockholders were to get something, what could they get if not a return of their capital stock?

Moreover, the entire language of the Act of 1876 is that of an appropriation, not of a loan. No obligation to repay was required from the Board of Finance; there is no indication that the United States intended to assume the position of a creditor; or that they could maintain a claim until all the creditors were paid in full.

The debates in Congress are of no value in the interpretation of the Act of 1876.

United States *v.* U. P. R. R. Co., 1 Otto, 72.

B. Williamson concluded the argument.

Jan. 19. THE COURT. This is a bill for an interpleader. The complainants have in hand the sum of about $2,000,000, of which they are trustees for distribution, and to which there are conflicting claims. The State of New Jersey, The International Exhibition Company, Joseph Patterson and numerous other private persons, are stockholders of the corporation created by the Act of Congress of June 1, 1872, under the name of the Centennial Board of Finance, and they claim that the whole fund should be distributed among the stockholders. On the other hand the United States, represented by the Assistant Treasurer, claim that, before any payment to the stockholders, the sum of $1,500,000 should be

Digitized by Google

paid into the United States Treasury. The case is a proper one for the adjudication of this Court. The parties litigant are before us, and they have answered the bill, asserting their claims. Though all the stockholders are not parties of record, they are all represented, and the United States has submitted the matter in dispute to our determination.

The rights of the contending parties grow out of several acts of Congress to which we shall refer. On the 3d of March, 1871, an Act passed, by the preamble of which it was declared that it behooved the people of the United States to celebrate, by appropriate ceremonies, the Centennial anniversary of the Declaration of Independence; and that it was fitting the completion of the first century of our national existence should be commemorated by an exhibition of the natural resources of the country and their development, and of its progress in those arts which benefit mankind in comparison with those of other nations; and that, as the exhibition should be a national celebration, in which the people of the whole country should participate, it should have the sanction of the Congress of the United States. It was, therefore, enacted that a commission, consisting of not more than one delegate from each State and Territory, should be appointed by the President of the United States, on the nomination of the Governors of the States and Territories respectively, whose duty it should be to prepare and superintend the execution of a plan for the holding of the exhibition in Philadelphia. The commission was also required to report to Congress a suitable date for opening and closing the exhibition, a schedule of appropriate ceremonies, a plan or plans of the buildings, a complete plan for the reception and classification of articles intended for exhibition, and the requisite custom house regulations for the introduction into the country of the articles from foreign countries intended for exhibition. Provision was also made for notice to the diplomatic representatives of foreign nations, and of the regulations that might be adopted by the commissioners, by a proclamation of the President, in order that the time and place of holding the exhibition, and the regulations therefor, might be published in their respective countries.

This act, though it declared the United States should not be liable for any expenses attending the exhibition, or by reason thereof, plainly recognized it as a national celebration, in which the whole country should participate, and gave to it the sanction of Congress (16 Stats. at Large, 470). It was followed by another Act, approved June 1, 1872 (17 Stats. 203), which, after premising that such provision should be made for procuring the requisite funds as would enable all the people of the United States to aid in the preparation and conduct of the exhibition and memorial celebration, created the complainants a body corporate, to be known as "The Centennial Board of Finance," and to continue to have corporate existence until the object for which it was formed should be accomplished. The corporators were taken from every State and Territory. A capital stock, not exceeding $10,000,000, divided into shares of $10 each, was authorized, and stock certificates, prepared by the Secretary of the Treasury, were directed to be issued to the subscribers for the stock. The proceeds of all such subscriptions were directed to be used for the expenditures required in carrying out the objects of the Act of March 3, 1871; and the corporation was empowered to borrow money, to issue bonds therefor, not in excess of its capital stock, and to secure the payment of the same, principal and interest, by mortgage upon its property and prospective income. By the tenth section it was enacted "that, as soon as practicable after the said exhibition shall have closed, it shall be the duty of said corporation to convert its property into cash, and, after the payment of all its liabilities, to divide its remaining assets among its stockholders, in full satisfaction and discharge of its capital stock;" and it was made the duty of the Centennial Commission to supervise the closing up of the affairs of the corporation, to audit its accounts, and to submit to the President a report of the financial results of the Centennial Exhibition.

Thus it plainly appears not only that the exhibition was a national one, set on foot and sanctioned by Congress, but that the Centennial Commission and the Centennial Board were made the agents of the Government in preparing and conducting it.

Under this legislation the corporation was authorized, and stock subscriptions, for which certificates were issued to the amount of about $2,400,000, were made, which are still outstanding. The subscriptions were made in reliance upon the provisions of the Act of Congress. The number of subscribers was very large, and they are scattered all over the United States, holding the stock in various amounts, from one share to ten thousand, the number held by the State of New Jersey.

Such had been the action of Congress, and such were the rights of stockholders when the Act of February 16, 1876, was enacted, out of which arises the controversy in this case. Its preamble is significant. After referring to the Act of March 3, 1871, and the Act of June 1, 1872; and after reciting that the President of the United States, in compliance with a joint resolution of Congress, approved June 5, 1874, had extended to foreign nations, in the name of the United States, an invitation to take part in the Inter-

Digitized by Google

national Exposition to be held in Philadelphia, under the auspices of the Government; and after reciting that the governments so invited, to the number of thirty-eight, had accepted the invitation, and were making extensive preparations to embrace the courtesy so extended to them, "thereby rendering proper arrangements for the coming ceremonies, on the part of the Government of the United States, a matter of honor and good faith;" the preamble asserted that the preparations designed by the United States Centennial Commission, and in part executed by the Centennial Board of Finance, were in accordance with the spirit of the Acts of Congress relating thereto, and on a scale creditable to the Government and people of the United States. It was, therefore, enacted as follows: "That the sum of $1,500,000 to complete the Centennial Buildings and other preparations be, and the same is hereby appropriated out of any moneys in the United States Treasury not otherwise appropriated, which shall be paid on the drafts of the president and treasurer of the Centennial Board of Finance, one-third immediately after the passage of this Act, and the remainder in four equal monthly payments; provided, that, in the distribution of any moneys that may remain in the treasury of the Centennial Board of Finance, after the payment of its debts, as provided for by the tenth section of the Act of Congress approved June 1, 1872, incorporating said Centennial Board of Finance, the appropriation herein before made shall be paid in full into the Treasury of the United States before any dividend or percentage of the profits shall be paid to the holders of said stock; provided, also, that the Government of the United States shall not, under any circumstances, be liable for any debt or obligation of the United States Centennial Commission, or the Centennial Board of Finance, or any payment *in addition to the foregoing sum.*"

The appropriation was avowedly made to complete the necessary preparations for a celebration and exhibition, which Congress had declared national, and under its sanction, in which other nations had been invited by the Government to join, and the proper arrangements for which the preamble to the Act declared to be a matter of honor and good faith on the part of the Government of the United States. It was, therefore, meeting at least an honorable obligation, and that it was so considered may be inferred from the closing words of the section, which declared the United States should not be liable for any obligation or payment "in addition to the sum" appropriated.

A careful inspection of this Act, under which alone the United States asserts a claim to any portion of the funds in the hands of complainants, makes it evident that Congress did not intend thereby to create the relation of debtor and creditor between the Centennial Board of Finance and the United States. The language used is the ordinary language of an appropriation, not of a loan. No evidences of debt were required from the Board. Bonds were not exacted for the return of the money, though by the Act of 1872 the Board was empowered to borrow money and give bonds therefor, and though the president of the Board was required, by the second section of this Act, to execute a bond with sufficient security in the sum of five hundred thousand dollars, conditioned for the safe keeping and faithful disbursement of the sum appropriated. Were it not for the proviso relative to the distribution of any moneys that might remain in the treasury of the Board, or (as they are called in the Act of 1872) "remaining assets," after the payment of all its liabilities, there could be no pretence that the Act was anything more than a mere appropriation demanded by the honor and good faith of the Government. But even the proviso repels the idea that the Board became a debtor by receiving the sum appropriated. It reserves no right to the United States until the debts of the Board shall have been paid. It is only "after the payment of its debts," not after the payment of its *other* debts, but after all its debts shall have been satisfied, that any payment into the treasury of the United States is required to be made. If the appropriation was intended to be a loan merely, it created a debt, and was demandable as such, without adding the words, "after payment of its debts." It would be an absurd meaning to attribute to Congress that they intended to say that after the payment of its debts the Board shall pay another one of its debts. And if it had been intended the Board should be a debtor for the amount of the appropriation, but that its payment should be postponed till the other debts were paid, the language used would have been, "after its other debts are discharged," or words equivalent. It seems plain, therefore, even from the reading of the proviso, that it was not the purpose of Congress to assume for the Government the position of a creditor. That was carefully avoided. Congress had in view the fact that at the close of the Exhibition, its agent, the corporation, would wind up, and, after paying its debts, would distribute its remaining assets, and the proviso reserves nothing more than a right to be a possible distributee of a portion of those assets. It was not known how large they would be; whether they would suffice to repay what the stockholders had paid in, and profits on their investment, or not. It may have been supposed the Exhibition would yield profits on the investment.

If then the appropriation was not intended to have the character of a loan, creating a debt of the Board, and to be paid as a debt, the stock-

Digitized by Google

holders who subscribed for the stock have, by the 10th section of the Act of 1876, a clear right to the "remaining assets," at least to the extent of their capital invested. The section enacted, as we have seen, that after the close of the Exhibition, it should be the duty of the Board to convert its property into cash, and after the payment of all its liabilities (or debts, as they are called in the Act of 1876), to divide its remaining assets *pro rata* among its stockholders, in full satisfaction and discharge of its capital stock. The stockholders were thus entitled to a satisfaction of their stock out of whatever assets remained after the payment of the debts of the corporation. It is not to be assumed that Congress intended to take away those rights without the consent of the stockholders. The directors of the corporation could not bargain them away. And there are no words of repeal in the later Act; nor is there any necessary implication of an intent to repeal. The proviso, therefore, must receive a construction consistent, so far as possible, with the provisions of the Act of 1872. Its direction is that after the payment of the debts of the Centennial Board the appropriation shall be paid in full, into the Treasury of the United States, before any "dividend or percentage of the *profits* shall be paid to the holders of the stock." What is here meant by "dividend or percentage of profits"? It is observable that in all the legislation respecting the Centennial Exhibition, the word "profits" here first appears. In the Act of 1872, the residue after payment of the liabilities was called "remaining assets," and in a former part of this Act it was called "moneys that remain." But when the fund is mentioned, to which the United States may resort, in case there is such a fund, it is called profits. The phraseology is changed, and with it, we think, the meaning. So far as the United States has rights as a distributee, the subject for distribution is "profits," not "remaining assets," not capital. Before any dividend or percentage or proportion of the profits may be paid to the stockholders, the appropriation must be paid into the United States Treasury. If there are no profits, the Government has no claim. Now, what are the profits of a corporation that has a capital stock? Very plainly only what has been gained beyond the stock. They are always acquisitions beyond the investment or expenditures. Nobody would think a tax on the profits of a bank or an insurance company, or, indeed, of any corporation, was a tax on its capital or a tax on its entire property, if that property had been converted into cash in the process of winding up. Congress, in the proviso, is speaking of the profits of a corporation, and it is to them, and them only, it sets up a claim. But in this case there were no profits. The assets remaining after the payment of debts, and now for distribution, are only remnants of the capital, and insufficient to return what the stockholders paid in.

We think the word "dividend," as well as the word percentage, points to profits and not to capital. They are synonyms, as here employed. That the word dividend is sometimes used to describe a distribution of capital may be admitted, but such a use is abnormal. It is more commonly used to denote a division of profits, and very evidently it was so employed in this proviso. It was not said dividend unqualifiedly, or dividend of the remaining assets, or dividend of moneys that remain after payment of debts, but it was used in connection with profits; "dividend or percentage of the profits"—that is, as we understand the phrase, dividend, portion, or percentage of the profits. If it was intended to embrace a division of all the moneys remaining in the treasury of the Board, why were the words "or percentage of the profits" added? If the amount appropriated was meant to be paid before the stockholders could get anything, those added words were totally unnecessary and unmeaning. The introduction of the word profits could have had no other object than to designate the subject of the dividend or percentage. If it was intended to give the United States a prior claim on the entire remaining assets, it would have been sufficient to have said before any dividend or division shall be made among the stockholders—and we are not at liberty to say the added words have no meaning.

For these reasons we are of opinion that the fund in the treasury of the Centennial Board of Finance should be distributed *pro rata* among the stockholders of the corporation, as directed by the 10th section of the Act of 1872, and, as it is insufficient to pay the stockholders the full amount invested by them as stockholders, as no part of it is made up of profits, the case contemplated in the proviso has not arisen, and the United States is entitled to no part of the fund.

The following decree was entered:—

"Circuit Court of the United States, etc. The Centennial Board of Finance *v.* Patterson et al. And now, this 19th day of January, 1877, this case having been heard upon the bill and answers, and having been argued by counsel; whereupon, in consideration thereof, it is ordered and decreed that the complainants do pay and distribute the fund in their hands to and among the several and respective stockholders of the complainant, pro rata, according to the true intent and meaning of the Act of Congress, approved the 16th day of February, 1876, and it appearing that the said fund is insufficient to pay to the said stockholders the full amount invested by them, it is ordered that no part of the said fund be paid into the Treasury of the United States.

"And it is further ordered that upon such payment and distribution among the said stockholders being made, the complainant do stand discharged of and from all liability in the premises.

"And it is further ordered that the costs in this cause be paid out of the said fund."

Opinion by STRONG, J.

[On Jan. 30, 1877, an appeal to the Supreme Court of the United States was allowed.]

Digitized by Google

Weekly Notes of Cases.

VOL. III.] THURSDAY, FEB. 8, 1877. [No. 19.

Supreme Court.

Jan. '77, 48. Jan. 9.

Lippincott v. Whitman et al.

Evidence—Parol evidence to affect written instrument—Admissible in all cases where equity would reform instrument—Admissible to show a parol agreement by which a party was induced to execute a written contract—Such written contract, though under seal, may be contradicted by evidence of a parol contemporaneous agreement.

Parol evidence is admissible to vary the terms of a written instrument (other than commercial paper) by showing that its execution was procured upon the express agreement that its terms should not be enforced but should be qualified in accordance with a previous and contemporaneous parol agreement of the parties.

It is not necessary in order to pave the way for the admission of such evidence to show that the party procuring the writing was actuated by a fraudulent intent at the time of its execution; it is sufficient if he afterwards seeks to procure an unfair advantage by denying the parol qualification.

In a suit upon a mortgage, payable *one year* after date, the affidavit of defence averred that the understanding and agreement, at the time of the transaction, was, that the mortgage should be payable in *three years;* that defendant, finding it was drawn payable in one year, remonstrated about it, but finally executed and delivered it upon the plaintiff's assurance and agreement that "it should be considered as for three years, and would not be enforced before the expiration of that time." The Court having entered judgment for plaintiff, for want of a sufficient affidavit of defence:

Held (reversing the judgment of the Court below), that the facts set forth in the affidavit constituted a sufficient defence, and the defendant should have been afforded an opportunity to prove them before a jury.

PER PAXSON, J. "It may be that parol evidence in such cases is of a dangerous character. We may concede it to be so. But the rule in this State is too well settled to be disturbed."

The cases in Pennsylvania reviewed and distinguished.

Error to Common Pleas No. 2, of Philadelphia County.

Scire facias sur mortgage, by William E. Whitman and Daniel Steinmetz, executors, etc., against Mary Ann Lippincott. The mortgage sued on was dated Sept. 22, 1874, and was drawn payable in one year. This suit was brought Sept. 16, 1876.

The affidavit of defence averred as follows:—

"No interest was paid or due at the suing out of the *scire facias* in the above case, as the same was paid in full to the 23d March, 1876, as receipted for. Neither were there any taxes due upon it so unpaid. And, further this deponent says, that at the time of the purchase of the Union Street house, in which she resides, from the said plaintiffs, the mortgage now sued upon was given by her and received by them in part payment thereof, and *with the express understanding and agreement* that the same should be drawn payable in *three years* from its date. Deponent discovered that the mortgage was drawn up for one year instead of three years, and she then remonstrated with them about it, and *they assured her, and agreed, upon her so signing it,* that it should be *considered as for three years,* and would not be enforced before the expiration of the three years' time. Upon this agreement only did deponent consent to sign the same, otherwise she would not have done it. She therefore asks the protection of the Court against this premature foreclosure."

The Court below entered judgment, for want of a sufficient affidavit of defence, for $2112 (reported *ante*, p. 94). The defendant took this writ, assigning for error the action of the Court in entering judgment.

Aaron Thompson, for plaintiff in error.

It is the settled law of Pennsylvania that parol evidence may be given to show what passed at the time of the execution of a writing, *e. g.* that it was executed by the party in consequence of the fraudulent inducements and false promises held out by the other.

Miller *v.* Henderson, 10 S. & R. 290.
Hain *v.* Kalbach, 14 S. & R. 159.
Rearich *v.* Swinehart, 1 Jones, 233.
Green *v.* North Buffalo, 6 Sm. 110.
Schuylkill Co. *v.* Copley, 17 Sm. 386.
Shughart *v.* Moore, 28 Sm. 469; 1 WEEKLY NOTES, 498.

The plaintiff in error should, at least, be allowed to go before a jury; and it is a fraud on the part of defendants in error to seek to free themselves from the obligation of an agreement which was the inducing motive to the final giving and execution of the mortgage.

Dallas Sanders, contra.

Can the defendant below, by her parol testimony, directly contradict a written instrument, duly signed, sealed, and acknowledged by her, and this in the absence of any allegation of fraud, accident, or mistake? This would be taking a step in advance of any position heretofore assumed by this Court in regard to the admission of parol evidence to affect a written or sealed instrument. In view of the Act of 1869, permitting interested parties to testify, such a ruling would be productive of many and great evils.

Digitized by Google

In the cases cited by the other side there was either no contradiction of the writing, or actual fraud had been proved; while the cases of Fulton v. Hood (10 Casey, 365), Anspach v. Bast (2 Sm. 356), followed by Hacker v. Oil Refining Co. (23 Sm. 93), and Wharton v. Douglass (26 Sm. 273), abundantly show that the evidence of fraud must be clear, precise, and indubitable to permit the introduction of parol testimony directly contradicting a written instrument. No such fraud is even alleged in this case. See also—

R. R. Co. v. Shay, 3 WEEKLY NOTES, 45.

Jan. 15, 1877. THE COURT. The rule is well settled in Pennsylvania, that, where equity would reform or set aside a written instrument on the ground of fraud, accident, or mistake, parol evidence is admissible to contradict or vary the terms of the agreement as written. (Christ v. Diffenbach, 1 S. & R. 464; Iddings v. Iddings, 7 Id. 111; Miller v. Henderson, 10 Id. 290; Parke v. Chadwick, 8 W. & S. 96; Clark v. Partridge, 2 Barr, 13; Renshaw v. Gans, 7 Id. 117; Rearich v. Swinehart, 1 Jones, 233; Martin v. Berens, 17 P. F. Sm. 459; Kostenbader v. Peters, 2 WEEKLY NOTES, 531.) An exception to the rule exists in the case of commercial paper, which, for reasons of public policy, cannot be impeached in this way.

The judgment in this case was entered for want of a sufficient affidavit of defence. The plaintiff in error avers in said affidavit that the mortgage sued upon was given by her with the express understanding and agreement that it should be drawn payable three years from date; that she discovered that said mortgage was drawn payable in one year instead of three years. That she remonstrated with the defendants in error about it, and they assured her, and agreed upon her signing it that it should be considered as for three years, and would not be enforced before the expiration of that time; that upon this agreement only did she consent to sign the mortgage, and that without it she would not have done so. The defendants in error foreclose the mortgage at the end of a year. No interest was owing and unpaid at that time.

If the facts be as stated in the affidavit of defence—and, for the purposes of this case, we are bound to presume them to be so—it was a fraud upon the plaintiff to foreclose the mortgage at the end of a year; it was an abuse of the instrument that brings the case within the rulings in Renshaw v. Gans and Rearich v. Swinehart (*supra*). It was said in Renshaw v. Gans by Mr. Justice BELL, that, "in order to pave the way for the reception of oral declarations, it is not necessary to prove a party was actuated by a fraudulent intention at the time of the execution of the writing. His original object may have been honest and upright, but, if to procure an unfair advantage to himself, he subsequently deny the parol qualification of the written contract, it is such a fraud as will, under the rules, operate to let in evidence of the real intent and final conclusion of the contractors." So in Rearich v. Swinehart, it was said, "a legal delinquency attaches upon an attempted abuse of the writing sufficient to subject it to the influence of oral evidence." The case of Fulton v. Hood (10 Casey, 365) was cited as in opposition to this view. We do not so understand it. It is true, parol evidence was rejected in that case to show that the warrant of attorney was not to be entered up for ten years except upon a certain contingency, and that it had been entered up in violation of said agreement. But there was no offer to show that the bond was signed upon the faith of such agreement, and that it could not have been signed without. The parties were not misled. It was said by Mr. Justice STRONG, who delivered the opinion of the Court in Fulton v. Hood, that the doctrine of Renshaw v. Gans and Rearich v. Swinehart was inapplicable to that case. It is applicable here. The plaintiff in error swears distinctly that she refused to sign the mortgage until she was assured that it would be considered as for three years, and that without such agreement she would not have executed it. In view of this agreement it needs no argument to show that it was an abuse of the mortgage to use it for the purpose of selling the mortgaged premises at the expiration of a year. The abuse is shown by the premature foreclosure, and even under the views expressed by Mr. Justice STRONG in Fulton v. Hood would let in the parol evidence referred to. The plaintiff may have seen her way clear to pay the mortgage debt at the expiration of three years. It may be ruin to her to have it foreclosed at the end of one year. We think she was entitled to have her case passed upon by a jury, and that it was error to enter a judgment against her for want of a sufficient affidavit of defence.

It may be that parol evidence in such cases is of a dangerous character. We may concede it to be so. But the rule in this State is too well settled to be disturbed. On the other hand, it is in the experience of every lawyer that if we were to adopt, as an inflexible rule, the principle that when a man once puts his hand to a written instrument the terms thereof cannot, under any circumstances, be modified or contradicted, it would lead to consequences of a most serious character. Instead of being a shield against fraud it would be its efficient and sure protection.

Neither view of the case is entirely free from difficulty. The rule adopted in this State seems to be the lesser of two evils, and because it is so, and because it has become established by a line of authority, we prefer to adhere to it.

Digitized by Google

The judgment is reversed, and a *procedendo* awarded.

Opinion by PAXSON, J. WILLIAMS, J., absent.

[See Caley *v.* R. R. Co., 2 WEEKLY NOTES, 313.]

Jan, '76, 27. June 6.

Quigley et al. v. DeHaas.

Principal and agent—Individual liability of agent contracting under his hand and seal—Contract—Whether entire or several a question of intention—Arbiter named in—Decision of, necessary to maintain action.

An agent of a corporation who enters into a contract under his hand and seal is individually liable thereon, although he is named as agent and the contract is expressly made for the benefit of the corporation.

The rule adopted in Lucesco Oil Co. *v.* Brewer (16 Sm. 31), that where the part of a contract to be performed by one of the parties consists of several and distinct items, and the price to be paid by the other is apportioned to each item, the contract is severable, does not apply when it clearly appears from the face of the contract that the parties intended it to be entire.

Where a contract names a person as arbiter to determine whether work therein contracted for is done in accordance with its provisions, a decision of such arbiter is an indispensable requisite to an action for the price of the work unless such decision is rendered by circumstances impossible, or is waived by the parties.

Error to the Common Pleas of Clinton Co.

Covenant by John P. DeHaas against A. J. Quigley and J. H. Bailey to recover a balance alleged to be due to the plaintiff under the following agreement:—

Agreement made and concluded this twenty-third day of August, A. D. 1871, by and between Joseph H. Bailey and A. J. Quigley, representing the Clinton and Potter County Navigation Co., of the first part, and John P. DeHaas of Curtin Township, Centre County, Pa., of the second part, as follows: Witnesseth that the aforesaid Bailey and Quigley, agents for said Navigation Co., agree to pay the afore-mentioned John DeHaas four thousand dollars and fifty-hundredths, in manner and form hereinafter described, in consideration that the said DeHaas fully execute and perform, according to contract, the following work, viz:—

(Here follows an agreement on the part of DeHaas to build two flood dams on Young-woman's Creek, to put a new chute in an old dam and to clean out, crib up, and straighten said creek. The agreement then proceeds as follows:)

And it is also agreed on the part of the said Bailey & Quigley, that they will pay the said DeHaas at the rate of fourteen hundred dollars for each dam, one thousand dollars for cleaning out and cribbing up the creek, and two hundred dollars for the chute in old dam, and in addition fifty dollars for travelling expenses. Out of all the above-estimated costs of each of the respective divisions of work they shall be privileged to retain fifteen per cent. until the whole is completed in a satisfactory manner according to contract.

(Here follows a provision as to the construction of the drop gates and the chute in the old dam, and the agreement then concludes as follows:)

The above work to be paid for as the work progresses from time to time. It is also agreed that John M. Mason shall be the judge of whether the work is done according to contract.

In witness whereof we have hereunto set our hands and seals this day and year above-mentioned.

A. J. QUIGLEY [SEAL.]
J. H. BAILEY [SEAL.]
J. P. DEHAAS [SEAL.]

Pleas, *non est factum*, covenants performed, *absque hoc.*

On the trial of the case plaintiff offered the above agreement in evidence. Defendants objected, because it described the defendants as agents, while they were sued as individuals. Objection overruled; exception.

Plaintiff then gave evidence to show the performance of the contract on his part. He also gave evidence (under objection from defendants) that while the work was progressing and when it was nearly completed Mason, the arbiter named in the agreement, visited it in company with Mr. Bailey; that Bailey expressed his disapproval of certain portions of the work, and that Mason advised plaintiff to do whatever Bailey wanted done and gave certain directions as to the performance of the work which directions were afterwards complied with. Mason was present at the trial, but was not called by either party.

Defendants offered to prove that in making the contract they acted only as agents for the Clinton and Potter County Navigation Company, and that this fact was explained to plaintiff at the time the contract was made. Offer overruled; exception. Defendants then gave evidence to show that the work was not done in accordance with the terms of the contract, and they also proved payments on account of the work to the amount of $2612.00.

At the conclusion of the testimony defendants presented certain points, which with the answers of the Court thereto were as follows:—

(1) That the agreement of the 23d August, 1871, in evidence does not in law impose an individual or personal liability or obligation upon the defendants, and that upon said agreements the plaintiff is not entitled to recover against the defendants. *Refused.*

(2) That John S. Mason being the person named in the agreement by the parties, who is to judge whether the work was done according to contract, the plaintiff is bound by the terms of the said contract, and not having shown or proved an award or decision of said judge, or in any manner accounted for his failure to do so, or that the judgment of said John S. Mason was ever sought, refused or obtained, the plaintiff is not entitled to recover, and the verdict of the jury should be for the defendants.

(3) That John S. Mason having been chosen by the parties as judge whether the work referred

Digitized by Google

to in the contract was done according to contract, there can be no recovery by plaintiff until he has proved by said John S. Mason that he performed his contract full and entire according to the terms thereof. And inasmuch as said John S. Mason was in attendance upon Court during the trial of the cause and was not called as a witness for the plaintiff to prove performance, the plaintiff has failed to make out such a case as would entitle him to recover, and the verdict of the jury should be for the defendants.

These two points were answered together thus: By the terms of the contract between the plaintiff and defendants, John S. Mason was chosen to judge whether the work was done according to contract, and if the evidence does not show that in the judgment of Mason the work was done in accordance with the stipulations of the agreement, the plaintiff is not entitled to recover; but if the jury should believe the testimony of DeHaas that Mason went upon the work, made an examination of what had been done under the contract, gave directions as to what was yet necessary to be done to make the work satisfactory, we are of the opinion that the requisitions of the contract have been satisfied, and that the plaintiff is entitled to recover whatever may be due to him under the contract, if the evidence shows that DeHaas went on in good faith and completed what Mason directed should be done in order to make the work satisfactory.

The Court also charged the jury as follows:—

"It is contended by the plaintiff that this is not an entire, but a severable contract, and that the plaintiff is entitled to recover the price specified in the agreement for each item of work, if the evidence should satisfy the jury that plaintiff has fully performed that item of work in accordance with the terms of the contract. A careful consideration of the agreement between the parties leads us to the conclusion that this is not an entire but a severable contract, for the reason that the work to be done by the plaintiff under the agreement consists of several and distinct items, and the price to be paid by defendants is apportioned to each item of work. . . . This being our construction of this agreement, we say to the jury that DeHaas is entitled to recover the price stipulated to be paid for each of these several items of work, if the evidence satisfies the jury that he has fully performed and completed these several items of work in accordance with the terms of the contract."

Verdict and judgment for the plaintiff $1001.41. Defendants took this writ, assigning for error the rulings of the Court upon the questions of evidence excepted to, the refusal of the Court to affirm defendants' points, and so much of the charge of the Court as is above set forth.

C. S. McCormick, for plaintiffs in error. A decision by Mason, the arbiter named in the contract, that the work had been properly done, was a *sine qua non* to a recovery by the plaintiff.

Monongahela Navigation Co. *v.* Fenlon, 4 W. & S. 205.

Herdic *v.* Bilger, 11 Wr. 60.

Secondary evidence of declarations made by Mason, pending the work, is inadmissible as a proof of his decision. Such a decision should have been proved by Mason, who was present during the trial.

The covenants sued on were not the individual covenants of Quigley and Bailey. The intent of the parties as gathered from the instrument is to be considered rather than the manner of its execution. Where the contract expresses explicitly, as it does here, that the parties are acting merely as agents, they are not personally bound.

Campbell *v.* Baker, 2 Watts, 83.

Dunn *v.* Rector, 14 Johns. 1:8.

The contract was not severable. Its entirety is to be determined by the interest of the parties, not by the divisibility of the subject. (Shinn *v.* Bodine, 10 Sm. 185.) While the severable nature may assist in determining the intention it can never overcome the intent to make an entire contract when that is shown. The intention as gathered from the present contract is plainly that it is entire. The work must all have been done before any part of it could have been of any use to the defendants, and it could not have been intended that plantiff could, after performing part only of the work, stop operations and recover for the part done. The estimate of the cost of each item was merely for the purpose of arriving at the amount of money to be paid from time to time and the amount to be retained as the work progressed.

W. C. Kress and *S. D. Ball*, contra.

The defendants, although described in the contract as acting for and on behalf of their principal, expressly covenant under their individual seals *that they will pay the said De Haas at the rate, etc. etc.* Therefore, under Hopkins *v.* Mehaffy (11 S. & R. 126), they are individually liable.

Campbell *v.* Baker, and Dunn *v.* Rector, etc., cited by plaintiffs, are not in point, as the writings in those cases were not under seal.

The evidence discloses that Mason, when the work was nearly completed, visited the stream and gave directions with Bailey in regard to the work. These directions are shown to have been complied with and the work was then completed to Mason's satisfaction. Mason was not a judge to whom were to be submitted all disputes, but his judgment was fixed as a standard by which the work was to be estimated. His award was not required to be in writing, and it was competent for plaintiff to show by testimony that the work had been done to his satisfaction. The

Digitized by Google

contract is severable. This appears conclusively when viewed by the criterion established in Lucesco Oil Co. *v.* Brewer (16 Sm. 351), that where the part to be performed by one party consists of several distinct items, and the price to be paid by the other is apportioned to each item to performed, or is left to be implied by law, the contract is generally severable.

Oct. 9, 1876. THE COURT. This action was well brought against Quigley and Bailey. Though they contract as agents, for the benefit of the Navigation Company, yet they do so under their own individual seals, and thence become individually liable. (Hopkins *v.* Mehaffy, 11 S. & R. 128, per GIBSON, J.) So far we agree with the learned Judge below, but from his construction of the the contract we must dissent. Whether a contract be entire or severable depends more on the intention of the parties, as gathered from the whole instrument, than upon the specific method of performance or payment. We have, in the case of Carmalt *v.* Platt (7 Watts, 318), an instance of this manner of construction. By the terms of the contract, Platt agreed, from the lands therein described, to manufacture and deliver, to Carmalt, 60,000 feet of white pine boards, for which he was to receive $300. In a subsequent covenant, in the same agreement, Carmalt agreed to sell to Platt certain lands for which Platt was to pay $525, in lumber, at customary prices. At first blush this would appear to be a severable contract; but it was held not to be so. For though, by a strict construction of its terms, it might well bear such an interpretation, yet as it was apparent that it would not have been executed by the parties except as an entire contract, it was held to be entire. The rule, as adopted, in the case of the Lucesco Oil Co. *v.* Brewer (16 Sm. 31), from Parsons on Contracts, that if the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such contract will generally be held to be severable, is certainly applicable to contracts such as that which was under consideration in that case. But it is not even intimated that the circumstances therein stated would override the clear intention of the parties if such intention were apparent from the whole face of the agreement. Indeed it is expressly said by the author, by whom the above rule is stated, that no precise rule can be given by which this question, in a given case may be settled, but, like most other questions of construction, it must depend upon the intention of the parties as gathered from the whole subject matter of the contract. (2 Par. on Cont. 517). In any view, this contract must be taken as entire. It was designed to accomplish a single object, to wit, the navigability of the stream therein mentioned. It was one job, though made up of several items; there was one price, though, for convenience, because the work was to be paid for as it progressed, it was apportioned to the several items. Even this apportionment must be taken as inseparable from the whole work, for it was more than probable that, for instance, the price of fourteen hundred dollars for building each dam, was a value put upon such dams as part of the whole job, rather than as separate isolated items; for the dams would be worth little or nothing with the remainder of the creek unimproved.

The parties themselves have, however, put this matter beyond doubt by the following clause in their agreement, to wit: "Out of all the above estimated costs of each of the respective divisions of work, Quigley and Bailey should be privileged to retain fifteen *per centum* until *the whole* is completed, in a satisfactory manner, according to contract." That this provision was designed to secure the proper completion of the whole work is not open to doubt, and if the plaintiff is permitted to recover full price for a partial performance, it is certain that this covenant is, in effect, abrogated.

We conclude, therefore, that the Court below was wrong in holding the subject matter of this contract to be severable. We think also that the Court erred in refusing the defendants' 2d and 3d points. By the contract John M. Mason was the arbiter who was to determine whether the work was done according to the provisions of that contract. This provision was a reasonable one, designed to prevent controversy, and until the plaintiff procured the judgment of this arbiter, he had no action. The cases of the Monongahela Nav. Co. *v.* Fenlon (4 W. & S. 205), and Reynolds *v.* Caldwell (1 Sm. 298), certainly do hold that, in a case like that above stated, the decision of the arbiter is a *sine qua non* to an action for the price of the work. We find nothing in the evidence which goes to show that Mason, as arbiter, pronounced upon plaintiff's work, or upon any part of it, as a finished job. At best Mason did but advise DeHaas to do certain things which Bailey required to be done, but whether they met his approval when done we are not informed.

We do not say that the plaintiff might not have been excused from producing this judgment or decision by showing circumstances which rendered its production impossible, such as the death or absence of the arbiter or his refusal to act, or that the defendants by the acceptance of the work, or otherwise, waived that part of the contract. But in the absence of such showing the rule as above stated holds good.

Judgment reversed and *venire facias de novo* awarded.

Opinion by GORDON, J. SHARSWOOD and WILLIAMS, JJ., absent.

Digitized by Google

Oct. and Nov. '76, '53, and '54. Oct. 11.

Rowand v. The Commonwealth.

Criminal Procedure—Powers of the District Attorney—Act of May 3, 1850—When bills of indictment may be preferred before the Grand Jury without a preliminary hearing or previous commitment of the accused—Indictment, after a previous indictment for the same offence has been ignored.

The District Attorney under the powers of the deputy Attorney General, conferred upon him by the Act of May 3d, 1850 (P. L. 654), may prefer an indictment before the grand jury without a preliminary hearing or previous commitment of the accused, and this even after a return of *ignoramus* to a previous indictment of the accused for the same offence; but this power is to be exercised under the supervision of the proper Court of criminal jurisdiction, and its employment can only be justified by some pressing and adequate necessity.

Where the exercise of such power by the District Attorney has been approved by the Court of Quarter Sessions, it will not be reviewed by the Supreme Court.

R. was held to bail upon two informations charging assault and battery, and indictments thereon were preferred against him before the grand jury at June Term, which were returned *ignoramus* with direction that the county should pay the costs. At September Term indictments upon the same informations were sent up to the next grand jury and true bills were found in each case. At the trial the Court refused a motion to quash these indictments, and the accused was tried and found guilty.

Held (affirming the judgment of the Court below), that the action of the Court of Quarter Sessions in refusing to quash the indictment would not be reviewed.

Per Woodward, J. When a defendant has once been discharged on a return of *ignoramus*, a new bill sent up without a fresh hearing, and without the leave of the Court, should be promptly quashed in the absence of affirmative proof that the course taken was required to meet some grave emergency. In the present instance it must be assumed that the Court of Quarter Sessions have approved the action of the District Attorney, and this Court is powerless to interfere.

Error to the Quarter Sessions of Allegheny County.

A. H. Rowand, Jr., was held to bail upon two informations to the June Session, 1875, of the Court of Quarter Sessions upon charges of aggravated assault and battery, and assault and battery on one John Clark. The grand jury returned *ignoramus* to the bills of indictment founded upon these informations and ordered the county to pay the costs. At the September Session of the same year, without any application to or permission from the Court, new bills founded upon the same informations were sent up to a different grand jury and true bills were found in each case. When the cases were called for trial the attorney for the accused made a motion to quash the indictments, for the reasons (1) That the informations and bills were before a former grand jury and were ignored by them. (2) That no new informations were made, and the ignoring of the bills by the grand jury was a conclusive determination of said informations; and (3) That it was contrary to practice and at variance with law to subject defendant to the jurisdiction of two grand juries upon the same informations.

The Court (White, J.) refused the motion to quash, saying "I doubt not the power of the Court on cause shown upon affidavits, to direct a bill to be sent back to be reconsidered by the same or a subsequent grand jury, but in the absence of such direction by the Court, I doubt the legality, and very much condemn the practice of sending up the same bill (or one just like it based on the same informations) to a subsequent grand jury, after it has been ignored by one grand jury. Ordinarily an *ignoramus* should be the end of the case. If I were acting on my own judgment I would quash the indictments. But as I have been informed that the course pursued in these cases has been always sustained by this Court, I shall conform to this practice, and refuse these motions."

Rowand, having been tried and found guilty, took this writ, assigning for error the action of the Court in refusing the motion to quash.

Bayne (*Magee* with him), for the plaintiff in error, denied that there ever was such practice as led the Court below to refuse the motion to quash, and that if there had been it would be unjustifiable and illegal under the Acts of March 31, 1860 (Purd. Dig. 390) and March, 20, 1818 (Purd. Dig. 391). This legislation shows that a discharge upon a return of *ignoramus* is a finality and not an interlocutory proceeding.

The District Attorney, contra, presented no paper book and made no argument.

Oct. 23. The Court. Indictments in these two cases were preferred before the grand jury at the June Term of the Court of Quarter Sessions in 1875, and were returned "*ignoramus*," with a direction that the county should pay the costs. New indictments were sent to the next grand jury at the September Session, 1875, and a true bill returned in each case. Before the June Term, Rowand, the defendant, had been held to bail on information made against him, and he was indicted in September for the offences charged in those informations. Expressing grave doubts as to the legality of the proceeding, and emphatically condemning the practice which sustained it, the Court of Quarter Sessions overruled the motion to quash the indictments.

If the question were an open one, there would be little doubt as to the rule it would be the duty of this Court to lay down. On principle, the return of "*ignoramus*" made on an indictment by

Digitized by Google

the grand jury ought to be the end of the prosecution originating in the information returned by the committing magistrate. The defendant has complied with the conditions of his recognizance. The prosecution has failed with the failure of the bill. The bail of the defendant are released, and he is entitled to be discharged. In analogy to the rules by which other judicial proceedings are governed, this ought to be the end of the case founded on the complaint he was called on in the first instance to answer. If the public interest should require that further action should be taken against him, it should be by a new warrant on a new information, except in those rare cases, which should be defined as accurately as possible, in which a district attorney is justified in preferring an indictment without a preliminary hearing Such a rule would not interfere with the power of the judges of the Quarter Sessions on proper notice, to recommit to the same or a succeeding grand jury a bill thrown out in consequence of oversight, mistake, or fraud. It would only prevent the injustice which the exercise of unlimited discretion by a district attorney is capable of producing. Discharged from his recognizance by the action of the first grand jury, the defendant is thrown off his guard, and the second presentation of the indictment can be delayed till his witnesses are dead or distant, and his means of defence destroyed.

But principles have been long settled which require that the action of the district attorney in these cases shall be sustained. The Act of the 3d of May, 1850, providing for the election of this officer, makes it his duty to "sign all bills of indictment, and conduct in court all criminal or other prosecutions in the name of the Commonwealth, or when the State is a party, which arise in the county for which he is elected, and perform all the duties which now by law are to be performed by deputy attorneys general." A defendant discharged from custody after the return of "*ignoramus*" to an indictment against him, remains still subject to prosecution in any of the forms to which the attorney general or his deputy before the Act of 1855 could resort. "If a man be committed for a crime, and no bill be preferred against him, or it be thrown out by the grand jury, so that he is discharged by proclamation, he is still liable to be indicted. . . . . And so, too, a discharge from a former indictment upon payment of costs, in consequence of the refusal of the prosecutor to prosecute further, is no bar." (Wh. Cr. Law, § 544, referring to 2 Hale, 243, Com. *v.* Miller, 2 Ash, 61, and State *v.* Blackwell, 9 Alabama, 79). The modes of proceeding in the initiation of criminal prosecutions were stated with great fulness and accuracy by Judge KING in a charge to a grand jury of Philadelphia in 1845, quoted at length in a note to § 458 of Wharton's Criminal Law. In the course of the charge the judge said: "Another instance of extraordinary proceeding is where the attorney general *ex-officio* prefers an indictment before a grand jury without a previous commitment of the accused. That this can be lawfully done is undoubted. And there are occasions where such an exercise of official authority would be just and necessary; such as where the accused has fled the justice of the State, and an indictment found may be required previous to demanding him from a neighboring State, or where a less prompt mode of proceeding might lead to the escape of a public offender. In these, however, and in all other cases where this extraordinary authority is exercised by the attorney general, the citizen affected by it is not without his guarantees. Besides the intelligence, integrity, and independence which always must be presumed to accompany high public trust, the accused, unjustly aggrieved by such a procedure, has the official responsibility of the officer to look to. . . . In practice the law officer of the Commonweath always exercises this power carefully; generally under the direction of the Court, and never unless convinced that the general public good demands it." Dr. Wharton, speaking of the general result of the rules stated by Judge KING, says, "this is the view which may be considered as now adopted in Pennsylvania." The same general result was reached by the reasoning of the present Chief Justice in McCullough *v.* The Commonwealth (17 P. F. S. 30). He said: "It has never been thought that the 9th section of the 9th article of the Constitution, commonly called the bill of rights, prohibits all modes of originating a criminal charge against offenders except that by a prosecution before a committing magistrate. Had it been so thought, the Court, the attorney general, and the grand jury, would have been stripped of power universally conceded to them. In that event the Court could give no offence in charge to the grand jury, the attorney general could send up no bill, and the grand jury could make no presentment of their own knowledge, but all prosecutions would have to pass through the hands of inferior magistrates."

It is thus apparent that upon considerations involving the maintenance of public security it has been found necessary to lodge this extraordinary and delicate authority somewhere, and it is apparent also that it has been lodged in the prosecuting officer of the Commonwealth. It is to be exercised, in the ordinary case, under the supervision of the proper court of criminal jurisdiction, and in all cases its exercise is subject to their revision and approval. The action of the officer and the Court could be brought here for purposes of review only when the abuse of their discretion should be found to have been both

Digitized by Google

manifest and flagrant. Cases can be conceived where the ends of justice would be defeated by the delay and publicity of a motion in open court for leave to send up an indictment, and in such cases it would be the duty of the prosecuting officer to act promptly and upon his own responsibility. Whether the exclusion of the attorney general from the connection he formerly held with the criminal business of the Commonwealth, and the transfer of his powers to the district attorneys of the several counties, was well advised, is a legislative and not a judicial question. Whatever individual theories may be entertained, and whatever the rule, if it were competent now to establish one, it might, in view of the tendencies of modern systems, be thought wise to adopt, all that can be said is, that the questions presented by this record have been settled, and all that can be done is to accept the law that has been inherited from the able men by whom the foundations of our jurisprudence were laid.

While, however, the possession of this exceptional power cannot be denied, its employment can only be justified by some pressing and adequate necessity. When exercised without such necessity, it is the duty of the Quarter Sessions to set the officer's act aside. When a defendant has been once discharged on a return of "*ignoramus*," a new bill sent up without a fresh hearing, and without the leave of the Court, should be promptly quashed in the absence of affirmative proof that the course taken was required to meet some grave emergency, or to provide for some urgent public need. In the present instance, the Court of Quarter Sessions must be assmued to have approved the action of the district attorney. The defendant has been tried, convicted, and sentenced on the bills found by the second grand jury. If there was wrong it was one which the Quarter Sessions could alone redress. This Court is powerless to interfere.

Judgment affirmed.

Opinion by WOODWARD, J. WILLIAMS, J., absent.

Jan. '75, 18. **Price's Estate** Feb 29, 1876.

Martin's Appeal.

Appeals of Sallie Martin, St. John's Orphan Asylum and The House of the Good Shepherd.

Executor — Allowance of commissions and counsel fees—Costs of audit, how apportioned—Will—Construction of—Pecuniary legacy given after a direction to pay income to widow for life—When payable.

In the absence of fraud or bad faith, an executor should not be disallowed commissions merely because he has been surcharged in his account.

When a surcharge is made, counsel fees will not be allowed an executor for resisting the claim. He is, however, entitled to services of counsel, and so far as those services are rendered for the benefit of the estate or to protect the accountant in his rights, compensation should be made therefor out of the estate.

The same rule applies to all the costs of audit. But where the audit has been unduly protracted in the contention of a claim, the increased expenses should be paid by the unsuccessful party by whom they were occasioned.

Testator bequeathed his estate to his executors to pay the income to his wife for life, and after her death to his mother for life, and after the death of both his wife and mother to pay the principal to others named. He then bequeathed several pecuniary legacies.

***Held*, that the payment of the legacies must be postponed until the termination of the life estates.**

Appeals from the Orphans' Court of Philadelphia County.

Harry F. Price died in September, 1869, leaving a will, whereby he appointed Thomas J. Martin his executor. It appeared before the auditor (Henry S. Hagert) that in 1864, Martin, who had then carried on the wholesale liquor business for some years, formed a co-partnership with the testator, which continued until the latter's death; giving him for his services an eighth interest in the net profits, but no interest in the capital of the concern. At the death of Price there was standing to his credit on the books of the firm a balance of undrawn profits, which, with Martin's capital, was represented by the stock in trade and the other assets. Martin did not make sale of the partnership property at the dissolution, but took it himself at a valuation, and charged himself in his executor's account with $2662 89 as Price's proportion thereof. The widow claimed that the executor should be charged with $25,000 as her husband's interest in the partnership assets, on the ground that Martin had said on several occasions shortly before the testator's death, that Mr. Price was worth between $20,000 and $30,000. She also objected to the credits for funeral expenses, carriage hire, and other items, some of which were allowed, and some disallowed, and also to any allowance of commissions to the accountant. The auditor reported that it was the duty of Martin to have made sale of the stock upon his partner's death, and that he had no right to take it at a valuation, which, too, in this case was too low. He found Price's real interest at the time of his death to have been $4904.98, and accordingly surcharged the accountant with $2242.09. He also found that there had been no fraud or bad faith on the part of the executor, and therefore allowed him his commissions as charged, and $500 for services of counsel, and charged his own fee, $350, to the estate. To this report Mrs. Price excepted. The Court below (ALLISON, P. J.) disallowed all commissions, and also any counsel fees to the executor,

Digitized by Google

and further charged him with $300 of the auditor's fee, whereupon the accountant took this appeal, assigning for error the disallowance of his commissions and counsel fee and the surcharge of the auditor's fee.

Another question which was decided by the auditor in his report, related to the payment of certain legacies under the terms of testator's will, which were as follows:—

I give, devise, and bequeath to Thomas J. Martin, my executor, all my estate, real, personal, and mixed, to have and to hold the same in trust, for the following uses and purposes: To collect all my personal estate, and invest the same in bonds and mortgages, and to pay the income thereof, and the rental of all my real estate to my beloved wife, Mary Price, half-yearly, during her natural life, so long as she shall remain my widow; and in the event of the death of my said wife, or her remarriage, then I give, devise, and bequeath the same, subject to the same trust, unto my mother, Jane Price, for, and during the term of her natural life, and should my mother then be deceased, then I give the same, in fee-simple, to William R. Price, Charles M. Price, and Caroline, wife of Lukens Clayton, in equal shares.

And upon the death of both my said wife and mother, I give, devise, and bequeath all my estate unto William R. Price, Charles M. Price, and Caroline, wife of Lukens Clayton, in fee-simple; and if any of them be deceased, their children to take their parent's share.

I direct my executor to purchase a watch or other present, of the value of one hundred dollars, to be given to Sarah Martin, daughter of my friend Thomas J. Martin.

I give and bequeath to the House of the Good Shepherd, and to the St. John's Orphan Asylum, the sum of $500 each.

No one appeared before the auditor on behalf of either Sarah Martin, the House of the Good Shepherd, or the St. John's Orphan Asylum. As to their legacies the auditor reported as follows:—

The gift of all his real and personal estate to his executor, in trust for the use of his wife and mother for life, with remainder to William and Charles Price, and to Caroline Clayton, is inconsistent with the subsequent bequests to Sarah Martin, and to the two charitable corporations named in the will; as a rule of construction, where two parts of a will are inconsistent, the latter prevails, but this is applied only after the failure of every endeavor to give such a reasonable construction to the entire dispositions as will render every part of them operative. (Roper on Legacies, 1461; Constantine *v.* Constantine, 6 Ves. 102; Shipperdson *v.* Lower (1 You. & Coll. 441)

In the present instance, the primary intent of the testator seems to be, to make provision for the support of his widow and mother during their lives, and to devote the income of his entire estate, both real and personal, to that purpose. Such a purpose is at variance with an intention to make the pecuniary legacies payable in the lifetime of either the wife or mother of the testator. In the opinion of the auditor the payment of those legacies is to be postponed until the termination of the two life estates. (See Burdett *v.* Young, 9 Mod. 93; S. C., 5 Bro. P. C. 54.)

Exceptions were filed on behalf of the said three legatees on the ground that the auditor should have awarded immediate payment of their legacies. These exceptions were dismissed by the Court, whereupon the exceptants appealed, assigning for error the dismissal of their exceptions.

Pierce Archer, Jr. (*L. C. Cassidy* with him), for the appellants.

The auditor has found that there was no fraud or bad faith on the part of the executor. In such a case commissions should not have been disallowed, nor should any of the costs of the audit have been imposed upon the executor.

McElheny's Appeal, 10 Wr. 348.
Yoder's Appeal, 9 Wr. 394.
Harding's Appeal, 12 H. 189.
Norris's Appeal, 21 Sm. 106.

A. V. Parsons, contra.

The auditor found that it was the duty of the executor to have sold the partnership stock, and instead of doing that he had appropriated it to his own use. If this was not actual fraud it was such unfaithfulness as would forfeit commissions.

Smith's Appeal, 11 Wr. 427.
Greenleaf's Estate, 12 H. 232.

The expense of the audit was caused by the neglect of the executor to file a true account, as appears by the fact that he was surcharged with nearly $2000. He should, therefore, bear the costs, and he was properly disallowed counsel fees for resisting a just claim.

Gossner's Estate, 6 Wh. 401.
Sterrett's Appeal, 2 P. & W. 419.

March 13, 1876. THE COURT. The first assignment alleges error in surcharging the accountant with the sum of five hundred dollars, paid counsel for professional services. Upon what ground said surcharge was made we are not informed, as no opinion was filed by the learned Judge of the Orphans' Court. It is always desirable, in such cases, to know the reasons upon which the decree of the Court below was predicated. The auditor's report, however, discloses sufficient to show that the action of the Orphans' Court should be in part sustained. The executor was also the surviving partner of the testator; in his account he charged himself with the sum of $2662 89, as the value of the deceased partner's interest in the firm. The auditor surcharged him with the sum of $2242.09, as the real value of said interest.

The contention upon this question protracted the audit very greatly, and involved a tedious examination of the books and the business of

Digitized by Google

the firm. The burden of this increased expense ought not to be thrown upon the estate. It should be borne by the unsuccessful party by whom it was occasioned. It would be manifestly unjust to charge the widow, who succeeded in thus surcharging the accountant, with the amount expended by him in counsel fees in resisting her claim. But we think it was error to strike out all allowance for counsel fees. The accountant was entitled to the services and advice of counsel, and so far as those services were rendered for the benefit of the estate, or to protect the accountant in his rights, compensation should be made therefor out of the estate. An examination of the auditor's report discloses the fact, that the widow objected to a number of items on the credit side of the account, which were allowed by the auditor. Among them was the item of funeral expenses. It is also noted that she attempted to surcharge the accountant with a much larger sum, as the value of the testator's interest in the firm, than was found by the auditor. It is only right that a reasonable allowance should be made out of the estate to pay for this portion of the services of counsel. We think $150 is sufficient for this purpose. The accountant must be surcharged with the residue, to wit, $350.

We think the Court below erred in disallowing the accountant's claim to commissions. The auditor finds that he was not guilty of actual fraud, or bad faith. It would be a harsh rule to hold, that in the absence of fraud or bad faith an accountant should be deprived of his commissions merely because he has been surcharged in his account, especially when the subject of the surcharge was the value of the testator's interest in the profits of a business. It is unnecessary to refer to the cases upon this point. The whole subject has been thoroughly discussed in a number of recent decisions. None of them sustain the disallowance of commissions in this case.

No question as to the amount of the auditor's fee was raised in the Court below. It was fixed by the agreement of the parties, with the approval of the Court. The question is, whether it shall be paid by the accountant, or by the estate. The Court below surcharged the accountant with all but $50 of the amount. What we have said upon the first assignment of error is equally applicable here. The necessary and proper expenses of the audit should be paid out of the estate. So far as they were increased unnecessarily by the accountant, the burden should fall upon him.

It is not easy to fix the precise line of division, but in our judgment the estate should pay $150 of the auditor's fee. The accountant must be surcharged with the residue thereof, to wit, $200.

There are three other appeals in this estate, viz: Appeal of Sarah Martin, legatee; Appeal of St. John's Orphan Asylum, legatee; Appeal of House of Good Shepherd, legatee. Neither of these appellants appeared before the auditor to claim any legacy or bequest under the will, nor were the appeals pressed upon the argument here. The auditor has given satisfactory reasons why the payment of the respective legacies should be postponed until after the termination of the life estates. As to each of these appeals the decree of the Court below must be affirmed, and the appeals dismissed at the cost of the respective appellants.

In the Appeal of Thomas J. Martin, executor, the decree is reversed, and the record remitted for further proceedings.

Opinion by PAXSON, J. AGNEW, C. J., and WILLIAMS, J., absent.

Jan. '75, 106. Jan. 7.

Lehigh Navigation Co. v. Mohr.

Agent—Extent of authority—Power of substitution—Revocation of power of substitute by death of the original attorney—Corporation—Liability of—Improper transfer of loan.

The powers of the substitute of an attorney in fact cease upon the death of such attorney.

M. appointed C. her general attorney in fact to sell and transfer all stocks or loans owned by her with power of substitution; C. appointed V. his substitute and died; after C.'s death, V. transferred certain loans of M., and embezzled the proceeds.

Held, that the corporation permitting this transfer were liable to M. for the value of this loan.

Appeal from the Common Pleas of Philadelphia County.

Bill in equity filed February 10, 1873, by Sophia Mohr, against the Lehigh Coal and Navigation Company, setting out that the complainant was the owner of a certificate of the loan of the defendant for $2000, which the defendant permitted one Charles Vezin, Jr., to transfer without authority from her to one Longstreth, to whom a new certificate was issued, and that Vezin had appropriated the proceeds of this sale to his own use, and was now insolvent. The bill prayed that the defendant be decreed to pay to the plaintiff the cash value of the said certificate of loan.

The defendant's answer denied that the transfer had been made without the plaintiff's authority.

The Master (Charles W. Katz) found the following facts; on October 30, 1865, the defendant issued a certificate for $2000 of its loan in the name of the plaintiff, a resident of Germany. The purchase was made by Charles Vezin, Jr., who stated at the office of the defendant, that

Digitized by Google

he did it for the plaintiff, and the certificate was delivered to him as her representative. The money used in making this purchase was the proceeds of the sale of other loans of the plaintiff which had been sold by Vezin, Jr., under a special letter of attorney. Vezin, Jr., always retained possession of this certificate, and collected the interest upon it as it accrued, and remitted it to the plaintiff. On October 14, 1870, Vezin, Jr., sold the certificate, and the defendant transferred it and issued a new certificate to the purchaser upon the faith of a notarial copy of what purported to be a general power of attorney to Charles Vezin, Sr., from the plaintiff, dated April 22, 1851, authorizing him as her attorney to sell and transfer all or any stocks or loans owned by the plaintiff in the United States with a general power of substitution. On March 4, 1853, Charles Vezin, Sr. executed to Charles Vezin, Jr. a power of attorney, whereby, *inter alia*, he "substituted and appointed the said Charles Vezin, Jr., to be his true and lawful substitute and attorney, to do, transact and perform all acts, matters and things whatsoever, without exception, which he the constituent is authorized to do, transact and perform as attorney in fact of any person or persons whomsoever, by virtue of any power or authority already or hereafter to be given, and for the purposes aforesaid with whomsoever it doth, shall, or may concern, to account."

Charles Vezin, Sr., died April 8, 1853. The original of what purported to be the notarial copy of the general letter of attorney to Charles Vezin, Sr., under which the transfer of this loan was effected, was never found, and it was contended on behalf of the plaintiff that no such letter ever existed, but the determination of this question became immaterial on account of the view taken by the Court of the other questions of the cause.

Upon these facts, the Court below (FINLETTER, J.) decreed that the prayer of the bill should be granted. From this decree the defendant appealed, assigning for error that the Court erred in not dismissing the bill.

The case was argued by *Gibbons*, for the appellant, and *Rosengarten*, for the appellee, on February 25, 1876, and on March 9, 1876, the Court made the following order:

"It is ordered that this case be re-argued. In the mean time the counsel will be prepared with authorities to discuss the question of the substitution of Charles Vezin, Jr. by Charles Vezin, Sr., as attorney for the principal, of whom the latter was attorney in fact; the effect of the death of the latter upon his substitution, and the sufficiency of the evidence to establish the power from Miss Mohr to Charles Vezin, Sr."

The case was now re-argued by *Gibbons*, for the appellant.

Whether the original power from the plaintiff to Vezin, Sr. authorized such a substitution as he made, might under other circumstances be a serious question; in this case her acts, recognizing the validity of such substitution, render the decision of that question unnecessary. The deed of substitution provided that Vezin, Jr. should account to the principal directly; this was done, and he was recognized by her as her sole agent in the United States. He had no authority but what was contained in this substitution to collect her interest.

[SHARSWOOD, J. The question on which we chiefly desired a re-argument is, whether when an attorney died, his substitute's powers continue.]

Whatever may be the answer to that question in the abstract, in this case the plaintiff has ratified and recognized the act. This is not an ordinary case of substitution by an attorney but the acceptance of a new one.

[SHARSWOOD, J. I do not see why the fact that there is a direction to account to the principal should alter the case.]

This is more than that; there was an entirely new agency constituted.

Cassidy *v.* McKenzie, 4 W. & S. 282.
Morgan *v.* Steele, 5 Binn. 305.

Rosengarten, contra.

It is a general rule that the derivative authority expires with the principal authority from which it proceeds. The power of constituting an agent is founded upon the principal's right to do the business himself; and when that right ceases to exist, the right of appointing another person for the same object also ceases; and where an attorney, with a power of substitution, appoints a substitute, the authority of the substitute ceases with that of the attorney.

2 Livermore's Agency, 306.

The derivative authority cannot generally exist longer than the original authority. (Story's Agency, § 469.) The death of the agent is a revocation by operation of law, and this is an ancient and well settled doctrine of the common law. (Id. § 488.) The death of the agent extinguishes the power of the substitute, for the agent is accountable to the principal for the acts of his substitute since he is appointed by and in place of the agent, and the appointment is therefore naturally withdrawn by the death of the agent. (Id. § 490.) See also—

Wharton's Agency, § 109.
Merrick's Est., 8 W. & S. 402.
Burdett *v.* Willett, 2 Vern. 638.
Whitcomb *v.* Jacob, Salk. 160.
Wells *v.* Stewart, 5 Binney, 328.

Jan. 15. THE COURT. On the 3d day of Oct. 1865, the appellant, the defendant below, issued to Sophia Mohr, a single woman, native of Germany, and resident in Bremen, a certificate of its loan of 1864 for two thousand dollars. The

Digitized by Google

purchase was made by Charles Vezin for Miss Mohr, so stated by him in the office of the company at the time of the purchase, and to him the certificate was delivered as her representative. On the 14th Oct. 1870, Vezin sold this certificate to Wm. C. Longstreth, through a broker, made the proper transfer on the appellant's books, and surrendered the certificate, which was cancelled by the company, and a new one issued in the name of the purchaser. The plaintiff alleges that this sale and transfer were made without authority on the part of Vezin and the company in fraud of her rights; hence she brings this bill in order to compel the defendant to restore the certificate or pay the equivalent in cash. Now, as the company had full notice, not only from the act of its officers in issuing the certificate in the name of Miss Mohr, but from the declarations of Vezin at the time of the purchase, that this was her property, it lies upon it to show the authority under which it acted in permitting the transfer on its books, and the cancellation of the certificate, and reissue to Longstreth. That Vezin had the certificate in his possession, and produced it at the time of the transfer, is hardly a circumstance in favor of the justification of the conduct of the company, who well knew that this property belonged, not to Vezin, but to the plaintiff; it knew that he held it, just as he had purchased it, as the agent of Sophia Mohr. But the defendant, not relying upon so weak a staff as this, sets up a power of attorney from the plaintiff to Charles Vezin, father of him who transferred the certificate in controversy, dated at Bremen, April 28, 1851, and purporting to have been executed on that day before the United States Consul of that port, by which he was authorized to sell all or any stocks or loans belonging to her or which she might thereafter possess, with a power of substitution. This was followed by a power of attorney, executed by Charles Vezin to his son on the 4th March, 1853, which is remarkable in this, that it is executed, not only in his private right and as partner in the firm of Chas. Vezin, Son & Co., but also as attorney in fact, agent, trustee, executor, administrator, or assignee of any other person or persons or otherwise; but neither persons nor property are specifically designated. Now, admitting this to have been sufficient, at the time of its execution, to carry the power contained in the letters of 1851 over to Charles Vezin, Jr., yet as Chas. Vezin, Sr., died before the date of the sale of the stock or the purchase of the certificate in question, it is certain the transfer to Longstreth could not have been made thereunder, for that power had been revoked by the death of the grantor, as we learn from the case of Peries *v.* Aycinena (3 W. & S. 79). Where an attorney has created a substitute, the power of such substitute is necessarily withdrawn by the death of his principal. For the attorney being accountable for the act of his substitute, since he appoints him on his own resposibility to do those things which he was authorized to do, it follows that when his death occurs, the source of the substitute's power is cut off and fails. So likewise it is said in the Roman law, the rule is fully recognized, that a mere power or authority expires with the death of either the principal or agent. (Story on Agency, 491.) That the substitution was provided for in the original delegation does not alter the rule, the only exception thereto being where, from the express terms or from the nature of the power, an inference may arise that the principal intends that the substitute shall act for him, notwithstanding the revocation of the authority of the original agent. (Ibid. § 469.) We need hardly say that this exception to the rule does not apply in the present case, for nowhere does it appear that Miss Mohr intended that Charles Vezin should act as her agent after his father's death, by virtue of the substitution of the 4th March, 1853, or that she recognized or even knew of such substitution. It follows, therefore, that when the defendant permitted the transfer by Chas. Vezin, Jr., on the power from his father, or on the production of the power to his father alone, and received and cancelled the certificate, it did so without authority, and on the personal responsibility of Charles Vezin, and, if this responsibility has proved worthless, the blame rests with the company's own officers. That there was any such laches on the part of the plaintiff, as would amount to a ratification of Vezin's acts, we have failed to see. She was an old lady, resident in Germany, and it does not appear that she had any knowledge or means of knoweledge of the transaction until her agent, Mr. Plate, was informed thereof by the officers of the defendant, in December, 1871. And when we consider that as late as July, 1871, some nine months after the sale of the certificate, she received a remittance from Vezin & Co. of $55.55, interest on Lehigh Navigation stock, $2000, less taxes, and that in this manner she was kept in total ignorance of what had been done, and was thus led to suppose that her securities remained intact, we can readily understand why she did not sooner make demand upon the company for a restoration of her certificate. But on the other hand, the defendant was fully informed that this was the plaintiff's property which it was helping Vezin to transfer and put beyond her reach. Furthermore, its officers did know, or, what is the same thing, might have known, but from their gross carelessness, that they were acting without authority. Had they demanded the original power to Vezin, the elder, we think it quite probable they would have discovered that no such paper was in existence, and

Digitized by Google

that the copy presented to them, and under which they assumed to act, was manufactured for the occasion. Certain it is that no such power can now be found. Under such circumstances it would not prove to be a very edifying spectacle were a court of equity to exonerate this corporation from the consequences of its own folly, and cast them upon a faultless old lady.

The decree of the Court of Common Pleas is affirmed, and it is ordered that the appellant pay the costs.

Opinion by GORDON, J. WILLIAMS, J., absent.

July, '76, 104. **Carter v. Hess.** Jan. 10.

Landlord and tenant—Alderman—Appeal—Affidavit that it is not intended for delay—In what case necessary—Act of 1*st May*, 1861—*Act of* 14*th December*, 1863, § 1—*Act of* 27*th March*, 1865.

The provisions of the 1st section of the Act of 1st May, 1861 (since supplied by the Act of 27th March, 1865), requiring in appeals from Aldermen, an affidavit that the appeal is not intended for delay, apply to proceedings under the Landlord and Tenant Act of 14th December, 1863.

Error to the Common Pleas of Philadelphia County.

This was a proceeding under the Landlord and Tenant Act of 14th December, 1863 (Purd. Dig. 882), by Hess against Carter to recover possession of demised premises at the expiration of the term.

Hess, claiming that the lease terminated December 1, 1875, gave due notice to Carter to quit, and the latter not complying, he commenced these proceedings before a magistrate, December 2, and obtained judgment in his favor, with costs, December 8. An appeal was taken by defendant December 18, and bail absolute entered in the sum of $1500, conditioned for the payment of rent and costs up to final judgment. But no affidavit was made before the magistrate that the appeal was not taken for the purpose of delay.

On motion, the Court below struck off the appeal on account of the failure to make such affidavit.

Defendant took this writ, assigning for error the striking off of his appeal.

J. M. West and *J. G. Johnson*, for plaintiff in error.

The right to this appeal is given by section 1 of Act 14th December, 1863, where the manner of taking it is referred back to section 1 of the Act 3d April, 1830. There the appeal is given in landlord and tenant cases such as this, by simply entering bail absolute as was here done. And, although prior to that, on May 1, 1861, an Act was passed, requiring that in all appeals from the judgments of aldermen in Philadelphia, such an affidavit must be made, yet as the Act of 1863 was subsequent to that, and provided for the taking of an appeal without an affidavit, surely none can be required to make this appeal good. And the act of 27th March, 1865 (Purd. Dig. 862), providing that, in lieu of the affidavit required by the Act of 1st May, 1861 (P. L. 535), in all cases of appeals an affidavit should be made, setting forth that the appeal is not for delay, and that unless the proceedings be removed, the defendant will be required to pay more, or receive less money than is justly due, evidently refers only to judgments for money, or in damages. And being *in lieu* of the former Act of 1861, it is applicable only to such appeals as prior to its passage, required affidavits.

George Junkin, for defendant in error.

The uniform practice since 1861 has been to make affidavits in these cases; and it is just as necessary for the purposes of justice that in this instance an affidavit that the appeal is not taken for delay, should be made, as in actions for rent or damages.

The Act of 1861 applied to *all* judgments, which certainly covers landlord and tenant cases under the Act of 1830. And as the Act of 1863 shows by its provisions that proceedings under it are similar to those of any other civil suit, there exists no reason why it should not be covered by the word *all* of the Act of 1861, as would be any other new cause of action.

And the subsequent Act of 1865 removes all doubt as to the necessity for this affidavit. It provides that in *all cases* of appeals from the judgments of aldermen, a certain affidavit should be made. Making no exception to the rule, it merely enlarges the scope of the affidavit.

[SHARSWOOD, J. If this be so, how, in this case, could the plaintiff conscientiously make an affidavit under the Act of 1865, that 'unless the cause be removed, he would have to pay more, or receive less than was justly due'?]

The law was made to apply to all cases, and it is a mere accident that there are no damages in this case. The vital point of the affidavit is that the appeal is not for delay.

Jan. 15. THE COURT. While it is true, the Act of 1st May, 1861, requiring an affidavit in all cases that the appeal is not intended for delay, is not referred to in the Act of 14th December, 1863, relating to landlord and tenants, yet it is a part of the general system and *in pari materia*. The Act of 1863 refers to the Act of 3d April, 1830, for the manner in which the appeal should be taken, but we think it does not necessarily exclude the requirement of the Act of

Digitized by Google

1861, the latter Act being in the most general language applicable to "*all cases*," and its provisions being necessary and just, standing unrepealed by the Act of 1863. We ought not to consider the affirmative language of the Act of 1863 as conclusively excluding the operation of the Act of 1861.

Order affirmed, with costs.

PER CURIAM. WILLIAMS, J., absent.

Common Pleas—Law.

C. P. No. 1. Jan. 13.

Baldwin v. George et ux.

Agency—Estoppel of principal by acts of agent—Mortgage—Consideration—Parol evidence of non-payment of mortgage money to mortgagor—Parol agreement with agent for both parties.

Rule for judgment for want of a sufficient affidavit of defence.

Sci. fa. sur mortgage.

The affidavit and supplemental affidavit of defence, made by the wife, set forth that the mortgage sued on was given on her separate property; that the deponent did not know the plaintiff in the transaction, but dealt solely with one Redner who was acting as agent for the plaintiff, which fact, however, the defendant did not know until the execution of the mortgage; that said Redner agreed to furnish deponent $7000 on such mortgage, out of which were to be paid liens on the property amounting to $5519.95, leaving a balance of $1480.05; that at the time the mortgage was executed no other lien had been filed against the property, although a summons had been issued by one Bell against her, which Mr. Redner said did not amount to anything, as no judgment had been obtained; that it was agreed at the time of executing the mortgage, and as an inducement thereto, that the amount of Bell's claim should be deposited in Court or in a trust company and the balance be paid to her, which had not been done; that Redner subsequently informed deponent that there was a lien filed for said claim, which lien deponent is advised is invalid; and that even after deducting the amount thereof there would still remain a balance due deponent, payment of which had been refused, and she had, consequently, received no part of the money for which said mortgage was given.

T. K. Longstreth, for the rule.

Lucas Hirst, contra. Parol evidence of a promise made at the time of the execution of a written instrument and used as an inducement for its execution is admissible to affect the written instrument.

Coal Co. *v.* McShain, 25 Sm. 245.
Caley *v.* Railroad Co., 2 WEEKLY NOTES, 313.
Youngman *v.* Walter, 23 Sm. 134.
Shughart *v.* Moore, 1 WEEKLY NOTES, 598.

Jan. 20. THE COURT. We think from all the statements in the affidavit that Redner was the agent of the mortgagor as well as of the mortgagee.

Rule absolute.

C. P. No. 1. Dec. 23.

Shiras, Assignee, v. McAdam.

Mortgage—Affidavit of defence—Breach of trust—Parol agreement to vary written instrument.

Rule for judgment for want of sufficient affidavit of defence.

Sci. fa. sur mortgage. The affidavit of defence set forth that the defendant took the title to the land on which the mortgage was given, in his name from one Bell, in trust for Ashton, and that at the time the title was transferred and the mortgage executed to Bell for the purchase-money, it was expressly agreed between Bell, the defendant, and his *cestui que trust* Ashton, that the said mortgage should not be sued on, but that when Ashton could sell the land the proceeds should be applied first to the payment of the mortgage. And further, that Bell had purchased the land originally at a sheriff's sale under a judgment entered in his favor, on condition that when he purchased he would dispose of the title as Ashton should decide; that the mortgage had been assigned to the present plaintiff, who paid no value for it, upon the understanding that he would carry out the terms of the above agreement, and it was from a reliance on this assurance that a declaration of no off-set had been given.

An affidavit of Ashton's further set forth that every effort had been made to sell the premises for an adequate price, but so far unsuccessfully.

Gummey, for the rule.

N. B. Thompson, contra.

The affidavits show such a state of facts as creates a relation of trust between the parties, and would justify the introduction of parol testimony to vary the absolute contract set forth in the mortgage and declaration of no set-off. The certificate of no set-off was not filed until three weeks after return day, and defendant did not receive notice of its being filed. The certificate is no part of the record.

Twitchell *v.* McMurtrie, 27 Smith, 383.

C. A. V.

Dec. 30. THE COURT. The affidavit sets up that which, if proved, would be a good defence;

Digitized by Google

for Bell had no right, under the trust relation existing, to transfer the mortgage in order to enable another to bring suit upon it apart from the terms of the original agreement.

Oral opinion by ALLISON, P. J.

Rule discharged.

C. P. No. 3. **Dickerson v. M'Causland.** Jan. 13.

Affidavit of defence law—Averment supplementing copy of instrument filed—Function and scope of averment—Practice.

Rule for judgment for want of a sufficient affidavit of defence.

Covenant on a lease. Plaintiff filed a copy of the lease, which contained the following clause:—

"And it is further understood and agreed that said lessee will pay all additional premium that may be charged on the building as fire insurance, in consequence of any business carried on or merchandise stored in said building by him."

The following averment was endorsed on, and filed with said copy:—

"Plaintiff avers that on Sept. 17, 1875, he paid to the Fire Association of Philadelphia $125, additional premium charged by them for fire insurance, in consequence of the business carried on in said building by said lessee, which amount, with interest, the plaintiff claims to recover."

The affidavit of defence suggested that the copy filed, together with the averment, was not such as to entitle the plaintiff to judgment under the affidavit of defence law.

Chas. D. Freeman, for the rule.

Peace, contra.

THE COURT. The function of an averment, supplementing a copy filed under the affidavit of defence law, is to liquidate a sum for which the defendant's liability is fixed by the instrument sued on; *e. g.*, to aver the amount of interest which has accrued on an interest-bearing obligation. But where, by the instrument sued on, the defendant's liability is not absolute, but depends on the happening of a contingency, proof of its having happened cannot be supplied by averment. In such case the effect would be, first, to fix the liability, and then to liquidate it.

Rule discharged.

Oral opinion by LUDLOW, P. J., YERKES, J., concurring.

C. P. No. 3. Dec. 22, 1876.

Greenwald v. Kaster et al.

Conflict of laws—Effect upon a judgment in Pennsylvania against one partner of a release of judgment against another partner in a State where by law such release enures to the benefit of both.

Rule to open judgment.

On and prior to April, 1869, the defendants were trading as Kaster & Eckhouse, in Decatur Co., Indiana. The firm became indebted to Greenwald, the plaintiff, doing business in Philadelphia. In October, 1869, the defendants dissolved partnership. In July, 1873, plaintiff brought suit against defendants here, Kaster alone being served. Judgment was entered against him, July 22, 1873. In 1874, in a suit against defendants in Indiana, judgment was obtained against Eckhouse, he only being served. The judgment in Indiana was compromised by the attorneys of the plaintiff under a power of attorney from him, and they there, on February 4, 1875, executed a release to Eckhouse, expressly reserving all rights under the judgment against Kaster.

Depositions of prominent lawyers in Indiana, taken in support of the rule, showed that the law there in reference to the release of one or two persons from liability for a partnership debt is the same as the common law, the effect of the release being to discharge both, even though there be, in the release, an express stipulation to the contrary.

Sharp and *Alleman*, for the rule.

A foreign law is to be proved as a fact.

Dougherty *v.* Snyder, 15 S. & R. 84.

A release of one party by the law of Indiana is the release of all. This is also the common law, and it rests upon the reason that to hold otherwise would be to increase the responsibility of those not included in its terms if the release were given effect.

Milland *v.* Himes, 8 B. 268, per BELL, J.
Salmon *v.* Davis, 4 Binn. 375.

If the release is effective by the law of the place of delivery, it is effective everywhere.

Story on Conflict of Laws, pp. 304, 305, 306, and § 411.
Blye on Suretyship, pp. 302, 303.
Levy *v.* Levy, 2 WEEKLY NOTES, 117.
Born *v.* Shaw, 5 C. 288.
Speed *v.* May, 5 H. 91.
Allshouse *v.* Ramsey, 6 Wh. 332, 335.
Seabright *v.* Galbraith, 4 Dall. 325.

Walter J. Budd, contra.

The intention of the parties was not to release Kaster. C. A. V.

Dec. 30, 1876. Rule absolute.

C. P. No. 3. Dec. 19, 1876.

Rhoads et al., Executors, v. Detwiler et al.

Contract—Measure of damages for breach where there is difficulty in ascertaining value—Consideration the measure, and not loss—Effect of an individual judgment upon firm assets when firm insolvent.

Sur motion for judgment on points reserved, and rule for a new trial,

Action on case for damages.

The facts which appeared in evidence on the trial were substantially as follows: In September,

Digitized by Google

1872, the firm of Linnell & Price was in debt to the amount of $6768. Its assets consisted of the stock of a retail drug store, worth, according to the statement of Linnell (estimated from its cost), $5000, but which sold, when not materially decreased, in June, 1873, for $893.65. The plaintiffs' testator, Rhoads, held a judgment against Linnell & Price for $648.77, and the firm of Rhoads & Harris, of which he was a member, also had a judgment for $1715.49. Executions had been issued upon these judgments, and levy made, but which had the priority did not appear. About October 1, 1872, the defendants, who were relatives of Price, agreed with the testator that they would loan Linnell & Price $1500 for three years and six months, provided the testator and Rhoads & Harris would satisfy their judgments, and that all the creditors would grant an extension for four years, without interest. According to the testimony of Linnell this arrangement was made with the testator at his store. According to the testimony of Price, it was made by Harris on behalf of the creditors, at the store of the defendants. Price also said that in order to make the defendants safe, the defendants were to have a judgment note, at twenty days, to be used in the event of "anything turning up adverse to the interests of the store." At the time the arrangement was made, Harris had with him a list of the creditors, which he showed to the defendants, and he told them it "was a complete list." At a meeting of creditors, they signed an agreement with Linnell & Price to wait four years, without interest. Harris then went to the defendants and assured them that "the creditors had signed off." The defendants then loaned Linnell & Price the $1500, taking a judgment note, and testator and Rhoads & Harris satisfied their judgments.

In June, 1873, the defendants learned, for the first time, that a judgment note for $1000, given by Linnell, which had been in existence at the time of the agreement, was coming due in a few days, and had been placed in the hands of an attorney with instructions to collect it at maturity. This note was not on the list of debts said by Harris to be complete; its holder was not among the creditors who agreed to wait, and, at the time of the arrangement, neither testator nor defendants knew of its existence. At this time, June, 1873, Linnell & Price owed the old indebtedness of $6768; to the defendants, $1500; their stock had somewhat run down; they had been doing a business of $100 less per month, as compared with the previous year, and they only had, in cash, $25. One of the defendants went at once to the testator and asked what should be done, and whether they should enter up their judgment or wait. He replied that he had no advice to give, and that he, defendant, "should use his own judgment." Defendants endeavored to get the creditors together to make some provision for the emergency, but without success. They then entered up their judgment note and issued execution. A day or two later, the judgment note against Linnell was entered up, execution issued, and, under the two writs, the stock of Linnell & Price was sold, bringing $893.65.

At the trial, defendants offered to prove that "at the time of the agreement between plaintiffs and defendants, there was an outstanding judgment note given by Linnell for $1000, due June 27, 1873, which was not included in the list of debts stated by Harris to be complete, and of which defendants had no knowledge at the time; that this note was placed in the hands of an attorney with instructions to collect at maturity; that defendants learned of this fact before entering their judgment, and that when this note became due judgment was entered on it, and levy made on the interest of Linnell in the firm."

The offer was rejected and an exception noted.

The Court (Yerkes, J.) left it to the jury to find whether defendants were to have a judgment note, and charged them, that if so, the insolvency of Linnell & Price would be such a contingency as was contemplated by the agreement as stated by Price, but that the judgment against Linnell was not such a contingency. He further charged them that their verdict if for plaintiffs should be for the whole amount of the judgment originally held by testator, with interest, subject to two reserved points, viz.:—

(1) Whether the plaintiffs are entitled to recover without showing loss in consequence of the levy and execution of the defendants. (2) Whether the plaintiffs are entitled to recover more than they actually lost in consequence of the defendants' levy and execution.

Verdict for plaintiffs for $808.49.

Defendants moved for judgment *non obstante veredicto* on the points reserved, and also for a new trial, assigning as their reasons the rejection of the offer *supra*, and the charge upon numerous points of law submitted, raising chiefly the question of the measure of damages, and the question as to whether the Linnell judgment and the threatened execution was a contingency.

F. C. Brewster, Jr., showed cause.

The fact that an individual creditor did not unite in the agreement was no defence. The measure of damages ought to be the amount of the judgment plaintiffs held at the time they were induced to make the contract, and which their execution would have satisfied.

Pennypacker, for the rules.

The damages should be compensation not for the making of the contract, but the breach. The party injured should be placed not in the position he was before the contract was made, but in that

Digitized by Google

in which he would have been had the contract been fulfilled.

Sedgwick on Damages, 6th Ed., p. 273.
Wilkinson v. Ferree. 12 H. 191.
Robinson v. Harmer, 1 Exchequer, 855.
Coal Co. v. Foster, 9 Sm. 369.

In a sale of goods to be delivered *in futuro*, the measure for breach, except in cases of rescission, is the value at the time they were to have been delivered.

Smethhurst v. Woolston, 5 W. & S. 109.

[LUDLOW, P. J. I agree with you that the measure ought not to be the debts of the partnership, but should have reference to the value at the time of the breach.

FINLETTER, J. What do you say is the measure?]

What the jury find to be plaintiffs' proportion of what is left at the end of four years.

[LUDLOW, P. J. That won't do.]

In trover the measure is the value at the time of conversion.

Neiler v. Kelley, 19 Sm. 403.
Booth v. Powers, 56 N. Y. 27.

The excluded testimony should have been admitted, because it was a condition precedent that all the creditors of Linnell & Price were to agree to wait. It tended to show fraud in the statement of Harris, that his list was a complete list of the debts. It enabled the jury to reach a correct measure of damage.

Shannon v. Comstock, 21 Wend. 457.
Booth v. Powers, 56 N. Y. 27.
King v. Steiren, 8 Wr. 99.
Wolf v. Studebaker, 15 Sm. 462.

The judgment and execution against Linnell was a contingency, because all that prevents an individual creditor from seizing firm assets is the equity of the remaining partner, which he may waive, and which does not belong to the firm creditors, but to him.

Doner v. Stauffer, 1 Penna. Rep. 198.
Coover's Appeal, 5 Casey, 14.
Baker's Appeal, 9 Harris, 77.
McNutt v. Strayhorn, 3 Wr. 269.
Backus v. Murphy, 3 Wr. 397.

[FINLETTER, J. Not only that, but that judgment would break up the partnership.]

Though the plaintiffs have sued for and recovered the whole amount and interest of their judgment of $648.77, they stated in the agreement with the creditors their claim to be $556.23, which mis-statement was a fraud, and would entitle defendants to avoid the contract.

THE COURT. Judgment for plaintiffs on points reserved, and defendants' rules discharged. Judgment for the plaintiff on condition that he files a remittitur for all sums over $585.

C. P. No. 4. **Jones v. Gibson.** Jan. 20.

Amendment—Affidavit of defence law—Mistake in copy filed—Amendment not permissible after expiration of two weeks from time of suit brought—Practice—Guth v. Anderson, 3 *Weekly Notes,* 133, *not followed.*

Assumpsit on a book account.

The affidavit of defence suggested that the copy of book entries filed was not such as to entitle the plaintiff to judgment under the affidavit of defence law, because, *inter alia*, said copy contained no date of the entry or of the alleged sale.

W. H. Peace, for the rule, asked leave to amend at bar by inserting the date in the copy to correspond with the original entry. Where no defence is alleged on the merits, it is the practice of the Court to permit formal amendments at bar, and thereupon to give judgment.

Guth v. Anderson, 3 WEEKLY NOTES, 133, and cases there cited.

Greenbank, contra.

The affidavit of defence law provides that to entitle the plaintiff to judgment the copy shall be filed within two weeks after suit brought—which period has expired. To permit the amendment asked for now would be, in effect, to allow a new copy to be filed after the expiration of the statutory period. Where the jurisdiction of the Court depends on a statute in derogation of the common law, the statutory requisites must be strictly complied with.

C. A. V.

Jan. 27. THE COURT. The plaintiff filed a copy of book entries in this case which contains no date. The defendant filed an affidavit of defence insisting upon this defect as fatal to the plaintiff's right to judgment. Upon a rule for judgment for want of a sufficient affidavit, the plaintiff asked leave to amend the copy filed by inserting the date, and then that he might have judgment. The question, therefore, is whether a copy filed under the affidavit of defence law can be amended after the lapse of the two weeks within which it is required by the Act of Assembly to be filed. It is a question of considerable importance in practice, and for that reason we have given it very careful consideration. We entertain no doubt of the power of the Court to permit the plaintiff, where he has made a mistake in the copy filed, to substitute a new and corrected copy at any time within the two weeks, upon proper notice to the defendant. The plaintiff has the whole of two weeks in which to file his copy, and within that time we think he may be legally allowed to correct any mistake which has crept into the copy filed, by filing a correct copy. But we are unable to perceive from whence the Court can derive any power to permit him to amend or change the copy after the time which

Digitized by Google

the law allows for filing it has expired. Certainly there is no ground for allowing such an amendment at common law, for there is nothing to amend by. Nor is it within any statute of amendments or jeofails. It does not appear to be within the Act of 1806, which relates only to informalities cured by verdict, and to amendments of the pleadings. To permit the plaintiff to amend the copy filed after the two weeks, would in effect be to permit him to file a new copy after the time has elapsed within which he is permitted by law to file it, and at any time afterwards, however distant. Great abuses might creep in by such a practice. If he is permitted to amend by an alteration, he may with equal propriety be permitted to amend by an addition to his copy, as in the present case, and so the provision of the act requiring the copy to be filed within two weeks might be substantially abrogated by the liberal exercise of the power which is claimed. The question is very similar in principle to the question whether a mechanic's lien can be amended after the six months within which it must be filed, and although the point was not decided in Russell *v.* Bell (8 Wright, 54) an opinion distinctly hostile to the existence of such a power, was in that case expressed, the learned Judge saying, that if the limit of time imposed by the Act of Assembly is taken away the object of the Legislature is defeated.

It is with much regret, therefore, we find ourselves, after mature deliberation, unable to agree with the decision in Guth *v.* Anderson (3 WEEKLY NOTES, 133). We would have preferred to follow that decision if the obstacles in our path had not seemed to us to be insuperable. The cases cited by counsel in that case do not appear to us to touch the point at issue. They were all cases of amendment of misnomers of the parties to actions—amendments which are clearly allowable at any time, under the Acts of 1846, 1852, and 1858, and it is our settled practice to allow such amendments of the record, on notice to the adverse party, as well when the plaintiff moves for judgment as at any other stage of the proceedings.

Rule discharged.

Opinion by THAYER, P. J.

[A petition in a statutory proceeding cannot be amended after the expiration of the period prescribed for filing it. *In re* Contested Election of Welti, *ante*, 165.]

C. P. No. 4. June, 1876.

Todd & Co. v. The State Insurance Company of Missouri.

Fire insurance—Policy on real estate, fixtures, and stock—Conditions—Divisibility of contract—Lex loci contractus—Suit in one State on a policy of insurance made in another State by corporation of a third—Whether policy invalidated as to realty is thereby void as to personalty contained therein.

Motion to take off nonsuit.

The plaintiffs' evidence showed the following facts: The company defendant had insured the plaintiffs by a policy to the amount of $2500 in the following proportions: $500 on a mill, $100 on steam engine contained therein, $1500 on machinery contained therein, $212 on stock contained therein. The property insured was situated in Paterson, N. J. The office of the company was in Missouri, and the office of the general agents who effected the insurance, and by whom the policy was to be countersigned before it should become valid, was in New York City. Among the conditions upon which the policy was accepted was the following:—

"*First.* Any representation or description made by the assured or his agent . . . shall be considered part of this contract, and a warranty by the assured; and any false representation by the assured or his agent of the condition, situation, or occupation of the property, or otherwise . . . or in case of any misrepresentation whatever . . . this policy shall be void.

"*Second.* . . . if any incumbrance exists on the insured property, or any portion thereof, at the date of the policy . . . and the assured shall fail, in any such case, or neglect to notify the secretary of the company thereof in writing, and in that case have the same endorsed hereon, then and in every such case this company shall not be liable for loss or damage under this policy."

The evidence showed, further, that at the time the policy was executed, a mortgage existed upon the mill insured, which fact had not been communicated to the insurers or their agent.

A nonsuit was entered, and this motion was now made to take it off.

Katz, for the motion.

In the policy the realty and personalty are separately appraised and insured; the contract is therefore divisible, and if void as to the realty because of an undisclosed incumbrance thereon, is valid as to the personalty.

The contract is governed by the law of Missouri.

Hyde *v.* Goodnow, 3 Comst. 266.
Western *v.* Ins. Co., 2 Kern. 258.
Bailey *v.* Hope Ins. Co., 56 Mo. 474.

By the law of that State the contract is divisible.

Loehner *v.* Home Ins. Co., 17 Mo. 247.
Koontz *v.* Hannibal Ins. Co., 42 Id. 126.

If it should be held that the contract was made

Digitized by Google

in New York, it is divisible by the law of that State.

Burrill *v.* Chenango Ins. Co., 1 Edm. S. C. 233.
Rowley *v.* Ins. Co., 3 Keyes, 557.
Trench *v.* Ins. Co., 7 Hill, 122.

N. Dubois Miller and *A. Sydney Biddle*, contra.

In the interpretation of a contract not affected by a local statute, the laws of the State where the action is brought prevail. If not, the law of the State where the contract is made must prevail.

But this case must be decided by the law of Pennsylvania, and the doctrine that the law of the place of the contract should govern has no application. The meaning of that rule is, that a contract is made subject to the law, common or statutory, of the place where the contract is executed; but it does not mean that in the interpretation of the meaning of a contract the court of one State is to surrender its judgment to that of another simply because the latter court has territorial jurisdiction over the State in which the contract was made. This case is really a question of the meaning of a written contract.

Pattison *v.* Mills, 1 Dow & Clark H. L. C. 342.
Bank *v.* Sloan, 2 Weekly Notes, 542.
Story on Conflict of Laws, § 262-5.
Andrews *v.* Pond, 13 Peters, 77.
Brady *v.* Ins. Co., Am. Law Reg., June, '76.

The contract is not divisible.

Richardson *v.* Ins. Co., 46 Me. 399.
Day *v.* Ins. Co., 51 Me. 100.
Brown *v.* Ins. Co., 11 Cush. 280.
Lee *v.* Ins. Co., 3 Gray, 583.
Hinman *v.* Ins. Co., 36 Wis. 169.
Gottsman *v.* Ins. Co., 6 Sm. 212.
Willson *v.* Ins. Co., 6 N. Y. (2 Seld.) 53,

By the mortgage all the fixtures were included in the lien as being part of the realty.

Mitchell *v.* Freedley, 10 Barr, 205.
McCullough *v.* Irvine's Ex'rs, 1 H. 438.
Voorhis *v.* Freeman, 2 W. & S. 116.
Gray *v.* Holdship, 17 S. & R. 413.

June 24. The Court. The policy of insurance of the company defendant given in evidence on the trial, purported to be signed by the president and attested by the secretary of the company, at the office of the company in the city of Hannibal, Missouri. It contained, however, the condition that "this policy shall not be valid unless countersigned by the duly authorized agent of the company at New York city." The insurance was effected upon property in New Jersey, the premium being paid to the agent in New York city, who countersigned and delivered the policy. It covered real and personal property. One of the conditions of insurance was, that if any incumbrance existed on the insured property, or any portion thereof, without notice to the company, then the company should not be liable for loss or damage under the policy.

Upon the trial, the plaintiffs' evidence exhibited the existence of a mortgage upon the real estate not made known to company or its agent, and upon this ground a non-suit was entered. It is now argued, in support of the present motion, that the law to govern the contract is the law of Missouri, where the policy professes to have been made, and that by the law of that State the policy was divisible, that the concealment of the existing mortgage affected only the insurance on the realty, and that plaintiffs in any event are entitled to recover the insurance on the personalty.

That such an interpretation would be given the policy under the laws of Missouri, is well settled in Loehner *v.* Home Insurance Company (17 Mo. 247), and Koontz *v.* Hannibal Insurance Co. (42 Mo. 126). But the question arises, Can this in any sense be regarded as a contract to which the laws of Missouri can apply? True, it is signed by the officers of the company at Hannibal, but the condition is attached that it shall have no validity until countersigned by the agent at New York, where the policy was fully executed and delivered. Under the doctrine of *lex loci contractus*, which determines the validity of the contract, it must be governed by the laws of the State in which it is made, the parties having no other law in view at the time of the making of the contract. This, therefore, is a contract of the corporation in Missouri made in the city of New York, and, as is said by Lord Eldon in Male *v.* Roberts (3 Esp. 163), "the law of the country where the contract arose must govern the contract." The doctrine has been followed by the Supreme Court of the United States in Cox *v.* United States (6 Peters, 172); Duncan *v.* United States (7 Peters, 435), and numerous other cases in that Court; and Story on Conflict of Laws, p. 397, lays down the same principle.

That the power of the agent, as stipulated in this contract, fixes the place of its legal interpretation, is well settled in the case of Pomeroy *v.* The Manhattan Life Insurance Company (40 Ill. 398), where the Court say: "The instrument sent from New York by the company was incomplete, as it was not fully executed, and declared on its face that it was void until it should be countersigned and the premium should be paid. How an instrument which declares that it is void until other acts are performed, can be regarded as complete and binding, we are unable to comprehend. Had nothing further been done after it came from New York, could there have been the slightest pretence that it could operate as a binding contract? We think no one would have so contended. It was an inchoate, imperfect instrument, lacking essential and material acts to complete its binding force as a contract. It, in

Digitized by Google

fact, in contemplation of law, was executed in this State, and is to be governed by our laws (Illinois) and not those of New York."

The same ruling has been made in Kennebec County *v.* The Augusta Insurance Company (6 Gray, 208); Heebner *v.* Eagle Insurance Company (10 Gray, 131); Daniels *v.* Hudson River Fire Insurance Company (12 Cushing, 416). These cases are directly in point, and have not been qualified or doubted by the decisions of the courts of any of the sister States. We therefore hold that this is a contract made and to be enforced by the laws of the State of New York.

It has been further argued, that, by the rulings of the courts of New York, this contract is subject to the same interpretation that it would receive in Missouri; that is, that the concealment as to the mortgage on the realty would not affect the insurance on the personalty. That such could be fairly argued from the cases of Burrill *v.* Insurance Company (1 Edmonds's Select Cases, 233), Trench *v.* Insurance Company (7 Hill, 122), cited by plaintiffs' counsel, is without doubt; but these cases are directly overruled by Wilson *v.* The Herkimer County Mutual Insurance Company (6 N. Y. 53), where a misstatement of the relative situation of the neighboring buildings was held to avoid an insurance also on the goods, the Court holding that there was no distinction in this respect between an insurance upon the building and one upon the merchandise contained in it. This directly affirms the ruling in Smith *v.* The Empire Insurance Company (25 Barb. 497), which appears now to be the unquestioned law of New York, and determines that, if a policy on real and personal property be void as to the realty, by reason of a false warranty, it is also void as to the personalty. This is also the law as settled by numerous decisions in Maine, Massachusetts, Wisconsin, and also in our own State, in Gottsman *v.* The Pennsylvania Insurance Company (6 P. F. Smith, 210), where our Supreme Court held the contract was entire and not separate. We therefore fail to perceive in the learned and ingenious argument of counsel any reason to take off the non-suit.

The motion to take off non-suit is dismissed.

Opinion by ELCOCK, J.

Orphans' Court.

Stewart's Estate. Nov. 25, 1876.

Will—Pecuniary legacies—When a charge upon real estate—A residuary clause giving and bequeathing the remainder of testator's "property" is sufficient to create such charge—Order of sale by Orphans' Court.

Sur petition for sale of real estate for payment of legacies.

James Stewart died February 9, 1876, leaving a will wherein he made certain pecuniary bequests amounting in the aggregate to $3600, and certain specific bequests of personal property. He then, without making any specific devises of his real estate, directed as follows:—

"Eleventh. I give and bequeath the remainder of my *property* to my son John James Stewart."

It appearing that the personal property of the decedent was insufficient to pay the pecuniary legacies, this petition was presented by James Morrison, one of the legatees, praying for an order upon the executors to compel them to sell a portion of the decedent's real estate for the payment of the legacies.

J. Sergeant Price, for the petitioner.

Testator in his residuary bequest has blended his real and personal estate. "Property" signifies the right or interest one has in lands or chattels.

Morrison *v.* Simple, 6 Bin. 98.

The words "all my property" are as comprehensive as "all my estate."

Foster *v.* Stewart, 6 H. 25.
Rossetter *v.* Simmons, 6 S. & R. 456.

The real and personal estate being blended in a general devise of the remainder, the legacies are a charge upon the realty.

Hawkins on Wills, 293.
Greville *v.* Browne, 7 H. L. C. 689.
Gyett *v.* Williams, 2 Jo. & H. 438.
Nichols *v.* Postlethwaite, 2 Dal. 131.
Tucker *v.* Hassenclever, 3 Yeates, 294.
Hassenclever *v.* Tucker, 2 Bin. 525, 532.
Witman *v.* Norton, 6 Bin. 395.
McLanahan *v.* Wyant, 1 Penna. Rep. 96, 112.
Marcy's Estate, 10 H. 143, per LEWIS, J.
Becker *v.* Kehr, 13 Wr. 230.
Wertz's Appeal, 19 Sm. 176.

The legacies being a charge upon the realty, the Court has jurisdiction to order a sale thereof for the purpose of paying them.

Act of Feb. 24, 1834 (Purd. Dig. 450 § 222).

J. Alexander Simpson, contra.

Dec. 3, 1876. THE COURT. The prayer of the petition is granted, it coming within the 59th section of the Act of Feb. 24, 1834. (Purd. Dig. 450, pl. 222.)

(No opinion.)

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, FEB.* 15, 1877. [No. 20.

Supreme Court.

Jan. '76, 11. Jan. 5, 1877.

Wheeler et al. v. Rice et al.

Equity — Injunction against public works — When not decreed—Act of April 8, 1846—*Constitutional law—Act of August* 5, 1870.

Even without the Act of April 8, 1846, prohibiting an injunction against the erection of a public work, a Chancellor would not arrest such a work, especially after the expenditure of a large amount of public money upon it, except in a case of the clearest kind of abuse on the part of the representatives of the people of the powers conferred upon them.

Certificate from Nisi Prius.

Bill in equity, filed June 10, 1871, by Charles Wheeler and others, citizens and tax-payers of Philadelphia, against John Rice and others, commissioners for the erection of public buildings in Philadelphia, setting out the Act of August 5, 1870 (P. L. 1871, p. 1548), under which the commissioners were appointed, averring that it was unconstitutional and void for the following reasons: (1) Because it included three distinct subjects, viz., the construction of public buildings on Penn or Washington Squares; the removal of buildings from Independence Square, and its dedication as a public walk and green forever; and the contingent donation of Penn Square to certain corporations; one of said subjects, the second, not being mentioned in the title at all. (2) Because the Legislature, by said Act, delegated to the qualified voters of the city the power to legislate on the question whether real estate of great value should be given away to certain private corporations. (3) Because the Act gave away to private corporations real estate which the Legislature had no power to give away. (4) Because the Act delegated to a board of commissioners, a body authorized to perpetuate itself for any number of years, the power to make contracts binding on the city to an unlimited extent, and to compel the city to tax its citizens to meet them. The bill averred that the various provisions of the Act were so dependent upon and so closely connected with each other, that if any of them were void the whole Act must fail; and prayed that the Act might be declared unconstitutional and void, and that the commissioners might be restrained from proceeding with the construction of the buildings.

An application for a preliminary injunction was refused by THOMPSON, C. J., who delivered the following opinion:—

The bill in this case prays an injunction to restrain the defendants, commissioners, from proceeding, under the Act appointing them, to erect the public buildings mentioned in the Act, as it is alleged in the twelfth section of the bill "they have begun to do." The complainants are tax-payers and citizens of Philadelphia, and interfere because of the increased taxes they will, as they allege, be obliged to pay if the buildings are erected. The ground of their application is, that the Act of Assembly of August 5, 1870, under which public buildings are authorized to be erected by the commissioners, is unconstitutional and void. Several reasons for this are set forth in the bill.

The point of unconstitutionality of the Act was made by a bill filed by tax-payers and citizens of the city against the commissioners, on the 3d of December, 1870, and was heard before all the Judges at Nisi Prius, on the 4th, 5th, and 6th of January, 1871. The unanimous opinion of the Court was delivered by READ, J., on the 18th of the same month (Baird *v.* Rice, 13 P. F. Sm. 489), pronouncing the Act constitutional, and overruling that and other causes insisted on as grounds for injunction. That judgment, so far, I learn, has been acquiesced in. I regard the question of constitutionality of the Act, therefore, as *res adjudicata*. Until that decision is changed by the authority which made it,—and it was virtually the decision of the Court in banc, although technically at Nisi Prius,—I must treat it as a decision pronounced upon a consideration of every argument and reason which existed and could then have been advanced against the Act. The reasons given now against its constitutionality existed then, and, in presumption of law, were then considered and held insufficient. A different rule would lead to anomalous results not to be allowed for a moment. An Act would be constitutional, dependent on whether all the grounds or reasons were or were not given which might have been given on the argument on which the decision should be made. That would not do as a reason for disregarding the action of the Court of the last resort by an inferior tribunal. It is bound by the judgment of constitutionality pronounced by the highest authority, until that authority corrects its own error, if any, or changes its decision. That is the situation of this Court in this case. *All* the judges declared the Act in question constitutional, in the decision referred to. That decision binds me in this case as effectually as if technically in the Supreme Court, as it virtually was.

But even if this were entirely out of the way, and there were reasons sufficient to authorize an

Digitized by Google

injunction to issue in ordinary cases, which I do not say is the case, the first and only section of the Act of 8th of April, 1846, deprives me, I think, of jurisdiction to grant an injunction in this case. It provides, "that no Courts within the city and county of Philadelphia *shall exercise the power of a Court of Chancery*, in granting or continuing injunctions against the erection or use of any public works of any kind, erected or in progress of erection, under the authority of an Act of the Legislature, until the question of *title and damages shall be submitted and finally decided by a common law Court;* and in such cases the Courts shall have authority to issue a *venire*, for the summoning of a jury, to the sheriff of an adjoining county." (P. L. 1846, p. 272.)

It is admitted in the plaintiffs' bill, as already remarked, that the work towards the erection of these buildings had been begun before filing the bill, and that fully accords with the affidavits of the defendants. It matters not that comparatively little had been done. The first stroke of the axe or the pick, with a view to the erection of the buildings, brings their case within the provisions of the Act, which forbids an injunction, in the first instance. It is obviously not the amount of the work done or progress made in the erection of the buildings which *ousts* the jurisdiction in chancery. It is, as the Act plainly shows, the fact of being in progress of erection which is to have that effect. (Woelbert *v.* The City, 12 Wr. 439; Flanagan *v.* The City, a recent case before SHARSWOOD, J., at Nisi Prius, arising out of the Penrose Ferry Bridge over the Schuylkill.)

The fact being found that work had been commenced towards the erection of the buildings authorized by the Act of 1870, before this bill was filed, it follows that no injunction can be granted to stop its progress until a resort has been had to a common law Court, as provided by the Act of 1846. Till then jurisdiction in chancery is suspended, at least. What may be done after that resort I am not prepared to say. For the wisdom of the legislation the Courts are not responsible. *Ita lex scripta est* is a controlling maxim, and it must be obeyed. I confess myself at a loss to understand the purpose for which the Act of 1846 was passed, unless to prevent injunctions in every case of public buildings. If it should turn out in any case, as it probably would in this, that no dispute about title or damages to be assessed would arise, would the proceedings fall, or revert to equity jurisdiction? This is one of the problems connected with the Act which I am not able to solve, but which will not, for that reason, allow me to disregard the positive prohibition that "no Court in the city and county of Philadelphia shall exercise the power of a Court of Chancery in granting injunctions against the erection or use of any public works of any kind . . . . until the question of title and damages shall be submitted and finally decided by a common law Court." This strikes down the power in chancery in this case. I can make nothing else of it. But I need not enlarge. I regard either of the foregoing reasons sufficient to prevent me from granting the preliminary injunction asked for in this case.

Preliminary injunction refused.

The defendants subsequently demurred because the above act forbade an injunction in such a case, and because the Court had no jurisdiction.

The Court dismissed the bill, and the plaintiff certified the case to this Court, assigning for error the refusal of the injunction and the dismissal of the bill.

E. Spencer Miller, for plaintiffs in error.

The Act of 1846 only applies where the authority to erect public buildings is unquestioned. Here it is the very question in dispute. We contend that the board of commissioners is an illegal body. The Act is intended to apply only to the case where the Legislature has authorized the erection of public buildings on private property; the damages of private owners are to be ascertained, not the damages of tax-payers which are incapable of ascertainment.

Baird *v.* Rice, cited by the Court below, does not govern this case. Baird sued for himself and others standing in like equity; the parties are different, and different questions are raised.

The Act of Aug. 5, 1870, is unconstitutional, for it has three subjects. The first and third have no natural relation to or necessary connection with each other—

Blood *v.* Marcelliot, 3 Sm. 345.
Baldwin *v.* The Tel. Co., 54 Barb. 505.
Pullman *v.* The Mayor, 54 Barb. 169.
Smith *v.* The Mayor, 34 How. Prac. Cases, 508.

and the title of the Act contains no reference to Independence Square.

The Act indirectly delegates to the people the power of giving away Penn Square to four private corporations by granting it to those institutions in the event of its not being selected for the public buildings by the popular vote. Such a delegation is unconstitutional.

Chenango County Bank *v.* Brown, 26 N. Y. 467.
The State *v.* Cummissioners of Perry Co., 5 Ohio N. S. 507.
Barto *v.* Himrod, 8 N. Y. 483.

The Legislature had no right to give away Penn Square to private corporations.

LeClercq *v.* Trustees of Galliopolis, 7 Ohio, 218.
Barclay *v.* Howell, 6 Peters, 507.
New Orleans *v.* U. S., 10 Peters, 663.
Commonwealth *v.* Alburger, 1 Wh. 469.
Id. *v.* Rush, 2 H. 187

A result brought about by the unconstitutional provisions of the Act should not be sustained. The people were compelled to select Penn Square

Digitized by Google

for the public buildings, or allow it to be illegally given away.

See State *v.* Commissioners, *supra.*

C. H. T. Collis, City Solicitor, and *R. N. Willson*, for defendants in error.

Baird *v.* Rice governs this case. The suit there was brought by persons having the same relation to the controversy—that of tax-payers—as the plaintiffs in this case.

The Act of 1846 is broad enough to include all cases of public works upon which public money has been spent. There might be cases in which parties asking for an injunction could hardly maintain an action at law upon a question of title and damages; but this would be owing to the infirmity of their status, and not to the fact that the courts were not open to them.

As to the Act of 1870 containing more than one subject: in Leger *v.* Rice (8 Phila. 167), CADWALADER, J., in construing this Act, said "the subject was a compound one, involving alternatives mutually dependent or consequential. The title expresses all the purposes of the Act, except one, which is directly consequential." The provisions relating to Independence Square are mere incidents. A title need not set out in detail all the minute provisions of an act.

Dorsey's App., 22 Sm. 192.
Blood *v.* Mercelliot, 3 Sm. 395.
Allegheny Home's App., 27 Sm. 77.

But supposing everything relative to Independence Square, or to the appropriation of parts of Penn Square, were not embraced within the main subject of the Act as expressed in the title, the Act ought to stand as to its residue.

Allegheny Home's App., *supra.*

It is said that the people virtually voted upon the question of giving away Penn Square to private corporations. Every statute, so far as it becomes the law of any particular case, depends upon a contingency within the control of voluntary action; but granting that the people did vote upon this question, it was legal, under—

Locke's App., 22 Sm. 491, and the cases there cited.

As to the broad question of giving away public property to private corporations, the Act did not contemplate a gift, but only a right to occupy. For this distinction see—

Kittaning Academy *v.* Brown, 5 Wr. 269.

But the case of Baird *v.* Rice, *supra*, shows that Penn Square was originally intended for public buildings.

All the points in this discussion, except the application of the Act of 1846, were raised in Leger *v.* Rice, *supra*, when CADWALADER, J., refused an injunction applied for by a citizen of New York against the building commissioners, on grounds similar to those now pressed by the plaintiffs.

Jan. 15th. THE COURT. The decree by way of injunction is an exercise of high power, and when its effect is to arrest a great public work, especially after a very large expenditure of the public money, a chancellor would require a case of the clearest kind of abuse on the part of the representatives of the people of the high powers conferred upon them, before arresting a work of such a character. Added to this is the express legislation of 1846 to prevent the exercise of this high power in the case of works erected for the use of the public. We do not perceive in this case as presented to us a state of the law or the facts demanding the exercise of this high power of injunction, and therefore have concluded to refuse it. The decree of the Court of Nisi Prius dismissing the bill is therefore affirmed, and the appellant ordered to pay the costs.

PER CURIAM. WILLIAMS, J., absent.

[See Tatham *v.* The City, 2 WEEKLY NOTES, 525; Lea *v.* Bumm, below.]

Jan. '76, 90. **Lea v. Bumm.** Jan. 5.

Constitutional law—Act of August 5, 1870—*Unconstitutional provisions of Act which were never called into life—When main purpose of Act will not be avoided thereby.*

The main purpose of an Act of Assembly will not be avoided by the unconstitutionality of certain of its provisions which were not called into life owing to their alternative contingent relation to the other provisions of the Act.

So much of the Act of 5 August, 1870, as provides for the erection of the public buildings upon the site selected by the vote of the people, is constitutional, and hence the taxes imposed for the erection of said buildings may be collected.

Error to the Court of Common Pleas No. 4, of Philadelphia County.

Case by Henry C. Lea, against the Collector of Delinquent Taxes, to recover the public building taxes paid by the plaintiff under protest, and, as he alleged, under illegal compulsion. Plea, the general issue. At the trial it was proved that the plaintiff refused to pay the tax assessed for the public buildings until threatened with a distress, and in one instance, until a distress was made, and that he then paid under protest, accompanying his check with a written claim of his right to recover the money. Defendant put in evidence the Acts of August 5, 1870 (P. L. 1871, p. 1548), relating to the erection of the public buildings, and the city ordinances relating to the same subject. Plaintiff claimed that the whole of said legislation was unconstitutional, and that the tax fell with it.

THE COURT directed the jury to find for the

Digitized by Google

defendant, and the plaintiff took out this writ, assigning this direction for error. The constitutionality of this legislation being the principal question before the Court in the case of Wheeler v. Rice (*ante*, p. 333)—

Miller, for plaintiff in error, and

Collis and *Willson*, for defendant in error, submitted this case to the Court on the arguments in that case.

Jan. 15. THE COURT. We perceive no sufficient ground to arrest the collection of the taxes laid by the city upon the citizens under the ordinance in evidence by declaring the tax of the plaintiff illegal. There is no good reason to doubt the constitutionality of so much of the Act of 5 August, 1870, as provides for the erection of the public buildings upon the Penn Square after their selection as a site by the vote of the people. The raising of the taxes for the purpose is an evident and germane consequence of the lawful erection of these buildings. If there be other portions of the Act not called into life owing to their alternative contingent relation to the main purpose to which effect has been given by the popular vote, they will not avoid the main and largely executed purpose of the law.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

Jan. '77, 49. **Hart v. Kelley.** Jan. 16.

Partnership—What constitutes—Loan of money upon agreement to participate in profits—Act of 6th April, 1870—Affidavit of defence.

A. being sued as a partner of B., filed an affidavit of defence, setting forth that he was not a partner, but that by a written agreement between them, he was to furnish to B. such amounts as should be necessary to carry on the business, and was to receive, after the repayment of such advances, a certain proportion of the profits; that he never advanced any money, or received any profits, but rescinded the agreement immediately after it was made; that some of the items of plaintiff's bill were furnished before the execution of the agreement, although after its ostensible date. and that other items had been furnished after the rescission of the agreement.

Held (reversing the judgment of the Court below), that the affidavit was sufficient.

Semble, that a dormant partner is not liable for work done after his withdrawal from a firm, by creditors who had no knowledge of his connection with it.

Per PAXSON, J. Since the Act of 6th April, 1870 (P. L. 56), a mere agreement to advance money to a partnership, and to receive, after repayment of such advances, a share of the profits, does not of itself constitute the person making it a partner; and where he has not actually received any of the profits, and has not been held out to the world as a partner, he is not liable as such.

Error to the Court of Common Pleas No. 1, of Philadelphia County.

Assumpsit by Kelley against Faucett, incus, Sautter, A. Hart, and Clarence A. Hart, trading as the International Restaurant and Hotel Company, for work and labor done about the defendants' premises. The plaintiff filed a copy of his book of original entries, showing charges for work done by the plaintiff for the company defendant, at intervals, from December 16, 1875, to May 1, 1876.

The defendant, Clarence A. Hart, filed the following affidavit of defence:—

"That neither he, nor any one for him, either individually or in partnership, or jointly with others, obtained f om the plaintiffs the work and materials charged for in this suit, nor is he indebted to the plaintiff on any account whatever."

A supplemental affidavit of defence being ordered, the following was filed:—

"That he is informed and believes, that prior to December 13, 1875, Pincus and Faucett became copartners, trading under the firm name of the International Restaurant and Hotel Company; that on December 13, 1875, Pincus and Faucett, so trading, leased the premises No. 1220 Chestnut Street; that in order to properly fit up the said premises for the proposed business, considerable plumbing work was necessary to be done, and the said Faucett and the said Pincus, so trading as aforesaid, agreed with the plaintiff, that he should do the work; that the plaintiff, being unwilling to do the work on the credit of the said Faucett and Pincus, required better security, and it was agreed that Abraham Hart shou d become responsible; that thereupon, and in pursuance of the said agreement, the plaintiff did work, and furnished materials to the premises 1220 Chestnut Street, which work and materials constitute the greater portion of the plaintiff's claim in this case, to wit, the items charged between December 16, 1875, and about February 25, 1876; that this deponent had nothing to do with the said agreement, nor with the ordering of said work, nor did he ever assume to be a partner with Faucett and Pincus, or hold himself out as such, nor was the work done on his credit in any manner, but on the contrary thereof the plaintiff well knew that the lease of the premises in which he was making the fixtures for which he claims, was in Pincus and Faucett, in whom the same has remained from that time hitherto.

"That the only connection this deponent ever had with the other defendants, in the matter of the International Hotel and Restaurant, was the following: That some time after the agreement between Faucett and Pincus on the one hand, and Kelley on the other, and when the greater part of the work contracted to be done by the plaintiff had already been done, to wit, on or about January 7, 1876, this deponent of one part, with Pincus, Sautter, and Abraham Hart, signed an agreement, erroneously dated December 13, 1875, with Faucett, wherein and whereby he, the deponent, and the parties joining with him, agre d to furnish Faucett, as a loan, such amounts as might be necessary to carry on the business at 1220 Chestnut Street for one year, in compensation for which loan the deponent, and the parties joining with him, were to receive, in lieu of interest, three fourths of all net profits. That this deponent immediately after the

Digitized by Google

signing of the agreement, found that he would be unable to furnish any money to Faucett & Pincus, and hence refused to act under the agreement. That he furnished no money to Faucett & Pincus, nor did he ever receive any profit or advantage from the business, nor did he ever perform any act whatever under the agreement, but on the contrary thereof, immediately after the execution of the agreement, the same was rescinded by the parties thereto, so far as this deponent was concerned. That subsequently, to wit, on March 23, 1876, this deponent, being thereunto requested, acknowledged this rescission in writing by an instrument written on the same paper whereon the previous agreement had been written, acknowledging that all the interest he, the said deponent, had had in the International Restaurant, had been theretofore disposed of to Pincus, Sautter, and Abraham Hart. That copies of said agreement and acknowledgment are hereto annexed, marked 'A' and 'B' respectively.

"That this deponent was not, at any of the times at which the work and materials claimed for by plaintiff were done and furnished, in partnership with the other defendants, nor did he, or any one for him, either individually or in partnership with any one else, order, procure, or receive any of the said work and materials, nor is he indebted to the said plaintiff in any manner, or on any account whatever.

"APPENDIX A.

"Whereas, Hiram W. Faucett, having the knowledge and ability to organize and manage the business under the name and title of the International Restaurant and Hotel Company, for which purpose the said Faucett and Ed. Pincus have leased the property, No. 1220 Chestnut Street, and that the said Faucett agrees to give his personal attention to the successful management and development of the business, for the purpose of promoting its character, and making it profitable; it is therefore agreed between the said Faucett on the first part, and Ed. Pincus, C. A. Hart, Paul Sautter, and Abraham Hart, all of the city of Philadelphia, and State of Pennsylvania, of the second part—that the party of the second part will furnish such amounts as may be necessary to carry on the business for one year at 1220 Chestnut Street, on the terms as follows:—

"That the party of the second part shall be entitled to receive three-fourths of all net profits, and the said party of the first part, the other one-fourth part of said net profits, but before any party, either of the first or second part, shall be entitled to receive any dividends or profits, the sum or sums loaned or furnished by the party of the second part, or any one of them, shall first be returned or paid back to said party of the second part, after which the profit to be divided shall be as follows: One-fourth of the whole of net profits to Faucett, and the remaining three-fourths of said net profits to be divided equally, share and share alike, to said Sautter, Pincus, C. A. Hart, and A. Hart, party of the second part.

"It is also understood and agreed by and between all the parties to this agreement, that the restaurant shall be carried on at the premises No. 1220 Chestnut Street, by Messrs. Faucett, Pincus, and Sautter, who will each use their best undivided exertions and influence to make it profitable, without any further remuneration than the interest they have in the undertaking.

"It is further understood and agreed that all sums to be received under this agreement shall be paid to A. Hart, one of the party of the second part, who shall also receive the daily amount of sales, and make all disbursements, and out of the net profits, as soon as any may be set aside, the said A. Hart shall return to each party of the second part the sum or sums so furnished, before any dividend of the profits shall be made.

"The cost of fitting up the said premises, as well as all outlay for furnishing, etc., shall be considered as expenses to be first deducted, and moneys borrowed or furnished returned before dividing any profits.

"Witness our signatures, this 13th day of December, 1875.

"APPENDIX B.

"Whereas, the within named Clarence A. Hart having disposed of all his interest in the International Restaurant and Hotel Company to Edward Pincus, Paul Sautter, and Abraham Hart—they will therefore each be entitled to one-fourth interest in the whole, instead of one-fourth of three-fourths, as stipulated in the foregoing articles of agreement."

The Court below entered judgment against all the defendants, for want of a sufficient affidavit of defence. [Reported 3 WEEKLY NOTES, 93.]

The defendant Clarence A. Hart took a writ of error, assigning for error the entering of this judgment.

Sulzberger and *B. H. Brewster*, for plaintiff in error.

The instrument marked "A" is to be construed as the work of men unlearned in the law. If they had intended by it to create a partnership, they would have so styled it. The Act of 6 April, 1870 (Purd. 1221, P. L. 15), enables one to loan money to a firm upon an agreement to receive a share of the profits, without thereby rendering the lender liable as a partner. Even if this agreement was a partnership agreement, it was rescinded before being acted upon, and hence the defendant was not bound. Under no circumstances would Clarence A. Hart have been entitled to an account of the profits of the concern until he had contributed money; until that was done, the paper was at most an agreement between the parties to become partners at a future time. An inchoate partnership must be effectuated before liability attaches.

Irwin *v.* Bidwell, 22 Sm. 244.

Dean *v.* Harris, 33 Law Times Rep. 639.

The other averments in this affidavit are of such a character as to make the case one which could only be decided by a jury.

Wm. Ernst, contra.

An examination of the contract between Clarence A. Hart and the remaining partners shows conclusively that he intended to become a partner. He is made one of the parties of the second part with three others, who undoubtedly were partners. Therefore, since they stand in that relation, the defendant, who is classified with them, cannot escape from his joint liability.

Digitized by Google

Jan. 29. THE COURT. The rule of law formerly prevailing, that participation in the net profits of a business, made a participant liable to third parties as a partner, has been greatly modified in England and this country. Thus in Dean *v.* Harris, and Harris *v.* Butterfield (Law Times Reports, N. S. vol. 33, p. 639), Butterfield, who was a person of small means, applied to Harris to advance him money for the purpose of developing certain mines. Harris consented to lend Butterfield £2000 upon certain terms, viz., that "B." having entered into an agreement to take a lease of the Lycet Mines, that the said mines be worked under the style or firm of the Lycet Mining Co.; that said "H." find capital to work the mines to an extent not exceeding £2000; that the money so advanced shall be repaid with 10 per cent. interest, the said "H." to be paid 3*d.* per ton on all coal and iron-stone, by way of commission. The said "B." to be paid £200 per annum by way of salary, but not to take date until the sum or sums advanced by said "H." be repaid; said "B." to promote the interest of the concern, and continue in receipt of salary as long as he should conduct the business to the satisfaction of "H." After payment of the above, and costs of raising and preparing and delivering to market the product of said mines, said "H." shall be entitled to three-fourths of the profits, and all the net proceeds of the concern to be disposed of in the like proportion, said "H." to be free from all liability, except in respect of the money advanced by him. The Vice-Chancellor held that there was no partnership, saying, "All that 'H.' did was consistent with his character as capitalist, assisting 'B.' in carrying on business. All that is said to constitute a partnership. If it could, it would be most unsafe for any man to lend a tradesman any sum of money, and to look after the best means he could get for its payment." Mollwo, Marsh & Co. *v.* The Court of Wards (4 Law Reports, Privy Council Cases, 419) is perhaps a stronger case than Dean *v.* Harris. To the same point is Cox *v.* Hickman (House of Lords Cases, vol. 8, p. 268). In this State the Act of 6 April, 1870 (Purdon, 1221, pl. 15, P. L. 56), expressly provides that "it shall be lawful for any person or persons to loan money to any individual, firm, association, or corporation, doing business in this commonwealth, upon agreement to receive a share of the profits of such business as compensation for the use of the money so loaned in lieu of interest; and such agreement, or the reception of profits under such agreement, shall not render the person or persons liable as a copartner in such business, to other creditors of such individual, firm, association, except as to the money loaned," etc. It is by the light of the law, thus modified by judicial decision and legislative enactment, that we must examine and construe the agreement of December 13, 1875, which was attached to the supplemental affidavit of defence, and forms a part thereof. We assume that the Court below held that this agreement, as to the parties thereto, created a partnership *inter se.* In any other view of the case, the supplemental affidavit of defence was ample to prevent judgment. The agreement was evidently drawn by a layman, and was probably intended to come within the provisions of the Act of 1870. So far as the defendant below is concerned, it provides for two things: first, a loan or advance by him to Faucett & Pincus, of such an amount of money as may be necessary to enable the latter to carry on the restaurant at No. 1220 Chestnut Street, for one year; and, secondly, a division of the profits *after* such loan or advances are repaid. If the defendant can be held liable at all to his creditors under said agreement, it must be by reason of his right to a participation in the profits. It is not alleged that he held himself out to the world as a partner, and that any one was induced to give credit to Faucett & Pincus by reason of his connection with them. The advance of the money itself would not constitute, of itself, the defendant a partner. The participation in the profits might make him one, but not necessarily so. It would depend upon the intention of the parties, as expressed by the terms of their agreement. There were to be no profits divided until the advances were paid. If, as was alleged upon the argument, no profits were ever made, and of course none divided, and the advances were not even repaid, the time never arrived when the defendant became a partner by reason of his participation in the profits. This was precisely the case in Dean *v.* Harris, *supra*, in which the Vice-Chancellor held that a participation in the profits might have made Harris liable as a partner, but inasmuch as the business was unprofitable, and no profits were ever made, he could not be held for such reason. Here the defendant pointedly denies any participation in the profits. Such denial ought to have carried the case to a jury. Again, he swears distinctly that he never acted under said agreement, being unable to comply and advance the money; and that, as to him, said agreement was rescinded *immediately* after its execution. If this be so, and we are bound to assume it, he would not be liable, in any view we may take of the agreement, for any debt incurred after his withdrawal, at least not to a creditor who never had knowledge of said agreement, and never trusted Faucett & Pincus on that account. Aside from all this, however, this suit is for a claim against Faucett & Pincus, upon a contract made with them prior to the agreement of December 13. For the purposes of this case, we must treat said agreement as of the date of January 7, the defendant having sworn that the date of

Digitized by Google

December 13 was erroneous. A large proportion of the work was done prior to January 7. Assuming the defendant to have become a partner, he did not assume the debts of Faucett & Pincus. There is not a word in the agreement which binds them to pay any of their old debts. A partner who enters a firm already established, does not thereby become liable for the debts of the old firm. Nothing but an express agreement will render him so liable. If it be said that as to so much of the work as was done after January 7, it enured to the benefit of the defendant, the answer is that the fact is not so. He acquired no title to the leasehold and fixtures by reason of the agreement. They were, and continued to be, the property of Faucett & Pincus. The clause in the agreement, that "the cost of fitting up the said premises, as well as all outlay for furnishing, etc., shall be considered as expenses, to be first deducted before dividing any profits," does not render the defendant liable for a debt which he never contracted. In the most favorable light for the plaintiff, it is but an assumption of his claim, so far as there may be profits out of which to pay it. He merely agrees that it may be paid out of the profits, before his own claim for advances; this imposes no personal responsibility on him.

We think this case ought to have gone to a jury. We therefore reverse the judgment, and award a *procedendo*.

Opinion by PAXSON, J. WILLIAMS, J., absent.

[See Boyd *v.* Hart, *ante*, 220; *Cf.* Shamburg *v.* Ruggles, *ante*, 293.]

Oct. & Nov. '76, 75. Oct. 4.

Faulkner et al. v. Wilson.

Attorney's commissions for collection of mortgage reserved in the deed—Part of the mortgage debt—Property of the mortgagee, and not of his attorney—Extinguished by satisfaction of the mortgage.

A. brought a *sci. fa.* on a mortgage which contained a proviso that if the mortgagee should be forced to resort to a *sci. fa.* to obtain payment, the amount of the judgment should include five per cent., attorney's commissions. Before judgment was obtained, the mortgagor paid the amount of the mortgage debt without commissions or costs, and A., in the absence of his counsel, satisfied the mortgage. The Court, however, on the suggestion of A.'s counsel, entered judgment for the plaintiff on the *sci. fa.*, with leave to issue execution for the attorney's commissions and costs:

Held (reversing the judgment of the Court below), that the attorney's commissions were part of the mortgage—incident to it, belonging not to the attorney, but to the mortgage—and were extinguished when that instrument was satisfied.

Error to the Court of Common Pleas No. 1, of Allegheny County.

Sci. fa. sur mortgage, brought by T. Wilson against F. Faulkner and Mary Ann his wife.

The facts of the case were as follows: Wilson was the holder of a second mortgage for $500 against a property belonging to Mrs. Faulkner. In the deed was a proviso that, upon thirty days' default in the payment of either principal or interest, a *scire facias* might issue for the amount of principal and interest, together with costs, etc., including an attorney's commission of five per centum for collection. In April, 1875, there being more than two years' interest in arrears, the plaintiff brought this suit, but before the return day of the writ, Mrs. Faulkner called on him, and assured him that if the suit was pressed, he would probably lose his claim, as the holder of the first mortgage would at once foreclose for a large amount; whereas, if Wilson would give time, she thought she could sell the property at a price which would pay both mortgages. Wilson accordingly agreed to stop the proceedings, and Mrs. Faulkner found a purchaser in John A. New, who assumed the mortgages as part payment. New promptly paid off Wilson's mortgage, and the two went together to the office of Mr. McCormick, Wilson's attorney, to get the bond and mortgage which were in his hands. Not finding him in, they went to the Recorder's office, where Wilson satisfied the mortgage, and then to the Prothonotary's office, in order to discontinue the action which had been instituted thereon. They could not, however, find any record of the suit, but Wilson told New that it was of no importance, and that Mr. McCormick would deliver up the bond and mortgage at any time he would call for them. Some time after this, New, learning that Mr. McCormick claimed the payment of attorney's commissions before he would withdraw the suit, filed an affidavit of defence, setting forth the foregoing facts.

Soon afterwards Mr. McCormick filed an affidavit, setting forth substantially the same facts as the affidavit of defence, and alleging in addition that when Wilson and New went to the Prothonotary's office, New, with a fraudulent intention of avoiding the payment of attorney's commissions and costs, persuaded Wilson, who was an ignorant man, that no *sci. fa.* had been issued.

On this affidavit the Court granted a rule on the defendants to show cause why judgment should not be entered for the plaintiff on the *sci. fa.*, with leave to issue execution for attorney's commissions and costs only, which rule was afterwards made absolute. The defendants thereupon took this writ, assigning for error the above-mentioned action of the Court.

Digitized by Google

A. Burgwin, for plaintiffs in error.

The attorney's commissions in a case like this are a part of the debt due the mortgagee, and are to be collected by him as such. A satisfaction of the mortgage is a full release of the claim.

Mahoning Bank's Appeal, 8 Cas. 158.

H. H. McCormick, contra.

Oct. 3, 1876. THE COURT. Upon the *scire facias* in this case, we have a judgment for the full amount of the mortgage, debt, interest, and attorney's commissions; and that in the face of an affidavit of defence, setting forth its full payment and satisfaction. This extraordinary judgment was entered upon a rule on the defendants and their vendee, to show cause why such judgment should not be entered, with leave to take out execution for commissions and costs.

This was all wrong. No judgment could be had upon the *sci. fa.*, except for costs. The mortgage was satisfied, and as the attorney's commissions were part of the mortgage—incident to it—belonging, not to the attorney, but to the mortgagee, they were extinguished when that instrument was satisfied.

That such commissions cannot be collected as costs, was settled in the case of the Mahoning County Bank's Appeal (8 Cas. 158).

The judgment is reversed, and a *procedendo* is awarded.

Opinion by GORDON, J. WILLIAMS, J., absent.

[See Schmidt & Friday's Appeal, *ante*, 282.]

Jan. '76, 45. **Binswanger v. Fisher.** Jan. 16.

Affidavit of defence law—What a sufficient copy within—Practice—Punitory damages—Writ of error taken for delay.

A. sued B. and filed a copy of his book of original entries, which, besides the items of goods sold, contained on the credit side an entry of a draft for $300, and on the debit side a subsequent entry of cash paid draft $300, and costs of protest $5.10. Defendant's affidavit of defence was to the effect that the debits of $300 and $5.10 were not properly subjects of book entries on which judgment could be taken.

Held, that the affidavit was insufficient.

Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit by Fisher against Binswanger for goods sold and delivered. Plaintiff filed a copy of his book of original entries, showing various charges for goods sold and delivered, and also the following:—

1875, Sept. 18. Cash paid draft returned,	$300 00
Protest charged . .	5 10
	$305 10

On the credit side the following item:—

1875, August 12. Draft on Schoenfeld Bros., Chicago	$300 00

The account showed a balance due by defendant of $491.89.

Defendant's affidavit of defence averred "that in the copy filed he is charged, under date of September 18, 1875, with 'cash paid $305.10.' That in point of fact the said plaintiffs have not paid the said amount of cash to the said defendant, nor to any one for him, nor has he or any one for him ever received that amount from them.

"And this deponent further says, that he is advised by his counsel and believes that the said charges (for cash paid $305.10) are not properly subjects of book entries on which judgment may be taken for want of an affidavit of defence.

"This defendant admits that the account filed is otherwise correct, and that the sum of one hundred and eighty-six and seventy-nine one-hundredths dollars is due to the plaintiffs thereon, and the said deponent is willing and ready to pay the same."

The Court below entered judgment against the defendant for want of a sufficient affidavit of defence. (Reported, 2 WEEKLY NOTES, 97.) Defendant took a writ of error, assigning for error the entering of this judgment.

Sulzberger, for the plaintiff in error.

The above was not such an entry as comes within the affidavit of defence law.

E. F. Hoffman, contra, was not called on.

Jan. 22. THE COURT. The charge of "cash paid draft returned $300" was nothing more than an ordinary book entry to counterbalance a credit for the draft. The purpose of both credit and charge is to keep the account straight, not to evidence absolute payment by draft and an absolute charge of *cash*. The proper balances of accounts never could be preserved without entries of this sort to evidence current course of business. We should destroy all confidence in merchants' books, were we to hold in such a transaction of credit and charge, that the entry of cash paid draft returned was an absolute charge of cash. In most cases drafts and bills are negotiated by way of discount, and the entry of cash paid on draft returned is true as to the bank discounting the paper, but not as to the defendants.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

Jan. 27. *Hoffman*, having obtained a rule upon the plaintiff in error to show cause why the

Digitized by Google

penalty prescribed by the Act of 25 May, 1874, should not be imposed, read the affidavit of the defendant in error setting forth that before the commencement of suit the defendant, Binswanger, offered to pay the claim in cash and notes, thus recognizing its validity; that in 1876 the case was put on the short cause list but certified off by plaintiff in error, and that deponent believed the writ to have been taken merely for the purpose of delay.

Sulzberger, contra, argued, that although the defence was technical, yet plaintiff had a right to make it, and cited Wall *v.* Dovey (10 Sm. 212).

C. A. V.

Jan. 29. Rule absolute.

Oct. & Nov. '76, 3. Oct. 4.

Moeck v. Littell.

Affidavit of defence law—Sufficient affidavit of defence—What constitutes—No special form of words necessary—Promissory note—Holder for collection only.

No set form of words is essential to the sufficiency of an affidavit of defence; it is merely necessary that the facts constituting the defence be averred with reasonable precision and distinctness.

In setting forth his ground of defence, A., instead of employing the usual form "verily believes, etc.," used, "avers, expects to be able to prove and show on the trial," etc.:

Held (reversing the judgment of the Court below), that the phrase employed was a sufficient allegation of the defence set forth.

Error to Common Pleas No. 2, of Allegheny County.

Assumpsit by Jas. Littell against Jacob Moeck, the endorser of a promissory note for $700, drawn by Jacob Moeck, Jr., to the order of J. Rowley, to recover the value of the said note, with interest, costs of protest, etc.

An affidavit of defence was filed, alleging that the defendant endorsed the note for the accommodation of one Peter Moeck; that Peter Moeck delivered it to Rowley, in part payment, in the purchase of the lease of a tavern No. 31 Diamond Square, Pittsburgh, guaranteed by Rowley to be a first-class stand, and of considerable personal property; and that the consideration for the note entirely failed, the tavern proving worthless, and the personal property never being delivered; and closing with the following averment, "the affiant further avers, expects to be able to prove and show on the trial of the case, that Jas. Littell, the plaintiff, is not the owner and holder for value, and before maturity, of the note in suit, but that the same was handed over to him by John Rowley, the payee, for the purpose of debarring the maker and endorsers thereof from a defence to the same."

The plaintiff took a rule for judgment for want of a sufficient affidavit of defence, which, on argument, was made absolute. Judgment was accordingly entered for $716.91. The defendant thereupon took this writ, assigning for error the action of the Court in entering the judgment.

W. Reardon (with him *T. J. O'Keefe*), for plaintiff in error.

An affidavit of defence is sufficient, if it set forth a good defence, and the defendant's belief in the actual existence thereof. No express words or form of words is necessary to express this belief; the usual form is "verily believes," but any phrase of similar import may be substituted.

Bronson *v.* Silverman, 27 Sm. 94.
Twitchell *v.* McMurtrie, Id. 383.

T. M. Bayne, contra.

The defendant in the affidavit merely "avers and expects to be able to prove and show on the trial" the material facts of his defence. This is an entirely inadequate assertion of the belief in its truth essential to the sufficiency of an affidavit of defence.

Oct. 30, 1876. THE COURT. In this case the Court below ordered judgment to be entered for want of a sufficient affidavit of defence. The action was against the endorser of a promissory note. The affidavit averred that he endorsed it at the request, and for the accommodation, of Peter Moeck; that the latter delivered it to one John Rowley, in part payment, in the purchase of the lease of a tavern, and a large quantity of personal property thereon. It further asserted the worthlessness of the tavern, and the non-delivery of the most valuable portion of the personal property, and a failure of consideration to the full amount of the note. Neither in the Court below nor here was it contended that the affidavit did not set forth a good ground of defence between the parties to the contract. As between them, and to the extent of the value of the personal property not delivered, there was an undoubted failure of consideration. The contention then was and now is, whether the affidavit avers sufficient facts to let in the evidence, against the plaintiff below. The language is, "affiant avers, expects to be able to prove and show on the trial of this case, that James Littell, the plaintiff above named, is not the owner, and holder for value, and before maturity of the note in suit; but that the same was handed over to him by John Rowley, the payee, for the purpose of debarring the maker and endorsers thereof from a defence to the same." This is not only an express averment that the defendant in error is not a purchaser for value of the note before it matured; but in substance the further averment

Digitized by Google

that it is still the property of Rowley. If the fact of present ownership in Rowley be proved, undoubtedly the same defence may be made to the note, as if the suit was in his name. (Eyre *v.* Yohe *et al.*, 17 P. F. Smith, 477.)

It is true the more usual form of an affidavit of defence is that the affiant "verily believes" the facts which he alleges. Here, instead of belief, he positively avers their actual existence. In its legal effect this form of an affidavit may be no stronger than one in the usual form, but certainly it is no weaker. It is quite as effective to prevent the taking of judgment.

The facts set forth, as constituting the defence, need be averred with reasonable precision and distinctness only. (Bronson *v.* Silverman, 27 P. F. Smith, 94.) A reasonable intendment should be made in favor of the affidavit. (Twitchell *v.* McMurtrie, Id. 383.) We think the controlling facts are averred with sufficient precision and distinctness. An ability to prove those facts is distinctly asserted.

The assignments are, therefore, sustained.

Judgment reversed, and a *procedendo* awarded.

Opinion by MERCUR, J. WILLIAMS, J., absent.

[See Reznor *v.* Supplee, 2 WEEKLY NOTES, 401; Brown *v.* Walton, *ante*, 76.]

Oct. & Nov. '76, 138. Nov. 10, 1876.

In the matter of the Division of Plum Township.

Act of April 15, 1834, *relating to the creation of new townships, construed—Statutory requisites must be strictly complied with.*

The Act of April 15, 1834, relating to the division of townships, provides that upon petition filed praying such division, the Court shall "appoint three impartial men, if necessary, to inquire into the propriety of granting the prayer of the petition."

An order of Court, appointing commissioners, directed them to mark out such new township, etc. "if it is necessary and proper that such new township should be formed, and to make report to the Court." On certiorari:

Held, that the proceedings were defective, in that the above requirement of the Act had not been complied with.

Certiorari to the Court of Quarter Sessions of Allegheny County.

This case was heard in the Court below on exceptions to the returns of an election held by order of Court to ascertain the will of the qualified electors of Plum Township on the question of the division of said township.

On May 8, 1876, upon the petition of residents of Plum Township, Allegheny County, praying for the division of said township, the Court appointed three commissioners "to mark out and lay out said new township, and suggest a name therefor, also to fix the place or polls for holding elections therein, if it is necessary and proper that such new township thould be formed, and to make report to the Court."

The commissioners having reported in favor of the formation of a new township, the Court ordered a vote of the qualified electors of the township to be taken, which resulted in a small majority in favor of the division.

Exceptions filed to the returns of said election, on the ground of irregularities in the election, were overruled and the report of the commissioners confirmed; whereupon the exceptants took this writ of certiorari, assigning for error, *inter alia*, "That the order of Court appointing the commissioners does not direct them to inquire into the propriety of granting the prayer of the petition."

J. McF. Carpenter, for exceptions.

The Act of April 15, 1834, sec. 14 (P. L. 539), expressly requires that the order of Court appointing commissioners to divide a township, must contain a direction to inquire into the propriety of making such division; and an omission to direct such inquiry is fatal.

In re Bethel Township, 1 Barr, 97.
In re Harrison Township, 5 Ibid. 447.
In re Conneaut Township, 6 Pitts. Legal Journal, 121.

James Fitzsimmons, contra.

It is true that the Act of 1834 directs the Court to appoint three impartial men, if necessary, "to inquire into the propriety of granting the prayer of the petition." But the spirit and intention of the act have been complied with in this case, the terms of the order of Court directing them to lay out such division, "if it is necessary and proper that such new township should be formed," being equivalent to the words used in the Act. The commissioners in fact reported that they had "made diligent inquiry as to the necessity of said division." The objection is merely technical.

Nov. 20. THE COURT. The fourteenth section of the Act of April 15, 1834 (P. L. 539), provides that upon application by petition to the Court of Quarter Sessions for the purpose of creating a new township, or altering the lines of any township, or of ascertaining the lines or boundaries of any township, the Court shall appoint three impartial men, if necessary, to inquire into the propriety of granting the prayer of the petitioners.

It has been settled, in a series of cases decided by this Court upon the construction of this act, that the order of the Court appointing the commissioners, which is their authority for acting, must contain an explicit direction to them according to the express terms of the law, "to inquire into the propriety of granting the prayer of the petition." (In the matter of the division of

Digitized by Google

Bethel Township, 4 Barr, 97; *In re* Harrison Township, 5 Ibid. 447; *In re* Conneaut Township, 6, Pittsb. Legal Journal, 121.) The order of Court in this case was plainly defective in this respect. It contained no direction to the commissioners to the effect required. The order directed the commissioners "to mark and lay out said new township and suggest name therefor; also to fix the place or polls for holding elections, if it is necessary and proper that such new township should be formed." It might well be inferred that the Court reserved to itself the decision of the question, whether it was necessary and proper that such new township should be formed; and that the work of the commissioners was to be contingent upon such determination.

There is certainly no explicit direction to them to inquire and report upon the propriety of granting the prayer of the petition. Conceding that they did report upon the question—and even the report varies from the words of the act—we may adopt the language of the Court in *re* Bethel Township (1 Barr, 101), "True, they voluntarily certify that they thought the division proper, but in going beyond the words of the order they acted unofficially. They are to be sworn but only to do those things rightly which they are commanded to do, and we know not that they swore to the truth of the opinion which they volunteered: officially they certainly did not."

As this defect is fatal to the proceedings, it is unnecessary to consider the remaining assignments of error. Order reversed and proceedings quashed.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

Oct. & Nov. '76, 83. Nov. 16, 1876

Hopkins et al. v. West.

Usury — Usurious interest — Not recoverable back when included in and paid under a judgment confessed—Recoverable back when voluntarily paid upon the amount of such judgment—Act of 28 *May*, 1858.

Where usurious interest is included in the amount of a judgment confessed by a debtor and afterwards paid in full by him, the excess over legal interest cannot be recovered back under the Act of 28 May, 1858.

The excess of interest paid upon the amount of such *judgment*, after its confession, may be recovered back.

A judgment was confessed for an amount including usurious interest. Afterwards the defendant paid the judgment in full, with usurious interest to the day of payment.

Held, that the excess of interest included in the judgment could not be recovered back, but that paid upon the judgment could be.

Per SHARSWOOD, J. There is no difference in legal effect between a judgment confessed or for want of an appearance or plea, and a judgment on the verdict of a jury.

Error to the Common Pleas of Washington County.

Assumpsit by West against Hopkins, Wright & Co., to recover back excess of interest over 6 per cent. paid upon a loan of money.

The affidavit of claim disclosed the facts, that on April 13, 1871, plaintiff borrowed of defendants the sum of $1500, and gave to them his judgment note for $1644, at nine months, on which judgment was entered April 14, 1871; that after the maturity of the judgment he continued to pay interest upon the loan, at the rate of 12 per cent. until January 13, 1875; and, finally, on October 6, 1875, he paid the judgment in full, having from first to last paid the defendants an excess of interest over 6 per cent. amounting to $502.01.

The affidavit of defence set forth, "that the judgment obligation referred to in the plaintiff's affidavit of claim, in which the alleged excessive interest was included, was entered in said Court, as stated in plaintiff's affidavit, and judgment entered thereon on the 14th day of April, 1871, and that at the date of said entry no part of said obligation had been paid; the record of which judgment affiant prays may be taken as part of this affidavit. And that the plaintiff's affidavit of claim does not disclose any cause of action."

A rule was taken for judgment for want of a sufficient affidavit of defence, under which the Court below entered judgment against the defendant for the full amount of plaintiff's claim.

Defendant then took this writ, assigning for error the entry of judgment.

Hart & Brady, for plaintiff in error.

The 2d section of Act 28 May, 1858 (Purd. Dig. 803, pl. 2), under which suit is brought, provides that the payment of the excessive interest must have been *voluntary* to enable the debtor to recover back the excess. Was the payment here voluntary?

Judgment, whether by confession or otherwise, is the sentence and end of the law, and all proceedings after and under it are simply ministerial.

1 Bouv. Law Diction., tit. Judgment.
Blystone *v.* Blystone, 1 Sm. 373.

And, therefore, payment made under a judgment is not voluntary, but is simply obedience to a legal mandate.

The plaintiff below is estopped by the judgment; and, having paid it in full, cannot now recover back any part of it.

Money collected or paid upon lawful process of execution cannot be recovered back, though not

Digitized by Google

justly or lawfully due by the defendant in the execution.

Federal Ins. Co. v. Robinson, 3 WEEKLY NOTES, 173.

And, therefore, plaintiff's only remedy was to have had the judgment opened and reformed.

McCracken & McIlvaine, contra.

When judgment was entered against West for $1644, it was not part of the mandate that he should pay more than 6 per cent. interest after that; and if he did it, he did it voluntarily.

And the usurious interest included in the judgment entered is not received for any different use, for it is the *execution*, not the judgment, which is the end of the law; and so, prior to execution, the interest is within the Act of 1858.

Freeman on Judgments, page 2, sec. 2.
Heath v. Page, 12 Wr. 130.

No contract, however framed, would hold good if the ultimate effect of it would be to secure more than the legal rate of interest.

Fitzsimons v. Baum, 8 Wr. 32.
Campbell v. Sloan, 12 Sm. 481.
Bosler v. Rheem, 22 Sm. 54.

It is true the plaintiff below could have applied to the Court to open the judgment, but the law gave him two remedies, and he was not bound to pursue the one if he preferred the other.

Nov. 23. THE COURT. Had the judgment confessed by the plaintiff below, in favor of the defendants, been an adversary judgment upon the verdict of a jury, it cannot be questioned that it would have been conclusive as between the parties, even though it should manifestly appear that it included usurious interest. There is no difference in legal effect between a judgment confessed or for want of appearance or plea, and a judgment on the verdict of a jury. The Court in which the judgment is rendered will indeed open one of the former kind, and let the defendant into a defence in a proper case and upon equitable terms. (Clark v. Douglass, 12 P. F. Smith, 415; Blystone v. Blystone, 1 P. F. Smith, 373.) This principle was applied in Verner v. Carson (16 P. F. Smith, 440), in a case in which usurious interest was included, and as against a vendee of land subject to the judgment. No substantial difference can be shown between this and any other illegality entering into its consideration.

The judgment in favor of Hopkins, Wright & Co. against West would no doubt have been opened upon his application, and the excess beyond legal interest would have been stricken from it. But standing as it did upon the record, and paid by West in full, he cannot be permitted now to go behind it and claim that part of it was not justly due either from usury or any other cause.

But then that judgment only carried legal interest from the time it fell due. Any voluntary payments in excess of lawful interest, when the whole debt is paid, may be recovered back by suit commenced within six months of the time of such payments. That was in this case, according to the affidavit of claim, October 6, 1875. Whatever the plaintiff below then paid more than the amount of the judgment and interest, deducting payments before made, he is now entitled to recover back, with interest. He would have a right, in strictness, to have such payments credited to the principal from time to time as made. He has not given the elements for such a calculation, but has stated generally that he had paid as usurious interest, from January 13, 1872, to May 13, 1875, the sum of $657.60. Allowing him this credit as of that date, his claim ought to have been liquidated as follows:—

Judgment Hopkins *et al.* v. West, Jan. 13, 1872	$1644 00
Interest to May 13, 1875; 3 years, 4 months	328 80
	$1972 80
Credit payments, May 13, 1875 . . .	657 60
	$1315 20
Interest from May 13, 1875, to Oct. 6, 1875; 146 days	31 56
	$1346 76
Which sum deduct from $1747.91, paid Oct. 6, 1875, leaves	$401 15
Add interest from Oct. 6, 1875, to Nov. 23, 1876; 1 year, 54 days	27 61
	$428 76

Judgment reversed.

And now, November 23, 1876, judgment for the plaintiff below against the defendant below for the sum of four hundred and twenty-eight dollars and seventy-six cents ($428.76), and it is ordered that the record be remitted to the Court below that the judgment may be carried into execution.

Opinion by SHARSWOOD, J. WILLIAMS and MERCUR, JJ., absent.

Jan. '74, 209. **Wagner v. Peterson.** Jan. 5.

Assumpsit for money had and received—When it lies—Broker—Charges of extra interest for carrying stock—Account—Receipt of balance shown by, when not conclusive.

A. deposited securities as a margin with a broker who thereupon agreed to carry certain stock for him at 7 per cent. Afterwards from time to time the broker made charges of extra interest, alleging that he was himself obliged to pay these charges in order to carry the stock. Finally the broker sold the stock and the securities held as a margin, and rendered an account to A., who accepted the balance shown by it.

Digitized by Google

Afterwards, A., alleging that the charges for extra interest were contrary to agreement, brought assumpsit against the broker for money had and received from the sale of the stock and margin. The Court below entered a non-suit, on the ground that the action should have been account render, and that, even if the form of action were proper, plaintiff was estopped by his acceptance of the balance found by the account.

Held (reversing the judgment of the Court below), that if the extra charges were improper the defendant was liable in this form of action for the money of the plaintiff retained by him to pay them.

Held further, that while the receipt by A. without objection of the balance shown by the account was evidence of an agreement on his part to pay the extra charges, yet it was for the jury and not the Court to draw the inference, and the non-suit was therefore improper.

Error to the District Court of Philadelphia County.

Assumpsit by Wagner against Peterson. The narr. consisted of the common counts, under which three bills of particulars were furnished.

The first and second bills charged the defendant with the market value of stocks carried by him for the plaintiff and then, as alleged, sold by him without notice; and the market value of U. S. bonds held as a margin; giving credit for the money paid by the defendant for the said stock. A third bill of particulars charged the defendant for the stock at the highest market rate between the conversion and the time of trial.

Pleas, non-assumpsit, etc., and the Pennsylvania statute of limitation to actions to recover back usurious interest.

At the trial (before LYND, J.) the plaintiff showed that in 1869, when a clerk in the *Press* office, he informed his friend Hewes, a broker and also the financial editor of the *Press*, of his desire to buy Pittsburg, Fort Wayne, and Chicago R. R. stock; that Hewes saw Peterson, the defendant, another broker, and proposed to bring Wagner to him as a purchaser of said stock, on the understanding that the commissions should be shared between the said Hewes and Peterson; that Hewes went with Wagner to Peterson's office and informed one Newhall, a clerk there, of Wagner's desire, stating that Peterson had agreed to carry the stock at the rate of seven per cent., which, it appeared, was the regular rate at that time in New York, where the stock was to be bought. The plaintiff further showed that 300 shares were purchased for him at different times, the last purchase having been made on September 7, 1869; that, 200 of these shares becoming entitled to a stock dividend, the number was increased to 442; that he deposited as margin at different times $2500 in United States bonds; that until after the last purchase of stock Peterson charged 7 per cent. for carrying, but that he then began to charge what he called extra interest at so much a day, viz., on 8 September $\frac{1}{64}$ per cent. on 442 shares; on 9 September $\frac{1}{32}$ per cent.; on the 22d, $\frac{1}{8}$; on the 24th, $\frac{1}{4}$, and on the 25th, 1 per cent., amounting to $442 per day; that Hewes knew of these charges.

Hewes testified that he informed Wagner of these charges about 23 September, and explained that they arose from the necessities of brokers owing to the panic on Black Friday; that on the 27th (when the charges amounted to $1 a share every day) he ordered a sale of 200 shares of the stock to prevent the margin from being eaten up and to save something for Wagner; that he did this without Wagner's knowledge or authority, but that when he told him of the sale that evening, Wagner, though much agitated, did not complain of it. The plaintiff further showed that the next day, 28 September, he went with Hewes to the office of Peterson who asked for more margin, and gave him 20 minutes to decide whether more margin should be put up or the remainder of the stock sold; that he then transferred to Peterson 14 shares of stock for which he had paid cash; that on the 29th, a charge of $\frac{1}{2}$ per cent. being still made for carrying the remaining stock, he consented to its sale, supposing that the extra charges were legitimate. In cross-examination, an account between Wagner and Peterson was shown to the plaintiff, in which Peterson charged Wagner with the money paid for the stock, at about 153, with 7 per cent. interest and the extra charges, which last amounted to $1223; and gave credit for the money received for the stock, sold at about 83, the money received for the bonds deposited as margin, and a balance of $395.27 in Wagner's favor. The plaintiff admitted the account had been shown to him, but could not state at what time. He admitted that in October of the same year he ordered a further purchase of 50 shares of stock, through Peterson, with the above balance as margin, and that after a sale of this stock in November of the same year he accepted a balance of $323.73, which was the balance Peterson then admitted. He admitted that, thinking the charges legitimate, he made no claim upon Peterson till 1 July, 1870, when he brought this suit. There was some evidence that at the time Peterson was charging 1 per cent. a day other brokers were charging only half as much, but there was also some evidence that Peterson charged only what he was compelled to pay his correspondents in New York who made the purchases for him.

Upon motion of the defendant a non-suit was granted, which the Court in banc, HARE, P. J., and THAYER, J., dissenting, refused to take off, LYND, J., holding, and MITCHELL, J., concurring in the result: (1) that the action should have been account render, and not assumpsit, and (2) that, even if it had been account render, a non-suit

Digitized by Google

should have been granted because the evidence was clear that an account had been rendered by the defendant, in which the plaintiff, with full knowledge and comprehension of its items, and after time for reflection and professional advice, acquiesced.

Plaintiff took out this writ, assigning for error the refusal of the Court to take off the non-suit.

Crawford, with whom was *Tull*, for plaintiff in error.

The form of the action was appropriate. Reeside's Executors *v.* Reeside (13 Wr. 322), relied on by the Court below, does not apply; see—

Brown *v.* Agnew, 6 W. & S. 235.
Evans *v.* Waln, 21 Sm. 69.
Deysher *v.* Tribel, 14 Sm. 386.
Satterlee *v.* Milick, 26 Sm. 65.
Smith *v.* Austin, 4 Brewst 89.

Practically assumpsit and account render differ only in form.

There was no ratification, because the plaintiff did not have full knowledge of the material facts.

Story on Agency, §§ 239-243.
Porter *v.* Paluson, 3 H. 235.
P. W. & B. R. R. Co. *v.* Cowell, 4 C. 335.
Wright *v.* Burbank, 14 Sm. 247.

Sharp and *Sellers* (*William B. Mann* with them), contra.

Under the count for money had and received, only what was received can be recovered. Here we have accounted not only for what was received for the stock, but for its market value at the time of sale.

The stock was sold by order of Hewes. There is little evidence that he was defendant's agent; he was really the plaintiff's agent.

The sale, at any rate, was ratified by Wagner.

Bronson's Executor *v.* Chappell, 12 Wall. 681.
Baker *v.* Drake, 53 N. Y. 211.
Negley *v.* Lindsay, 17 Sm. 217.
Lindslay *v.* Malone, 11 Harris, 24.

The sale was at 83. If the plaintiff had given notice of his disapproval of Hewes's order within forty-eight hours, as he was obliged by law to do, the defendant could have repurchased at a profit to the plaintiff.

The plaintiff never demanded the stock nor offered to pay for it. He is therefore confined to its value at the time of sale.

Neiler *v.* Kelley, 19 Sm. 403.
Work *v.* Bennett, 20 Id. 484.

The plaintiff could at most recover only for the excess of charges for carrying over six per cent., and the bills of particulars do not sustain such a course of action, and if they did the suit was brought too late.

Act of 28th May, 1858, P. L. 622; Purd. Dig. 803, pl. 2.
Heath *v.* Page, 13 Sm. 108.

B. H. Brewster, in reply, argued that the question was one of fact; that the evidence showed that Hewes was a partner of Peterson; that there was no evidence that Wagner agreed to pay anything for carrying the stock more than the seven per cent. agreed to, and that the case should have gone to a jury.

Jan. 15. THE COURT. Had the plaintiff's claim been confined to the value of the stock sold by the defendants, the non-suit would have been unquestionably right. Admitting that under the circumstances the sale was a wrongful conversion, and that plaintiff might waive the tort and sue in assumpsit, the measure of his damages would be the market value at the time of conversion. It is not the rule, even in the action of trover, in such a case, that the plaintiff is entitled to recover the highest price which the stock would have commanded at any time before the trial. That rule is confined to the case where there is a duty or obligation devolved upon a defendant to deliver such stocks at a particular time, and that duty or obligation has not been fulfilled. (Neiler *v.* Kelly, 19 P. F. Smith, 403.) Here it was manifest, from the plaintiff's own evidence, that the defendants had fully accounted to him for the market value of the stock on the day of sale. In an action for money had and received, which waives the tort, a portion only of the amount received could be recovered.

But the plaintiff showed that the defendants had charged him, and retained out of the proceeds of the stocks and securities received by him, several sums of money for carrying the stocks, amounting, it is alleged, to $1233.

Upon this part of his case we think, that there were questions which ought to have gone to the jury. There was evidence that defendant had agreed to purchase and carry the stock for the plaintiff for seven per cent. As it appears to have been understood that the stock was to be bought and carried in New York, there was nothing unlawful in stipulating for the rate of interest which was lawful there. But without an agreement that plaintiff should reimburse defendant whatever he might have to pay brokers in New York, the defendant had no right to make such charge. Whether there was such an agreement was a question of fact for the jury. The plaintiff received notice from the defendants on the 27th September, 1868, that he had made such charges of what he calls the extra interest up to that day amounting to $694. Subsequent charges were made on the 28th, 29th, and 30th of September. There was evidence that the plaintiff had assented to the sale of his stock after he was made acquainted with the charges, for the reason that they were rapidly eating up the securities he had pledged for margins. He afterwards received the balance due him according to plaintiff's account without objection. All this was certainly evidence that the understanding was that he was to reimburse the defendants the charges of the New

Digitized by Google

York brokers, but it was for the jury and not the Court to draw the inference. There was evidence that other brokers at the same time were charging less, enough certainly to cast upon the defendant the *onus* of proving that he had actually been compelled to pay the sums he claimed. Bevin *v.* Cullen (7 Barr, 281) has no application to this case; it arose upon the plea of the statute of limitations, the answer to which was merchants' accounts, and what was decided below and above was that where an account was rendered to his principal by a factor abroad and the consignor acquiesced and ordered the balance to be shipped without objection to the items, it became an account stated and was barred by the lapse of six years. Nor has the case of Reeside's Ex'r *v.* Reeside (13 Wright, 322) any application. There an executrix appointed the defendant her agent, or attorney, to settle up a large estate, to collect assets, and pay debts; and it was held, that, without an account stated and a balance struck, assumpsit would not lie, but the remedy must be account render or a bill in equity. There, all that the defendant undertook to do was to account, and it was treated as analogous to the case of copartners. But here, in effect, is a simple case of debtor and creditor. The defendant advances money on pledge of securities, and as broker for plaintiff purchases stock. Stock and securities are sold, and he pays the plaintiff the balance which he admits to be due. Surely, to the extent of the money of the plaintiff, which he retained by virtue of credits to which he was not entitled, it was money had and received to plaintiff's use. It is clear that the plaintiff insisted upon these items, as money actually paid by him with defendant's knowledge or assent. It was not, therefore, the case of money paid on a usurious agreement, barred by the lapse of six months.

Judgment reversed and *procedendo* awarded.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

Oct. & Nov. '75, 256. Oct. 6, 1876.

Phillips et al. v. Allegheny Car and Transportation Company.

Contract to receive payment from a corporation in its own stock—Not abrogated by failure to fulfil other distinct provisions of same contract, nor by the corporation's failure to tender certificates of stock.

A. sold lumber to a corporation, agreeing to receive payment one-half in money and one-half in the stock of the corporation. The corporation neither made the cash payments nor tendered the certificates of stock. A. thereupon brought suit for the payment in money of his entire claim:

Held, that as the agreement to take stock was unconditional, it was not abrogated by the failure to meet promptly the cash payments:

Held, further, that it was not abrogated by the failure to tender the certificates of stock, for certificates are merely evidence of ownership, and the stock really became A.'s property as soon as the lumber was delivered, although, if the agreement had been for stock of another corporation, a tender would have been necessary.

Error to the Common Pleas No. 1, of Allegheny County.

Assumpsit on a book account for $3363.70, brought by J. O. Phillips and W. Nuttenzwey, trading as Phillips & Nuttenzwey, against the Allegheny Car and Transportation Company. Plea, non-assumpsit.

The facts of the case were as follows: In the summer of 1873 the plaintiffs agreed to furnish lumber to the defendant at certain fixed prices, one-half to be paid in cash within the first fifteen days of each month, for the lumber delivered in the preceding month; and the other half in the stock of the company. The plaintiffs delivered lumber under this contract from time to time up to October 2, when their bill amounted to $4063.70. The defendant failed to make any cash payment on the contract, although often requested to do so by the plaintiffs. After the entire delivery the plaintiffs notified the defendants that unless the terms of the contract as to payment were complied with, they would rescind the agreement to receive stock, and claim the whole price in money. On November 22 the defendant paid $700 on account, which was received by the plaintiffs without objection or notice that they intended to disaffirm the original agreement, still leaving $1331.85 due on the cash half of the contract. The company making no further payment, and tendering no certificates of stock, this suit was brought in the following month.

At the trial the plaintiffs presented, *inter alia*, a point setting forth the above facts, and claiming that under the circumstances they had a right to demand the whole price in money, and were entitled to a verdict for the balance of their bill, $3363.73, with interest from November 22, 1873. *Answer.* The Court reserve the foregoing point, and, there being no dispute as to the facts set forth therein, direct the jury to find a verdict for plaintiffs for $1445.52, subject to the opinion of the Court on the question of law reserved; and should the Court be of opinion with the plaintiffs in the above point, then the judgment to be entered for the plaintiffs for $3363.70, with interest from November 22, 1873, *non obstante veredicto.*

The jury accordingly found a verdict for the plaintiffs for $1445.52, subject to the opinion of the Court on the reserved question of law; and the Court entered judgment on the reserved question for the defendant, and thereupon judgment

Digitized by Google

on the verdict. The plaintiffs took this writ, assigning for error, *inter alia*, the refusal of the Court to enter judgment for the full amount of their claim upon the point reserved.

H. Burgwin, for plaintiffs in error.

The contract, as shown by the evidence offered at the trial, was substantially that the plaintiffs were to take half their bill in stock, provided the other half was paid promptly in cash on delivery; otherwise the whole bill was to be payable in money. The defendants failed to meet the cash payments, and therefore the whole amount became payable in money.

[SHARSWOOD, J. You should have excepted to the reserved point; otherwise you accept the statement of the contract therein contained, which is very different from that which you now make.]

Besides, the defendant never tendered the stock to the plaintiffs. For this reason, also, the whole claim became payable in money.

Roberts *v.* Beatty, 2 Penna. 63.
Church *v.* Fetterow, Id. 301.
Fleming *v.* Potter, 7 Watts, 380.
White *v.* Tompkins, 2 Sm. 365.
2 Parsons on Contracts, 651.
Brown *v.* Foster, 1 Sm. 165.
Oil Co. *v.* Forsyth, 12 Wh. 291.
Miller *v.* Kelley, 19 Sm. 403.

H. H. McCormick (with him *Robb & Snively*), contra.

Tender of the certificates of stock was unnecessary. The defendants were at all times ready to deliver them on demand.

Oct. 23. THE COURT. A reserved point must be based upon certain facts admitted in the cause or found by the jury. In this case the facts are admitted, expressly stated to be so in the point itself. The Court below entered judgment on the reserved question for the defendant, and judgment on the verdict, which is assigned here for error.

The case was tried below upon the theory that the contract was conditional, and that the right of the defendants to pay for one half the lumber in stock of the defendant corporation depended upon their prompt payment in cash for the other half. But the facts, as set forth in the reserved point, are not so. It is there stated "that it was a part of the contract that one-half of the price was to be paid by defendant in cash within the first fifteen days of each month, for the lumber delivered in the preceding month, and the other half was to be paid in the stock of the company at par value." This was certainly an unconditional contract; but it was urged that the whole became payable in money for two reasons, viz.: the failure to pay for one-half in money as the lumber was delivered; and, 2d, the failure to tender the stock. In regard to the first proposition it is sufficient to say that the agreement to take pay in stock for one-half was absolute, and not contingent upon the prompt payment of the cash portion. A refusal to deliver the stock would undoubtedly have made the whole sum payable presently in money; but we are unable to see how a mere failure to pay the cash on the days and times appointed can enable the plaintiff to rescind the contract and demand payment of the whole in money. Nor do we see that the failure to tender the stock to the plaintiffs can have such effect. It is true there is a line of cases which decide that when a contract is made to pay in a particular commodity, the debtor must have the article at the time and place designated in the contract for its delivery, or he becomes liable to pay in money. (Roberts *v.* Beatty, 2 Pa. 63; Church *v.* Fetterow, Id. 301; Fleming *v.* Potter, 7 Watts, 380; White *v.* Tompkins, 2 P. F. S. 365.) There is also the case of Brown *v.* Foster (1 P. F. S. 165), in which Foster had done certain work for Brown, under an agreement that one-half of it was to be paid for on completion by Brown's notes at six and twelve months. Before the period at which the first note would have matured, Foster brought suit, and was permitted to recover on the ground that the giving of the notes was a privilege to Brown, and unless he chose to avail himself of it by delivering or tendering the notes at the time, the demand became a money demand, and Foster could sue at once. The Court held that there was an agreement for time, and that the giving of the notes was the price of the indulgence, and a condition precedent to his obtaining time.

The present case is easily distinguished from any of those above cited. Here the contract was with a corporation. It agreed to pay for one-half the lumber *in its own stock*. Had the contract been to pay in a horse, or even in the stock of another corporation, the case would have been materially different. But here the stock was to be issued by the defendant corporation to the plaintiffs, and to that extent they become purchasers from said corporation of its own stock; having paid for it in lumber, they became, in fact and in law, owners of the stock, and were entitled to demand a certificate therefor from the company. The stock of a corporation is an intangible thing; it can be neither seen nor handled. The certificate is the mere evidence of its existence, and of the title of the owner. The failure of a corporation to issue certificates of stock for the first instalment of the subscription is no defence to a subsequent one. (Shelbyville *v.* Shelbyville T. Co., 1 Met. Ky. 54; Hardy *v.* Merriweather, 14 Ind. 203; Vauter *v.* Ohio R. Co., Id. 174.) A subscriber who has paid for his stock cannot recover his money back for the mere failure to deliver the stock without a previous demand for it. It was even held in Arnold *v.* Suffolk Bank, 27 Barb. 424, that "an action for money had and received

Digitized by Google

will not lie against a corporation by one who has subscribed for a certain number of shares and paid for them, merely on the ground that the company refuses to deliver the certificate." There was no allegation here that the defendant corporation was not ready and willing to issue to these plaintiffs the certificates of stock to which they were entitled under the contract. In the absence of such demand and refusal, we do not think said defendant is in any default, and the judgment must be affirmed.

Opinion by PAXSON, J. WILLIAMS, J., absent.

May, '76, 115. **Ruby's Appeal.** May 13, 1876.

Errors and appeals—Appeal from a decree other than final—Decree that the insolvency of a State bank is fraudulent under Act of April 16, 1850, is interlocutory—Practice.

In a proceeding under the general banking Act of Pennsylvania of April 16, 1850, the Court confirmed the decree of auditors appointed to investigate the affairs of an insolvent bank, and decreed that the insolvency was fraudulent.

Held, That such decree was not a final one; and appeal quashed.

Motion to quash appeal of H. Ruby *et al.* from the decree of the Court of Common Pleas of Cumberland County.

This case was heard in the Court below upon exceptions to the report of auditors appointed by the Court, under the provisions of the Act of April 16, 1850, to investigate the affairs of the Farmers' and Mechanics' Bank of Shippensburg.

This bank was incorporated by a special Act of Assembly approved 11th April, 1862, and by its charter was made subject to the general banking laws of the commonwealth. Under proceedings in pursuance of the 27th section of the Act of April 16, 1850 (Purd. Dig. 144), the Court on May 3, 1875, decreed that an involuntary assignment of all the estate, real and personal, of the bank, should be made by the directors, which was accordingly done. On May 27, 1875, the directors, in compliance with the provisions of the 42d section of said Act, filed in the prothonotary's office a statement of the affairs of the bank, which on June 1, 1875, was presented to the Court for examination and referred to three auditors for investigation and report. These auditors found and reported that the insolvency of the bank was fraudulent, and also reported that large sums were due by the several directors under the liabilities imposed by the Act of 1850.

To this report exceptions were filed on behalf of Henry Ruby and others, directors and officers.

After argument the Court dismissed the exceptions and entered the following decree: "And now, to wit, 30 March, 1876, this Court having upon an investigation of the matters contained in the report of the auditors appointed to make a strict investigation of the affairs of the Farmers' and Mechanics' Bank of Shippensburg, and of the accuracy and fairness of the statement of the directors presented to the Court, determined that the insolvency of the said Farmers' and Mechanics' Bank of Shippensburg was fraudulent, it is now entered as the judgment of the Court that the insolvency of the Farmers' and Mechanics' Bank of Shippensburg was fraudulent."

From this decree the directors appealed.

When the cause was called for argument, the appellees moved the Court to quash the appeal, on the ground that the judgment and decree of the Court was interlocutory and not final.

L. Tood, W. H. Miller, and *W. F. Sadler*, for motion.

The decree of the Court below was interlocutory. No final judgment has been rendered against the appellants.

O'Hara *v.* Penna. R.R. Co., 2 Grant, 242.
Hilbish *v.* Catherman, 10 Sm. 444.
Longworth *v.* Sturges, 6 Ohio St. R. 154.
2 Daniel's Chan. Prac. 1190, and notes.
Miller *v.* Hoag, 7 Paige Ch. R. 18.
Peet *v.* McGraw, 21 Wendell, 667.

A. B. Sharpe and *Wm. Trickett*, contra.

The decree of the Court is the *end* of one stage in the proceedings for winding up the insolvent bank. It is final so far as that branch of the proceedings is concerned. When the Court had pronounced judgment that the insolvency of the bank was fraudulent, nothing further remained to be done, there was no action depending.

Straub *v.* Smith, 2 S. & R. 382.
Gardner *v.* Lefevre, 1 P. & W. 73.
Commonwealth *v.* Judges, 3 Binney, 276.

May 15. THE COURT. Appeal quashed.
(No opinion.)
WILLIAMS, J., absent.

Jan. '76, 67. **Rand v. Dovey.** Jan. 12.

Promissory note—Irregular endorsement made before that of the payee—Right of holder to strike off such endorsement.

A promissory note does not cease to be negotiable because endorsed by a corporation through its seal.

The holder of a promissory note may strike off an irregular endorsement through which he has not derived title, placed before that of the payee.

Error to Common Pleas No. 1, of Philadelphia County.

Digitized by Google

Assumpsit by John J. Dovey against Abraham W. Rand upon the following note:—

"$3750. PHILADELPHIA, September 14, 1874.

Two months after date, I promise to pay to the order of A. W. Rand, Esq., thirty-seven hundred and fifty dollars, payable at 432 Walnut Street, without defalcation, value received.

GEORGE F. HILT, *Secretary*.

Endorsed: Safeguard Insurance Company of Penna.
[Seal of Ins. Co.] per GEORGE F. HILT,
A. W. RAND."

An affidavit of defence was filed which was adjudged insufficient, and judgment entered for the plaintiff [see 1 WEEKLY NOTES, 159], but this judgment was subsequently opened and defendant let into a defence. Plaintiff then filed a narr. containing the common counts and the following special count: "For that whereas one George F. Hilt, on the fourteenth day of September, in the year of our Lord 1874, at Philadelphia, made his promissory note in writing, and thereby promised to pay to the defendant's order thirty-seven hundred and fifty dollars two months after date, which period has now elapsed, and the defendant then and there endorsed the same to the plaintiff, and the said George F. Hilt did not pay the amount thereof, although the same was there presented to him on the day when it became due, of all which the defendant then and there had notice."

Pleas, non assumpsit, payment with leave, etc.

On the trial (before PEIRCE, J.) the plaintiff offered the note in evidence. Defendant objected, first, because the endorsement under seal destroyed the negotiability of the note, and second, because it was not the instrument described in the special count of the narr. Objection overruled and note admitted. Exception. There had been a payment upon the note. Verdict and judgment for plaintiff for the whole sum claimed. Defendant took this writ, assigning for error the admission of the note in evidence.

Henry T. King, for plaintiff in error.

The note sued on is made and endorsed out of the usual form of promissory notes. It has a sealed endorsement and through that sealed endorsement the holder derives his title whether the endorsement of the company is treated as the first endorsement, which is the position it actually holds, or as in law under the principles of Schafer *v.* Bank (9 Sm. 144), the second endorsement. The sealed endorsement destroyed the negotiability of the note as to all parties claiming subsequent to and through that endorsement.

The holder did not strike out that endorsement, nor indeed could he, and thus make negotiable that which in its inception was not so.

Plaintiff should have stated in his declaration the endorsement of the company, and then at the trial proven it or offered to strike it off the note. But he did neither, and there was therefore a fatal variance between the narr. and the note. A holder may strike out all but the first endorsement, but in this case the company was in point of fact the first endorser. There was a fatal variance between the narr. and the note.

A. Sydney Biddle (*R. C. McMurtrie* with him), contra.

No one has as yet asserted that an endorsement of a note by a corporation makes the note a bond. The drawing does if it is sealed, but not the transfer. The contract of endorsement may be by deed though the primary debt be by parol.

The date, amount, and parties to the instrument proved, correspond to the description in the narr., there is therefore no variance.

The holder of a negotiable note may even at this stage of the case strike out any endorsements which are not stated in the declaration. But it is unnecessary to strike out the endorsement, since the plaintiff did not derive title through it.

Merz *v.* Kaiser, 20 La. An. 377.
Cook *v.* Banadhler, Chitty, 642, 9th ed.
Mayer *v.* Jadis, 1 M. & Robb, 247.

Jan. 22. THE COURT. This suit was brought by Dovey, the holder of the note, against Rand, the payee and endorser. Dovey does not need to trace his title through the irregular endorsement of the Safeguard Insurance Company. No question arises in this action between Rand and the insurance company as to their relations to each other. That relation does not affect Dovey, who takes title by the endorsement of Rand as payee. The latter cannot set up the endorsement of the insurance company as an irregularity to affect Dovey.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

[*Cf.* Lossee *v.* Bissell, 1 WEEKLY NOTES, 173; Robinson *v.* Rebel, Id. 9; Smith *v.* McElwee, Id. 231; Wardin *v.* Balfour, Id. 284.]

Common Pleas—Law.

C. P. No. 3. **McNamee v. Graves.** Dec. 18, 1876.

Malicious prosecution—Probable cause—New trial.

Rule for a new trial.

Case for malicious imprisonment. The declaration averred that the plaintiff had been maliciously imprisoned under a magistrate's warrant, at the suit of the plaintiff. Plea, Not guilty.

Digitized by Google

The following facts appeared at the trial: The plaintiff was a domestic servant of the defendant from some time in September to November 23, 1874, and during this time, up to November 12, there was another servant, Mary Ann, in the defendant's household. For several weeks before plaintiff's departure various articles had been missed by plaintiff's employer, the defendant. Mary Ann denied all knowledge of the articles. After Mary Ann left, and while plaintiff was absent, the defendant's wife searched for the missing articles in a hamper near plaintiff's room, and found nothing. The next day plaintiff produced one of the missing articles, a counterpane, out of the hamper. When told of the search of the day before, she blushed, and seemed embarrassed. On November 22, defendant told plaintiff that he was suspicious about her, spoke of the counterpane, and said he would be satisfied if she went before a magistrate and swore she was innocent. This she seemed unwilling to do, though affirming her innocence. On the morning of November 23, the defendant's wife went to call plaintiff, as usual, about 6 o'clock, and found her preparing to leave the house. The defendant then said that her leaving so early without her wages, a week before she was expected to go, convinced him that she was a thief, and he then procured an officer, who arrested plaintiff, without any warrant supported by oath or affirmation, and locked her up in the station house.

On the suggestion of the officer that she would probably confess, defendant waited until three in the afternoon, and then with his wife went to a magistrate, and made complaint. By advice of the magistrate, they concluded to abandon the prosecution, as there was little prospect of recovering the goods. Plaintiff had in the mean time been released before the warrant for her arrest had been issued.

The defendant requested the Court to charge, *inter alia:* "If the jury believe the defendant's testimony, then it establishes probable cause for the arrest, and their verdict should be for the defendant." The Court refused so to charge. The jury found a verdict for plaintiff for $250.

Ernst, for the rule.

The plaintiff should establish both malice and want of probable cause. The question of probable cause upon a given state of facts, is for the Court.

Dietz *v.* Langfilt, 13 Sm. 234.

Fisher *v.* Forrester, 9 Casey, 501.

The question of malice was not properly before the jury, still less that of the guilt or innocence of the plaintiff.

Archer, contra.

Rule discharged.

NOTE.—A motion in arrest of judgment, on the ground of variance between the *allegata* and *probata*, was also discharged.

C. P. No. 4. Jan. 13.

Borda et al. v. Phila. and Reading R. R.

Bill of particulars in action ex delicto—When allowed—Practice.

Rule for a bill of particulars.

Case, *ex delicto*, for damages sustained by reason of defendants' alleged tortious breach of duty as common carriers.

The counts of the narr. under which a bill of particulars was demanded averred, in substance, that the plaintiffs, on divers days and times in 1873 and 1874, tendered to the defendants, as common carriers, large amounts of coal for transportation, offering to pay therefor such reasonable sums as defendants were legally entitled to receive; that defendants had the means and facilities and ought to have accepted and transported the same at the legal rates and without unreasonable delay; but that, disregarding their duty, they, on divers days and times, required plaintiffs to pay excessive, unreasonable, and illegal charges; on other divers days and times refused to receive and transport coal so tendered, and on other divers days and times unnecessarily and unreasonably delayed the transportation and delivery thereof. That the defendants had been guilty of these acts and omissions for the illegal purpose of discriminating against the plaintiffs and in favor of the Reading Coal and Iron Company, which the defendants had organized and controlled, and in order to acquire a monopoly of coal and arbitrarily regulate the supply and price therefor, to the damage of the plaintiffs, etc.

T. Hart, Jr., for the rule.

In a former action of tort between the same parties, for a similar cause of action, this Court ordered a bill of particulars setting forth dates and quantities to be furnished under a count for excessive tolls precisely similar to that in this case. (Borda *v.* R. R. Co., reported 1 WEEKLY NOTES, 314.) The other counts in this narr., viz., for refusal to accept coal, and delay in transportation, are not different in principle, and it is only reasonable that defendants should be informed, by a bill of particulars, of the dates when the alleged tortious acts were committed, in order to enable them to meet the charges.

Geo. L. Crawford, contra.

This is a case of pure tort, in which a bill of particulars is neither practicable nor demandable.

[THAYER, P. J. I think it is now settled that a bill of particulars may, under certain circumstances, be demanded in actions of tort; and this appears to be such a case.]

Rule absolute.

Digitized by Google

C. P. No. 4. Dec. 7, 1876.

Bentley v. Leon Kaufman, defendant, and the Pennsylvania Company for Insurances on Lives, etc., Executors of Hannah Ann Kaufman, dec'd, and Executors and Trustees under the will of Joel B. Hilsee, dec'd, Garnishees.

Will, construction of—Bequest of income for life with remainder over upon failure of issue—Words "die without leaving issue" in a bequest of personalty construed to mean without leaving issue at the death of the devisee—Life interest in first taker—Attachment execution—Misnomer of garnishees amendable.

Case stated upon the following facts: Joel C. Hilsee died in June, 1856, leaving a will on which letters testamentary were granted on the 9th of June of the same year to the garnishees.

He directed his executors, after paying all debts and funeral expenses, to divide the residue of his estate into four equal shares, paying one thereof to his son Charles, and investing the remaining three shares in some good securities. Of these three shares he gave one to his son Joseph T., one to his daughter Hannah Kaufman, and the remaining one to his daughter Sarah T., each of them to have, use, and enjoy the interest of his or her respective share during his or her natural life, without the same being subject in any way to his or her debts, or to the control of the present or future husband of either of his said daughters. On the death of either of his last-named three children, he bequeathed the interest or share of such to his or her surviving children, if any; but if either of said last-named children should die without leaving surviving children or the issue of a deceased child or children, he directed the interest and income arising from the share of such decedent or decedents to be divided from time to time as it might accrue, among the survivors of said Joseph T., Hannah, and Sarah, and the issue of such as may be dead leaving issue, said issue, however, to take only the share of its parent. He left to survive him four children, three of whom died without children or issue; the fourth, Hannah Ann Kaufman, a widow, who died last of all, leaving one child, the defendant She also left a will, dated November 28, 1872, on which letters testamentary were granted on the 28th of September, 1873, to the garnishees. The garnishees, as executors and trustees under the will of Joel C. Hilsee, filed their account, on which there was an adjudication in the Orphans' Court, which showed a balance for distribution. By their account, after certain deductions, one-third of the balance was awarded to the defendant, one-half of one-third, which was Sarah's share, was paid to the administrator of Joseph T. Hilsee by the executors and trustees, thereby leaving in the hands of the garnishees one-third, and one-sixth of the original balance. The garnishees, as executors under the will of Hannah Ann Kaufman, filed their account, on which there was an adjudication in the Orphans' Court. The Court directed that the balance for distribution be paid to the accountants, and invested by them as trustees for Leon Kaufman, they paying him the income thereof half yearly during life, less the costs and expenses of the estate. This adjudication was confirmed absolutely by the said Court, and no exceptions thereto were ever filed. Bentley having obtained judgment against Kaufman, attached the fund in the hands of the garnishees; prior to which attachment another had been issued by one Smith, in which the garnishees were described as executors and trustees under the will of *Mary Ann* Kaufman, which it was agreed was a misnomer.

The following questions were submitted to the Court:—

I. Does the defendant take an absolute or only a life interest under the will of his mother, whether in her own estate or derivatively in the estate of Joel C. Hilsee. (1) If the Court should be of opinion that he took an absolute estate, then, subject to the prior claim of the attachment of Smith, above stated (if the Court shall adjudge it valid on the question hereinafter stated in respect thereto), judgment to be entered against the garnishees for the amount of the plaintiff's debt, interest and costs, to the extent of the assets in their hands, the exact amount to be settled by further agreement of counsel. (2) But if the Court should be of opinion that the defendant took but a life interest in his mother's estate, from whatever source derived, then, subject to the prior claim of the attachment execution of E. Eldridge Smith, above mentioned, if the Court shall adjudge it to be valid and have priority over those of the plaintiff, judgment to be entered for payment of this debt, interest and costs, out of the income accrued and thereafter to accrue.

II. Whether the attachment execution of E. Eldridge Smith has priority over that of the plaintiff, notwithstanding any misdescription of the character in which the garnishees have been acting. If the Court be of opinion that it has such priority, then the amount thereof shall first be deducted, and allowed to the plaintiff therein before any payment be made by the garnishees in the present case under the judgment in this case stated; either party to be entitled to take a writ of error to the judgment which may be entered in this case.

Isaac D. Yocum, for plaintiff.

Under the limitations in the will of J. C. Hilsee, the proportion of shares of those dying intestate went over, not only those originally given, but those accrued.

2 Williams on Executors, 5 Am. ed. 1095.

Digitized by Google

Douglass *v.* Andrews, 14 Beavan, 355.
Doe *v.* Birkhead, 4 Exch. 110.
Eyre *v.* Marsden, 2 Keen, 564.
Worlidge *v.* Churchill, 3 Bro. C. C. 465.
2 Jarman on Wills, 623.

In case of a gift of personalty for life, followed by a gift over in default of issue, there being no intermediate gift to the issue, the gift over is void, and the first taker takes absolutely.

Hawkins on Wills, 201, 206.
Smith on Executory Interests, 396, 715.
Lewis on Perpetuities, 318, 320.

John G. Johnson, for the garnishees.

The plain interpretation of the will of Joel C. Hilsee fixed the distribution of his estate, on the death of his children without issue, to their survivors.

Hannah Ann Kaufman, the survivor of Joseph T. and Sarah Hilsee, took their interests absolutely. The doctrine now held by the courts is that the intention of the testator must be carried out.

Still *v.* Spear, 3 Grand, 306.
Sheet's Est., 2 Sm. 257.

Henry Wharton, in reply.

Winche's Trust and the Pennsylvania cases, such as Sheet's Est. (2 Sm.), cited on the other side, do not apply, because there was there a gift to issue in the first instance. No gift to issue can be implied here.

McBride *v.* Smith, 4 Sm. 245.

Is the attachment of E. Eldridge Smith entitled to priority of payment? It is admitted that the attachment of Smith would have been good had it issued simply against the Pennsylvania Company without further description, but Smith went further, and named the particular fund which he attached, to wit, any interest which Leon Kaufman has in the estate of Mary Ann Kaufman. Where a trustee, under the wills of two persons, has an attachment execution issued against him as garnishee, describing him as trustee under one will only, by a person who has an interest in both, it certainly would not bind the other estate also. They are as distinct persons as John Doe and Richard Roe. True the record might have been amended, but that could only have been done subject to the rights of intervening attaching creditors.

Zimmerman *v.* Briggans, 5 Watts, 186.
Smith *v.* Hood & Co., 1 Casey, 218.

C. A. V.

Jan. 6. THE COURT. By the limitations of the last will of Joel C. Hilsee, the share of his daughter Sarah, who died without issue, July 11, 1867, became vested in equal parts absolutely in her surviving brother and sister, Joseph T. Hilsee and Hannah Ann Kaufman. The interests thus accruing by survivorship were absolute interests, and embraced the entire corpus of the gift to Sarah. It is true that the gift to the survivors, under the will of Joel C. Hilsee, is of "interest and income arising from the share of such decedent," but that a gift in these words, there being no limitation over, is a gift of the corpus of the legacy is too plain to require any citation of authority in its support.

We think therefore that the one-half of one-third which accrued to Joseph T. Hilsee in his lifetime by reason of his survivorship of Sarah, was properly paid by the executors of Joel C. Hilsee to the administrator of Joseph. As to the share bequeathed *directly* to Joseph by his father, he had only a *usufruct*, for life—a right to the interest, by the express limitations of his father's will. On his death without issue on the 15th of September, 1867, it passed to his surviving sister Hannah Ann Kaufman, in the same manner that Sarah's share had passed by survivorship to her and to Joseph, that is absolutely. Hannah already had a life interest in the one-third bequeathed to her directly by her father. She was thus the absolute owner of the one-half of one-third which accrued to her by her survivorship of her sister Sarah, and also of the entire third bequeathed to her brother Joseph for life, and was besides entitled for life to the income of the remaining third. Over the principal sum of that remaining third she had no right of disposition by will or otherwise, but it passed upon her death by the limitations of her father's will to her only child, the defendant, Leon Kaufman, and was properly paid to him by the executor of Joel C. Hilsee, long before the service of this attachment. There remains therefore in the hands of the garnishees in the present action, as we understand the case stated, the one-half of the one-third which accrued to Mrs. Kaufman by her survivorship of her brother, Joseph T. Hilsee. As to these interests devised to her under her father's will by survivorship, she was, as has been already observed, the absolute owner. They had been released from the trusts created by her father's will, and they belonged absolutely to her.

Being thus absolute owner of these interests, and of some other property otherwise acquired, Mrs. Kaufman died September 19, 1873, having previously made her last will, which bears date November 28, 1872. By her will she directed her estate, real and personal, to be sold, and the proceeds to be invested by her executors, the Pennsylvania Company for Insurance, etc., in the best securities, "the interest to be paid to my son Leon Kaufman during his natural life in half yearly payments for his sole benefit. If my son Leon Kaufman should die without issue, it is my desire that the whole amount of my investment be given to the Children's Orphan Asylum." In like manner she bequeathed the interest of her residuary estate to her son Leon Kaufman during his natural life, to be paid to him half yearly, and

Digitized by Google

"if he should die without issue, then the whole of the investment to be given to the Children's Orphan Asylum of this city, as a gratuity." By an additional clause at the foot of the will, duly signed, she explained that by the Orphans' Asylum mentioned, she intended the Lincoln Institute, at present located in Eleventh Street above Pine.

It is upon this fund that the attachment against Leon Kaufman has fastened in the hands of the garnishees. That portion of Joel C. Hilsee's estate, which, after the termination of Mrs. Kaufman's life estate, passed, by the limitations of her father's will, to her son Leon, was, upon the death of his mother, and the settlement of an account by the executors and trustees under Joel C. Hilsee's will, awarded by the Orphans' Court to Leon Kaufman, and duly paid to him, and so is not subject to the present attachment. The real question, therefore, which is now to be determined is, what interest did Leon Kaufman take under his mother's will? Did he take an absolute estate, or only a life estate? And, as regards the answer to this question, no difference is to be made between that portion of Mrs. Kaufman's estate which was of her own acquisition and that portion which she derived from her father by her survivorship of her sister Sarah and her brother Joseph, for over both portions alike she had an absolute right of control and disposition, and both alike passed under her will.

Now, it must be quite plain to the common understanding, that Mrs. Kaufman did not intend to give her son an absolute estate in her property, but only the interest of the proceeds, when invested, during his natural life. In the first place, she said so explicitly in her will. The gift to her son is a gift, "of the *interest* of my estate," and it is "to be paid to my son during his *natural life*, in half-yearly payments," and she gives him nothing more. In the second place, she directs that if her son, Leon Kaufman, should die without issue, the whole of her estate should go to the Lincoln Institute. What is this but a gift of the interest to the son for life, with a remainder (if one may for convenience speak of a remainder with reference to personalty), by necessary implication, to his children, and, in default of children, a gift over to the objects of her charitable bounty? But, although this may be never so plain to the common understanding, it is asserted by the plaintiff's counsel that the intention is defeated by the application of the rule that when there is a gift of personalty for life, followed by a gift over in default of issue, there being no intermediate gift to the issue, the gift over is void and the first taker takes absolutely—a proposition entirely correct in its terms where there is no intermediate gift to the issue, either expressly or by implication, and where the gift over is dependent upon an indefinite failure of issue. But it has no application whatever in a case where the limitation over is on failure of children only, or on failure of issue within a given time, or where there is an intermediate gift by necessary implication to the issue of the first taker. Now the limitation over to the Lincoln Institute is not a limitation after an indefinite failure of issue. Notwithstanding the doubts which have been expressed in some cases, it is now well settled, as was pointed out by Mr. Justice STRONG, in Still *v.* Spear (3 Grant's Cases, 307), that in gifts of personalty, the phrase "die without leaving issue" means die without leaving issue at the death of the person the failure of whose issue is spoken of. Words importing a gift to issue, or a gift over on failure of issue, when applied in a will to personal estate, receive a different construction from that which they would receive if applied to real estate, and the reason of this qualification of the general rule, as given by Vice-Chancellor STUART, in Wynch's Trusts (17 Jur. 588), is that "the operation of law, independent of express direction, makes real estate descendible, but makes personal estate distributable. The qualification of the rule has therefore been made in order to prevent the intention of testators being defeated." In the same case on appeal, Lord Justice TURNER struck exactly the true point of the distinction when he said, "the feudal principle does not reach to the subject matter, and so far from the application of the rule to personal estate effectuating the intention, it directly and immediately defeats it." (5 DeG. M. & G. 188.) The case of Still *v.* Spear, which has been referred to, was as near the present case as possible. There there was a bequest of a certain fund in trust to pay the interest to Levi Still, and in case of his death "without leaving issue" to pay the principal to the children of Charles Still; and it was held that Levi Still took no absolute interest under the will, but only an interest in the income for life; that the failure of issue contemplated was not an indefinite failure of issue, but a failure of issue living at the death of Levi Still; that there was by implication a gift to such issue, and on failure of such issue the bequest over to the children of Charles Still was good. Of the present case, it may be truly said that it is, in principle, the same case. It is *aller sed idem*, for the limitations are, both in form and effect, precisely alike.

It is unnecessary to go through all the cases, English and American, upon this subject, which are very numerous. They are collected in the three Pennsylvania cases on which I shall rest the judgment in this case. Myer's App. (13 Wr. 111) is to the same effect as Still *v.* Spear, and so is Sheets's Estate (2 Smith, 258), where it was ruled, that, although a bequest of personalty to

Digitized by Google

one for life, remainder to his *heirs*, may give the first taker an absolute interest, a remainder to issue will not, and that a limitation over of personal estate in default of issue of the legatee for life, or if he should die without issue, or leaving no issue, is an implication of a bequest to the issue. "The apparent intent is that the ultimate legatee is not to take when there are issue of the legatee for life, and hence, a gift to such issue is implied." Chief Justice TILGHMAN had long before, in Clark *v.* Baker (3 S. & R. 477), recognized the distinction between real and personal estate, saying, "these words, *without leaving issue*, applied to personal estate, have been held to mean issue living at the death of the person to whom the property is given in the first instance." If the cases of Amelia Smith's Appeal (11 Harris, 10), and Mengles' Appeal (11 Smith, 248), may at first sight seem to infringe upon the principles of construction which must be regarded as settled by the cases I have referred to, yet upon a careful examination it will be seen that they are plainly distinguishable. In Amelia Smith's Appeal the decision is put upon the ground that "not one word indicates an intention to limit the interest of the first takers of the personalty to a life estate, that it was *not* the profits which were to be paid to them, that no trustees were appointed to take charge of the fund," and that the whole will manifested an intention that the first takers should take absolutely—ingredients which are wholly wanting in the present case, for here the first taker is expressly confined to the interest of the fund during his natural life—the whole will shows that there was no intention that he should take anything more, and there are here limitations over, first by necessary implication to the issue of Leon Kaufman living at his death, and afterwards by express limitation, on failure of such issue, to the Lincoln Institute, and the executors are by the plain intent of the testatrix made trustees to invest the funds and to pay the interest to Leon Kaufman for life. Mengle's Appeal proceeds upon the same ground as Amelia Smith's Appeal, and expressly recognizes the doctrine laid down in Still *v.* Spear, Myer's Appeal and Sheets's Estate. In Bedford's Appeal (4 Wright, 18), which is cited by the learned Judge who delivered the opinion in Mengles' Appeal, the opinion was delivered by the same learned Judge who delivered the opinion in Still *v.* Spear, and in the same year, and the two cases affirm each other. In Matlack *v.* Roberts (4 Smith, 148), where the opinion was delivered by the present Chief Justice, and the question related to the construction of a devise of real estate, all that was decided was that the words used, in their application to a disposition of real estate, indicated an indefinite failure of issue, and so created an estate tail. The decision does not touch the present case.

The case of McBride *v.* Smyth (4 Smith, 245) was cited by the plaintiffs' counsel as showing that in the present case no bequest to the children or issue of Leon Kaufman, upon the termination of his life interest in the income, could arise by implication. McBride *v.* Smyth does not seem to me to be at all in point upon that branch of the argument. What was decided in that case was this: Where a testator gave his estate to trustees to hold until the youngest child who might then be living should attain the age of twenty-one years, and upon the youngest of his children who might be living attaining the age of twenty-one years, he gave the estate to such of his children as *might be living at that time, their heirs, etc.*, it was held that a child who died before that time took nothing under the devise, the provision being a selection of individuals from a class, a description of persons, not a regulation of the interest given. It would have been strange, indeed, if the same Judge who gave the opinion in Sheets's Estate in 1866, and who then so distinctly ruled that a limitation over of personal estate in default of issue of the legatee for life was by implication a bequest to the issue of the legatee for life, should, in the following year (for McBride *v.* Smyth was decided in 1867, and the opinion was delivered by the same Judge), without a single word of reference to the former case, have overturned the doctrine upon which it rested. There is no resemblance between the facts of the two cases, and the points decided are, it seems to me, altogether inapplicable here.

It is of no avail, therefore, to argue that if Mrs. Kaufman's will in its dispositions had concerned a devise of real estate, instead of a bequest of personalty, it would have carried an estate tail to her son Leon Kaufman. The rule of construction which would produce that result in a devise of real estate is not applicable to a bequest of personalty. It is sufficient, therefore, to say that this was a bequest of personalty—"of personal property and current funds to be invested in the best securities bearing interest," and that construing it as such a bequest we are of opinion that the intention of the testatrix clearly appears everywhere in the will to give her son only a life estate in the interest arising from the fund, while the principal was secured in the hands of her executors to her son's issue, and in case he should die without leaving issue, then to the ultimate object of her bounty, the Lincoln Institute, and that this clear intention of the testatrix is in perfect accord with the law of Pennsylvania.

Upon the second point raised by the case stated, we are of opinion that the priority of Smith's attachment is not affected by the misnomer of Mrs. Kaufman's first name in the writ of attachment. It was not necessary to put her name in the writ at all, or to add any descriptive character to the

Digitized by Google

names of the garnishees, or to say how or in what capacity they held the fund. The writ would have been just as good without all this as with it, for the plaintiff is not bound to say in his writ how the garnishee came by the money attached, or how the debt to the defendant arose. It is sufficient to name the right defendant and the right garnishees, and it is altogether unnecessary to add further matter of description. Here the right fund appears to have been attached, and in the hands of the proper garnishees. The mistake in the descriptive words appended to their names has been brought to their notice, and the fund is still in their hands. They do not allege that they have been in any respect prejudiced by the error, and under these circumstances, if it is of any consequence, it is doubtless amendable. As to the description of the garnishees in the writ as *trustees* under the will of Mrs. Kaufman, we think they were properly enough so described. We are of opinion that they were both executors and trustees under the will of Mrs. Kaufman. They have acted, and are still acting, upon that assumption, and upon the settlement of their account, as executors in the Orphans' Court, the fund was awarded to them as *trustees* for Leon Kaufman. They had no other right to receive it. Thus it was at their own instance that the fund was transferred from their account as executors to their account as trustees. As they received it in that capacity, they cannot complain that they are charged with it in that capacity.

Judgment is therefore entered for the plaintiff Bentley, subject, however, to the prior attachment of E. E. Smith, and both attachments are payable only out of the interest or income of Hannah Ann Kaufman's estate, and only to the extent of that income—the amount to be settled by counsel, as agreed upon in the case stated.

Opinion by THAYER, P. J.

C. P. No. 4. **Hoover v. Munyon.** Feb. 3.

Affidavit of defence law—Practice—When a written contract is referred to, it must be annexed.

Rule for judgment for want of a sufficient affidavit of defence.

The affidavit of defence alleged and relied on a certain contract.

Depositions were read showing that the contract referred to was in writing.

D. R. Patterson, for the rule.

Leave given to amend by annexing the written agreement.

Orphans' Court.

Alter's Estate. Dec. 18, 1876.

Citation to executrix to file account—What interest sufficient to sustain petition.

Sur petition for a citation to file an account, and answer.

The petition of Charles Edward Alter set forth that he is a son of Jacob Alter, who died June 22d, 1866, leaving a will wherein he appointed his widow his executrix, and bequeathed *inter alia* the sum of $20,000 to the petitioner; that no account has ever been filed by the executrix; and prayed for a citation to compel her to file an account, showing how much of the real estate had been sold, and the disposition of the proceeds.

The answer of Mary Alter, widow and executrix of Jacob Alter, admitted the bequest to the petitioner, but averred that the time for payment had not arrived; for, by the first item of his will, the testator gave, devised, and bequeathed to his wife all rents, income, interest, and dividends of estate for her life, recommending her to provide out of it for the support of his three grandchildren until they should marry, or attain the age of twenty-one years; that certain lands have been sold, but it was submitted that the petitioner was not in any wise interested in them, as by an item of his will, the testator devised all the rest, residue, and remainder of his real estate to his son W. W. Alter, and his daughter Emma E. Hance, in fee, as tenants in common.

The answer further set forth that in order to provide for the payment of the petitioner's legacy, the testator had, prior to his death, invested a sum of money sufficient for that purpose, which is still so invested in legal securities; that the filing of an account is unnecessary for the protection of the petitioner, and will be attended with great trouble and labor; that the petitioner has not such an interest in the estate of Jacob Alter, as to entitle him to have an account filed.

John G. Johnson, for the petitioner, was not called upon.

Goforth, for the executrix, cited—
Keene's Appeal, 10 Sm. 504.
Okeson's Appeal, 2 Grant, 303.

THE COURT decreed that the executrix should file an account before December 30.

[See Pratt's Estate, 2 WEEKLY NOTES, 704.]

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, FEB.* 22, 1877. [No. 21.

Supreme Court.

Oct. & Nov. '76, 170. Oct. 24, 1876.

Robert Morris for use of F. J. Rupp v. McCulloch.

Equitable assignment—Assignability of right of action in tort—Not included in assignment of chose in action ex contractu, relating to same subject matter—Attorney and client—Negligence—When attorney not liable in tort to his client's assignee.

Although the assignment of a debt carries with it all remedies and securities incident thereto, it does not transfer a personal right of action in tort, vested in the assignor, growing out of the same subject matter.

A. as attorney at law for B. caused a judgment to be negligently entered, the defendant being incorrectly named. B. assigned the judgment to C. In a distribution of the proceeds of defendant's real estate, the Court held that the error invalidated the lien of the judgment, and distributed the fund to subsequent judgment creditors. In an action on the case for negligence subsequently brought in the name of B. to use of C. against A.:

Held, that the right of action in tort was personal to the assignor, and, being a matter independent of the debt, did not pass by the assignment of the judgment.

Held, further, that the nominal plaintiff could discontinue the action, during the trial, by entering a *retraxit*.

Error to the Court of Common Pleas of Armstrong Co.

This was an action on the case brought in the name of Robert Morris for the use of F. J. Rupp, to recover the amount of a judgment bond, which the defendant James A. McCulloch, a member of the bar of that county, had caused to be entered in that Court. The obligee in the bond was John Moyer, but McCulloch filed a narr. and had judgment entered against *Jacob* Moyer. The bond was payable in instalments. The first instalment was assigned by Morris to Rupp and paid by the defendant about the time of its maturity. The remaining instalments were subsequently assigned by Morris to Rupp, but before their maturity, Moyer's property was sold by the sheriff, and the proceeds brought into Court for distribution. Although the judgment of Morris was first in date of lien, the entire proceeds were awarded to subsequent judgments, because of the mistake in the Christian name of Moyer in the entry of judgment. Thereupon Rupp, the assignee, brought this action to recover from McCulloch the amount thus lost, and the action proceeded to trial in the name of Morris for the use of Rupp, without objection from any one, Morris being present as a witness.

During the trial a deposition of Morris was, under objection, given in evidence by defendant's counsel to the effect that he (Morris) had not been injured by the alleged negligence of defendant, and that the present action was not brought by his direction nor at his instance. About the close of the trial another paper signed by Morris was received in evidence, also under objection, stating in effect that he (Morris) disclaimed all interest in the case and requested its discontinuance, as it was instituted without his authority.

The Court below (JACKSON BOGGS, P. J.) charged the jury, in substance, that the first question for their consideration was whether the defendant was guilty of such negligence as to give Morris a cause of action against him. In such case Morris would be entitled to recover damages in his own name as legal plaintiff. So too if he expressly assigned *his claim for damages*, if any he sustained, to Rupp, the latter could recover as equitable plaintiff. Morris assigned the judgment, or part of it, to Rupp, but there was no evidence that he had assigned his cause of action and damages *in tort*, and the law would not under the circumstances infer such an assignment; therefore no third party could as equitable plaintiff bring suit in his name, especially when he dissented, and the verdict should therefore be for the defendant.

Verdict and judgment for defendant. The plaintiff took this writ, assigning for error, *inter alia*, the admission of the evidence objected to and the charge of the Court.

E. S. Golden, for plaintiff in error.

If the right of action against the attorney is at the option or courtesy of the assignor, who has received his money and has no further interest in the matter, the assignee is practically without remedy. The assignment of a debt carries with it all the remedies that the assignee has for its collection. The tort in this case is not actual but constructive, springing as it does from a violation of the contract relation existing between attorney and client, and consequently the suit should be attended by all the incidents of an action *ex contractu*. It is clear, moreover, that the cause of action in this case was not fully perfected until the assignee of the judgment was denied participation in the proceeds of the sale of the real estate of John Moyer, hence the injury was directly to the assignee, and arose after his right to the judgment had accrued by the terms of the written assignment.

Addison on Torts, vol. i. sec. 570.
Livingston *v.* Cox, 6 Barr, 362.
Wilt *v.* Welsh, 6 Watts, 10.

Digitized by Google

J. Gilpin and *J. V. Painter*, contra.

This is an action on the case for negligence; the declaration is not based on contract, nor does it set forth any special contract between Morris and McCulloch; it has none of the necessary incidents of a contract, the plea is not guilty, so that in its inception and throughout it is an action of tort, and should be governed by its rules.

The rule, claimed by plaintiff in error, of Livingston *v.* Cox does not apply to this case. It has been repeatedly decided that a right of action for a personal tort is not assignable. At the time suit was brought Morris had no interest in the judgment, and even with his consent Rupp could not use his name.

The declaration is that Morris was injured; it does not claim or show title in Rupp, and if Morris had no existing debt at that time he could not maintain the suit. It will not do to prove an injury to Rupp in a declaration charging injury to Morris.

Jackson *v.* Tilghman, 1 Miles, 31.
Lynch *v.* Com'th, 16 S. & R. 368.

At most an attorney is liable only for the actual loss sustained by his client by reason of his negligence.

Suydam *v.* Vance, 2 McLean, 99.
Livingston *v.* Cox, 6 Barr, 360.

Again, the purchaser of a judgment is affected with a knowledge of the state of the record, and failing to make inquiry, his negligence contributes to his own loss and should prevent a recovery.

Henry *v.* Brothers, 12 Wr. 72.
Selover Ex. *v.* Rexford, 2 Sm. 308.

Oct. 30. THE COURT. The matter in issue in this case was alleged negligence of the defendant whereby the plaintiff lost the lien of his judgment upon the real estate of John Moyer. It was therefore very irregular to introduce into the trial of the cause a question whether the plaintiff's right of action passed over to Rupp, the assignee of the judgment. It was an entire departure from the issue. So the introduction of the testimony of the plaintiff and his written disclaimer of any interest in the suit before the jury to defeat the action, were equally irregular.

But it would be useless to reverse the judgment and send it back for a new trial, when the right of Rupp to maintain the action cannot be sustained, and when the plaintiff can prevent a trial by a retraxit or a discontinuance. It is not pretended that the plaintiff in fact assigned his right of action against McCulloch for negligence to Rupp. It is only claimed that it passed to Rupp by the effect of the assignment of the judgment against John Moyer. But this assignment carried with it only securities, if any, held to secure payment of the debt. A right of action founded on negligence of the attorney prior to the assignment, was a matter independent of the debt assigned, founded in alleged wrongful conduct whereby the plaintiff was injured; and was not a security held for the payment of the debt. Collaterals held as security pass in equity by the assignment, though not named; but a party is not bound to enforce a remedy for a wrong or injury done to him, though it relate to the matter assigned. Here the plaintiff in the judgment, Morris, assigned a judgment against John Moyer to Rupp, when in point of fact he had none, his judgment being against Jacob Moyer. This might raise a question between him and Rupp, but was not an equitable assignment of his right of action against McCulloch.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

Oct. & Nov. '76, 91. Oct. 12, 1876.

Liblong v. The Kansas Fire Insurance Co.

Fire Insurance—Foreign companies—Service of process under Act of April 4th, 1873—Only upon agent specially designated for that purpose.

Since the Act of April 4th, 1873, service upon a foreign insurance company must be made on the agent specially designated to receive service, if one there be, and the service of a summons upon a mere soliciting agent of the company under the former Act of April 8, 1851, is not sufficient; nor is the sheriff's return of "served upon F., *agent* for the company," conclusive of the fact of such special agency, for it sets forth neither the character of the agency nor the place or office at which the service was made.

Error to the Court of Common Pleas No. 1, of Allegheny County.

Assumpsit by W. W. Liblong against the Kansas Fire Insurance Company, a corporation of the State of Kansas, upon a policy of fire insurance for $600.

The facts of the case were as follows: The company had complied with the provisions of the Act of April 4, 1873 (Purd. Dig. 1794–1799), requiring foreign insurance companies doing business in this State to file with the insurance commissioner a stipulation that process might be served upon a particular person, designated as agent for that purpose.

The company had also another agent, named J. P. Fisher, who solicited insurances and transacted business at an office in Pittsburg. From him the plaintiff procured the said policy, upon his house at Parker City, Pa. The house insured having been destroyed by fire, and the company having failed to pay the loss, proof of which was served upon it as required by the terms of the policy, the plaintiff issued a summons in assumpsit which was returned *non est*

Digitized by Google

inventus. To an *alias* writ subsequently issued, the sheriff returned—

"Served Dec. 10th, 1875, by delivering a true and attested copy of the within writ to Joseph P. Fisher, agent for Kansas Insurance Company, and by making known to him the contents thereof."

The company defendant thereupon took a rule upon the plaintiff to show cause why the service of the writ should not be set aside on the ground that it was not a legal service upon the company under the Act of April 4th, 1873 (Purd. Dig. 1794–1799, P. L. 20), and in support of the rule the affidavit of Charles Tredick was presented, setting forth that he alone had been designated and specified as the proper party or agent to receive service of process for the company defendant within the State, and his authority as agent was duly filed with the proper officer of the Commonwealth; that the writ of summons in this case had not been served upon him, but upon J. P. Fisher, whose only authority to transact business was derived from him, and was limited to the effecting of insurance and receiving the premiums therefor, subject to his direction and approval.

The Court made the rule absolute.

Plaintiff took this writ, assigning for error the action of the Court in making the rule absolute and setting aside the service of the original writ.

Weir and *Gibson*, for the plaintiff in error.

Service of this writ was made under the 6th Section of the Act of April 8th, 1851 (P L. 354, Purd. Dig. 287), which enacts that the original writ in any action instituted against an insurance company doing business in the county, may be served upon the officers or *any agent* of such company. Therefore service upon any agent at any place is good, and the service upon Fisher should not have been set aside.

Cochran *v.* Library Co., 6 Phila. 492.

The Act of April 4th, 1873 (P. L. 20), is but cumulative in designating another person upon whom service may be made, but does not repeal the Act of April 8th, 1851.

The return on the writ is conclusive of the fact of agency.

Kennard *v.* Railroad, 1 Phila. 41.

J. A. Emery, contra.

The company, having fully complied with the requirements of the Act of April 4th, 1873 (*supra*), is entitled to its protection. Fisher is a mere soliciting agent, and Tredick is the only person within the State upon whom service can be properly made.

By virtue of subsequent legislation the Act of April 8th, 1851, under which this service was attempted, has no longer any vital force, and is in effect repealed.

Act of April 8th, 1856 (P. L. 281).
Act of April 11th, 1868 (P. L. 83).
Johnson's Est., 9 Cas. 511.
Commonwealth *v.* Cromby, 1 Ashmead, 179.

The provisions of the Act of 1873 are eminently judicious. There would be no safety for the companies, if service could be effectually made upon their numerous, irresponsible, and often negligent soliciting agents.

Oct. 30. THE COURT. The Act of April 4, 1873, was intended, among other matters, to regulate the conduct of foreign and other extra-territorial insurance companies within this State. The 13th section provides that no insurance company, not of this State, or its agents shall do business in this State until it has filed with the insurance commissioner a written stipulation agreeing that any legal process affecting the company may be served on the insurance commissioner, or the party designated by him, or the agent specified by the company to receive service of process, and this stipulation shall not be revoked or modified so as to require or dispense with the service at the office of the company. The 8th section requires every company to file with the insurance commissioner a copy of its charter, and a certified statement of the time of its organization, the location of its principal place of business, and the names and residence of its officers. No company, by the 9th section, can take risks or do business until it has fully complied with the provisions of the act. By the 10th section no person can act as agent of an insurance company of another State, or of a foreign government, until the provisions of the act are complied with, and a certificate granted by the commissioner to the company of its authority to transact business in this State. These with other provisions of the act show that the intent of the legislature was to bring such companies fully within the power and control of the State.

Now, as a reasonable conclusion from these provisions, the company must be protected in the proper enjoyment of its privileges. Having an actuary or agent armed with a certificate of authority, and an office or place of business, it is but reasonable that a company should be served with process upon its authorized agent, for whom a stipulation is given, at its place of business; and not that every agent in every county in the State sent out merely to solicit risks, should be its representative. Such agents have no responsibility in this respect, and their forgetfulness or negligence to inform the company of service on them, should not be permitted to result in injury, when the citizen has a full remedy by service on the proper representative. Before the passage of this act, when foreign and distant insurance companies were, by their agents, flitting over the State, leaving no impress of their feet on its soil, there was a good reason to permit service wherever it could be obtained.

The conclusiveness of the sheriff's return cannot

Digitized by Google

be appealed to, for it sets forth neither the character of the agent, nor the place or office where service was made.

We think the Court below was right in inquiring into and setting aside a service which neither in fact nor in law came up to the service required by the Act of 1873.

Order affirmed.

Opinion by AGNEW, C. J. WILLIAMS, J., absent.

July 29, '75. **Power v. Winsor.** Jan. 16, 1877.

Affidavit of defence law—Instrument within—Record of foreign judgment.

The exemplification of the record of a judgment of another State is a sufficient instrument within the affidavit of defence law.

Error to the Court of Common Pleas No. 4, for the County of Philadelphia.

Debt by Winsor against Power. Plaintiff filed a copy of the record of a judgment obtained in the State of New York by the plaintiff against the defendant. Defendant filed an affidavit of defence as follows: "that he is advised by his counsel, and therefore suggests, that the plaintiff is not entitled to a judgment for want of an affidavit of defence." The Court below entered judgment against the defendant for want of an affidavit of defence. Defendant took this writ, assigning for error the entering of the judgment.

D. C. Harrington, for plaintiff in error.

Although this question has been passed upon already by this Court, it is suggested that it was not then fully considered.

[AGNEW, C. J. This question has already been repeatedly decided, and we are not now disposed to review these decisions.]

The copy filed does not purport to be a copy of the entire record, but only a part of the record, and it is not certified in accordance with the Act of Congress.

Valentine, contra, was not called on. His printed argument insisted that the question was *res adjudicata*, citing—

McCleary v. Faber, 6 Barr, 476.
Hogg v. Charlton, 1 Cas. 200.
Moore v. Fields, 6 Wr. 471.
Luckenbach v. Anderson, 11 Wr. 123.
Palmer v. March, 14 Sm. 240.

Jan. 22. THE COURT. The defendant was bound to file an affidavit of defence in this case. The question as to an exemplification of a record of a judgment from another State has been repeatedly decided in favor of the affidavit rule.

No affidavit being filed and the judgment therefore being by default in this respect, the defendant is shut out from any objection to the contents of the exemplification. A sufficient judgment is to be found in it, to support the judgment *sec. reg.*

Judgment affirmed.

PER CURIAM. WILLIAMS, J., absent.

May, '76, 62. May 22, 1876.

Shryock et al., Assignees of the Farmers' and Mechanics' Bank of Shippensburg, v. Bashore.

Conflict of laws—General banking law of Pennsylvania—Bankrupt Act—When defendant in a suit by assignees under State law cannot plead the Bankrupt Act to invalidate the assignment—Set-off—Amendment, to cure technical mistake in record, allowed after writ of error.

Whether an assignment by bank directors under the general banking law of Pennsylvania is invalid, because in contravention of the United States bankrupt law, is a question which can be raised only by the creditors of the bank. A debtor of the bank cannot, in a suit against him by the assignees, set up as a defence that the assignment was invalid under the bankrupt law.

A technical error in the record, which could have been amended in the Court below, *e. g.*, that the action was brought in the name of assignees instead of in the name of assignor as legal plaintiff, will be considered in the Appellate Court as having been amended.

Palmer v. Waite, 1 WEEKLY NOTES, 363, followed.

Error to the Court of Common Pleas of Franklin County.

Assumpsit by S. S. Shryock and John P. Rhoads, assignees of the Farmers' and Mechanics' Bank of Shippensburg, against Abraham S. Bashore, to recover the amount due on a promissory note made by the defendant below and discounted by the said bank.

The pleas were set-off, and specially that the deed of assignment under which plaintiffs claimed the right to sue was in contravention of the bankrupt laws of the United States, and conferred no right of action upon them.

The Farmers' and Mechanics' Bank of Shippensburg was incorporated under a special Act of Assembly approved April 11, 1862, and was, by its charter, made subject to the general banking laws of the Commonwealth. On April 29, 1875, the bank having become embarrassed and unable to meet its liabilities, a petition was presented to the Court of Common Pleas of Cumberland County, under the Act of 1850, and a citation issued to the president, cashier, and directors of the bank, to show cause why an assignment should not be made under the provisions of

Digitized by Google

said Act. Upon a return of the citation an answer was filed admitting the truth of the facts set forth in the petition, and the Court thereupon ordered and decreed an assignment under the provisions of said Act. In pursuance of this decree, on the 4th of May, 1875, an assignment was duly made by the president and directors to the plaintiffs, S. S. Shryock and John P. Rhoads, in trust for the benefit of creditors. On the 8th of May, 1875, the assignees filed the requisite bonds and entered upon the duties of their trust. This suit was then instituted against Bashore by the assignees, in their own names, to recover on the note referred to, viz.:—

$2500. SHIPPENSBURG, Pa., Feb'y 5, 1875.

Fifty days after date, I promise to pay to the order of Emanuel Bashore, at the Farmers' and Mechanics' Bank of Shippensburg, twenty-five hundred dollars, without defalcation, for value received.

ABRAHAM S. BASHORE.

Credit the drawer, EMANUEL BASHORE.
Endorsed: EMANUEL BASHORE.

On the trial, the defendant claimed to set off a draft drawn by the Farmers' and Mechanics' Bank of Shippensburg, prior to the assignment, in favor of J. D. Guraman, Cashier of the First National Bank of Shippensburg, for $2620.94, on the Union Banking Company of Philadelphia, which was returned to the First National Bank protested for non-payment, and subsequently, at the request of the attorney in whose hands it had been placed for collection, who was also attorney for Bashore, endorsed and delivered to Bashore after the assignment, he giving in consideration therefor his own note with Emanuel Bashore as security for $2543.75. Upon this last-mentioned note there was this endorsement:—

"This note is given in purchase of a certain draft held by the First National Bank of Shippensburg for $2620.94, drawn by the Farmers' and Mechanics' Bank of Shippensburg upon the Union Banking Company of Philadelphia, date 1st April, 1875, and protested, and is good only f r so much as the makers hereof, or either of them, shall realize upon said draft either by collection, payment, or credit obtained upon obligation. If any excess shall be realized upon said draft, over and above the amount of the note, said excess to belong to the said National Bank."

No other consideration was given for this note than that appearing on the endorsement quoted, and no special authority was shown from the Board of Directors of the First National Bank to Guraman, Cashier, authorizing him to endorse the draft to Bashore.

The case on these facts went to the jury on the questions of set-off and the validity of the assignment under the bankrupt laws.

Under the instructions of the Court (ROWE, P. J.), the jury found a special verdict, in which all the facts above stated or pertinent to the questions raised were fully set forth. Subsequently ROWE, P. J., filed an elaborate opinion, holding that the State law under which the assignment was made, being in conflict with the main purpose of the Bankrupt Act, was, by the passage of that Act, *ipso facto*, suspended. The Court found for the defendant on both issues, and entered judgment on the verdict for the defendant.

The plaintiff took this writ, assigning for error the entering of judgment for the defendant on the special verdict.

Brewer & Gehr (*F. M. Kimmell* and *W. K. Shryock* with them), for plaintiffs in error.

The assignment was good and valid until impeached by a proper proceeding in the Bankrupt Court. No such proceeding having been commenced, and more than six months having elapsed since its execution and delivery, it cannot now be impeached on that ground. The mere existence of the bankrupt law, although in conflict, will not invalidate it.

Barnes *v.* Rettew, 8 Phila. R. 139.
Burkholder *v.* Stump, Id. 173.
Sturges *v.* Crowenshield, 4 Wheat. 116.
Ogden *v.* Saunders, 12 Id. 122.
Perry *v.* Langley, 7 Am. Law Reg. (N. S.) 429.
Sedgwick *v.* Place, 1 B. R. R. 204.
Reed Brothers & Co. *v.* Taylor, 32 Iowa.
Alden *v.* Boston and Erie R. R. Co., 5 N. B. R. 230.
In re Boston, Hartford, and Erie R. R. Co., 5 N. B. R. 232.
Hawkins's Appeal, 34 Conn. 548.
Maltbie *v.* Hotchkiss, 38 Conn.
Sampson *v.* Osker *et al.*, 4 N. B. R. 1.
In re Fogerty & Gerrity, 4 N. B. R. 451.
Ward *v.* Jenkins, 10 Metcalf, 583.
Kent *v.* Downing, 10 N. B. R. 538.
Gibson *v.* Green, 45 Miss. 209.
Sever *v.* Spink, 8 N. B. R. 218.
Collins *v.* Gray, 4 N. B. R. 631.
Watson *v.* Citizens' Saving Bank, 9 N. B. R. 458.
Hover *v.* Haskell, 14 N. H. 127.
Valient *v.* Childress, 11 N. B. R. 317.
Evans *v.* Helman, 13 Id. 440.
Okie *v.* Kelly, 2 Jones, 323.

The draft pleaded in set-off could not be used in payment of debts due to the insolvent bank. It was not a set-off contemplated by the Act of 1850. It is not within the meaning of the terms "notes, obligations, and checks" used in said Act.

Marine Bank *v.* Fulton Bank, 2 Wall. 252.
Pott *v.* Clegg, 16 M. & W. 320.
Penna. Bank Assignees' Account, 3 Wr. 103.
Phillips *v.* Bank of Lewistown, 6 H. 394.
Bank Penna. *v.* Spangler, 8 C. 474.

The defendant was not a *bona fide* owner of the draft.

John Stewart & J. McDowell Sharpe (*T. B. Kennedy* with them), for defendant in error, furnished no paper-book, and in their argument relied on the points covered by the opinion of the Court below.

Digitized by Google

October 9, 1876. THE COURT. A vast amount of learning has been wasted in this case. If the questions which were so elaborately argued here and in the Court below were legitimately before us, we should certainly feel that the case was not free from difficulty. But Bashore, the defendant, has no standing which entitles him to raise them. He is the debtor of the bank, and this suit was brought against him to recover the amount of such indebtedness. He defends upon the ground that the assignment by the bank was in contravention of the bankrupt law. What is that to him? What has he to do with the distribution of the fund? That question concerns only the creditors of the bank, and can only be raised by them. It is no answer to this to say that, the assignment being void, no title to the note sued upon passed to the assignees. This is substantially a suit by the bank against its debtor. If it were so in form it is not pretended that this defence could be set up. That it was brought by the assignees does not matter. It is true it should have been brought by the assignees in the name of the bank. But this is the merest technicality. It was amendable of right in the Court below, and could be amended here. We may regard that as done which ought to have been done, and consider the record as amended for the purposes of this case. There is abundant authority for this. (Palmer v. Waite, 1 WEEKLY NOTES, 363, and cases there cited.) Nor can this prejudice the defendant. The judgment against him is a full protection. While the defence has developed a solicitude for the rights of the creditors of the bank that is certainly commendable, we are inclined to the opinion that if the defendant will pay his debt to the bank some means will be found by which the rights of creditors can be ascertained and adjusted. Whether the fund shall be distributed according to the terms of the bankrupt law, or in accordance with our Act of 1850 under which the assignment was made, are questions which do not concern this defendant.

Any other conclusion would lead to difficulty. The time has gone by for proceedings in bankruptcy. There is no assignee in bankruptcy, nor can there be under the admitted facts in this case. If the bank, through its assignees, cannot sue for this debt, it cannot be recovered at all.

The draft in favor of Guraman, cashier, was clearly not the subject of set-off in this suit. The defendant had no title to it. The endorsement on the back of the note of Abner & Emanuel Bashore shows that there was not an absolute transfer of the draft. The excess of the draft over the note, if recovered, was to be returned to the First National Bank of Shippensburg. But the more serious difficulty is that the draft was given to the defendant without authority. It is found by the special verdict that neither the president nor directors ever gave the said J. D. Guraman any express authority to transfer the draft to Bashore upon any terms or conditions other than the note of Bashore for $2500. It needs no argument to show that a cashier cannot part with the assets of a bank without its authority. Nor can such authority be implied in the face of the finding of the jury. As the defendant had no title to the draft, it could not be set off, either under our defalcation act, or the Act of 16th April, 1850, under which the assignment of the bank was made.

The judgment is reversed, and judgment is now entered here upon the verdict in favor of the plaintiffs for the sum of twenty-six hundred and seven dollars and seventy-two cents, with interest from the eighteenth day of January, A. D. 1876.

Opinion by PAXSON, J. WILLIAMS, J., absent.

Shryock et al. v. McClure.

Oct. 9, 1876. THE COURT. What has been said in Shryock *et al. v.* Bashore (*supra*) renders any discussion of this case unnecessary.

The judgment is reversed, and a *venire facias de novo* awarded.

Opinion by PAXSON, J.

Oct. & Nov. '76, 213 and 218. Oct. 28, 1876.

Corrigan's Appeal—Foster's Appeal.
Estate of H gh Corrigan, deceased.

Decedent's estates—Lien of judgments—Act of February 24, 1834—Revival by scire facias.

Under the Act of April 4, 1797, a judgment obtained against the personal representatives of a decedent at any time within seven years after his decease, for a debt owing by him at his death, continued the lien of the debt against the real estate for a period of twelve years from the time of his decease; and a proceeding to revive within five years next following the seven years, continued the lien beyond the termination of the twelve years.

It is immaterial how soon judgment was obtained within the first period of seven years; the lien extended to the termination of the period of twelve years without a further proceeding.

A similar result ensues under the Act of February 24, 1834 (Purd. Dig. 421), with the exception that the first period is changed to five years instead of seven, and consequently the aggregate period is ten instead of twelve years.

A. being indebted to B. died in 1856. B. recovered judgment against his administrator in 1859. A *sci. fa.* issued on this judgment in 1865, but no judgment was obtained thereon prior to an Orphans' Court sale of decedent's real estate in 1868 for payment of debts. On distribution of this fund:

Held, that B. was entitled to payment of his judgment out of the fund.

Digitized by Google

Appeal from the Orphans' Court of Westmoreland County.

This was an appeal from the decree of the Court, reversing the decision of an auditor appointed to distribute the proceeds of the sale of the real estate of Hugh Corrigan, deceased.

The facts of the case were as follows: Hugh Corrigan died in July, 1856. In June, 1857, the county of Westmoreland brought suit against his administrator to recover the costs on an indictment in the Oyer and Terminer for homicide. In February, 1859, judgment was obtained by the county for $625.55. In March, 1865, a *sci. fa.* to revive this judgment was issued against all the parties, but no proceedings were had on the *sci. fa.* until February, 1874, when there was a trial and verdict rendered in favor of the county as against the administrator, but as to the other defendants, devisees under the will of the decedent, the verdict was for defendants. No judgment was ever entered upon this verdict.

In August, 1868, the real estate was sold by the administrator under an order of the Orphans' Court for the payment of debts and an auditor was appointed to distribute the fund. The county of Westmoreland presented its claim under the judgment aforesaid, but it was rejected by the auditor on the ground that the judgment had lost its lien at the time the land was sold.

The county of Westmoreland filed exceptions to this finding of the auditor, which exceptions the Court below sustained and decreed to the county the full amount of her claim.

From this decree the defendant, devisee of the decedent, appealed, assigning for error, *inter alia*, that the Court erred in awarding any part of the fund to the judgment of the county of Westmoreland. An appeal was also taken by another claimant, raising the same question.

H. P. Laird and *H. D. Foster*, for appellant.

The Act of April 4, 1797, provides, "that no such debts, except they be secured by mortgage, judgment, recognizance, or other record, shall remain a lien on said lands and tenements longer than seven years after the death of such debtor; unless an action for the recovery thereof be commenced and duly prosecuted against his heirs, executors, or administrators within the period of seven years." This is also the language of the Act of 1834, except the substitution in the latter Act of five years instead of seven. In Steel *v.* Henry (9 Watts, 523) it was held that where a judgment was obtained against personal representatives of a decedent within seven years after his death, the lien of the debt was continued for twelve years from his death, but it could not be extended longer by any proceeding by *scire facias*. In Maus *v.* Hummel (1 Jones, 228) Mr. Justice COULTER, in delivering the opinion of the Court, says: "The lien of a debt upon a decedent's land was extended to twelve years from his death by bringing suit within the seven years after that event under the Act of 1797, *but if the land is not brought into execution within, it would vest in the heir absolutely after the expiration of twelve years.*"

The same construction must be applied to the Act of 1834, substituting five years for seven, and ten years for twelve. But no verdict or judgment against the devisee was ever obtained on the *sci. fa.* in this case, and the land was not sold until more than ten years after the decedent's death; the lien of the debt was therefore lost.

Schwartz's Estate, 2 Harris, 42.
Sanders *v.* Wagonseller, 7 Id. 248.

Edgar Cowan, contra.

The county of Westmoreland brought suit and obtained judgment within three years after the death of Corrigan. It has been repeatedly decided that such a judgment extends the lien for ten years from the death of decedent, which would be, in this case, till the 20th of July, 1866. A *scire facias* to revive was issued March 9, 1865, which would continue the lien to the 9th of March, 1870, if prosecuted to judgment within that time. It is true, that no judgment was afterwards obtained on it against the devisee, but the land was sold by the administrator of decedent, in July, 1868, for the payment of his debts; this discharged the lien of the judgment from the land, and threw it on the fund, so that it was neither necessary nor possible to prosecute the *sci. fa.* further as to the devisee.

Nov. 6. THE COURT. The cases of Duncan *v.* Clark (7 Watts, 224), Steel *v.* Henry (9 Watts, 523), and Payne *v.* Croft (7 W. & S. 458), followed by later cases, settle the law, that a suit brought against the personal representative of a decedent within seven years after his decease, for a debt owing by him at his death, continues the lien of the debt against the real estate for a period of twelve years from the time of his decease, under the Act of 1797, and that a proceeding to revive within five years next following the seven years, will continue the lien beyond the termination of the twelve years. It is also settled that it is immaterial how soon judgment is obtained in the first period of seven years, the lien runs to the termination of the period of twelve years, without a further proceeding. In Duncan *v.* Clark (*supra*, p. 225), Justice KENNEDY says: "It is obvious that in the first case, when the judgment is obtained within the seven years, the five years ought not to commence before the expiration of the latter period, for if it were to be held to commence from the date of the judgment, it would be placing the vigilant creditor in a worse condition than the

Digitized by Google

negligent one, and also be contrary to the express as well as the plain import and meaning of the Act of 1797, which terminates the lien only after a lapse of seven years from the death of the debtor." So the lien of the debt may be continued after the period of twelve years by proper revivals. This is decided in Payne *v.* Craft (*supra*), where the death took place in 1813, and the sale of the real estate in 1833, and the lien was held to be continued by entries on the docket by agreement that the judgment should be revived without a *scire facias*.

The later cases run in the same line, only that in cases where the death has taken place since the Act of 26th February, 1834, went into effect, the first period is *five* instead of seven, and the entire period, ten, instead of twelve years, and the widow and heirs, or devisees, must be made parties. In this case, the *scire facias* to revive the judgment of the county was issued against all the parties within the ten years, and the sale of the property took place within three years thereafter, and consequently within the duration of the lien. The decree of distribution was correct, and it is therefore affirmed, with costs to be paid by the appellants, and their appeals are dismissed.

PER CURIAM. WILLIAMS, J., absent.

July, '75, 93. **Johnson's Estate. Seaton's Appeal.** Jan. 12.

Executors and administrators—When not liable to surcharge—Vessel—Insurance—Neglect of executor to insure—When not negligence.

A testator by his will desired that a vessel belonging to his estate, and which was then uninsured, should be retained by his heirs. After his death the vessel was sailed by a husband of one of the heirs, and the profits paid to the executors, who, at the request of the widow and heirs, effected no insurance. The vessel was subsequently lost:

Held, that the executors were not surchargeable with the value of the vessel.

Appeal from the Orphans' Court of Philadelphia County.

This was an appeal from the decree of the Court sustaining exceptions to the report of an auditor appointed to audit the account of the executor of the will of William Johnson, deceased.

It appeared from the testimony before the auditor, that the decedent, William Johnson, was in his lifetime the owner of a certain schooner engaged in the coasting trade. He acted as her captain, and ran her without having her insured. By his will he directed his executors—

"To pay the interest on a claim against my schooner, A. G. Cattell, whenever the same may fall due, and to pay as much of the claim as they conveniently can do with the money in their hands. I desire the said vessel to be retained by my heirs; and should my executors think they can sell her to advantage—that is, for what she is really worth—I direct them to do so; but should they not be able to do so, I direct her to be retained by my heirs, the heirs of my body."

The schooner was afterward run by a son-in-law of the decedent, and the profits turned over to the executors.

On December 14, 1854, the executors filed their first account, in which they charged themselves, *inter alia*, with the value of the vessel—$4000. This account was audited and confirmed. The vessel was subsequently lost, she being still uninsured. On February 14, 1861, Jacob C. White, surviving executor, filed the present account, in which he claimed a credit for four thousand dollars, the appraised value of the vessel. There was evidence that the executor had abstained from insuring at the request of the widow and legatees, and that the cost of insurance would be from 12 to 15 per cent. The auditor reported as follows: "It seems the owner of the vessel never insured, and testimony of a conflicting character was taken as to the custom of insuring such vessels. As a question of law, your auditor is of the opinion that it was the duty of the executor to have insured. The owner, in neglecting to insure, and in deciding to take all risks, was responsible only to himself. Not so with an executor. He is required by law to account to others for all he does in the conduct of an estate."

The auditor therefore decreed that the above item of $4000 should be stricken from the credit side of the account.

To this report the accountants excepted, because the auditor, in effect, charged them with the loss of the vessel and its value. The Court below (O'BRIEN, J., delivering the opinion) sustained the exceptions, saying: "The schooner was not left in the charge of the executors, but was sailed by Captain Williams, a son-in-law of decedent . . . The owner, the decedent, in his lifetime never insured the schooner. . . . It was in the testimony before the auditor that the widow, the legatees, and Captain Williams, requested the executor not to have the schooner insured. . . . No facts are furnished us that will warrant us in saying that this accountant was guilty of negligence in not effecting an insurance. Nor has any law been cited establishing it as his duty to insure. . . . We think the auditor erred in not allowing the credit taken for the value of the schooner, and direct the report to be corrected by such allowance."

The legatee took this writ, assigning for error

Digitized by Google

the refusal of the Court to charge the executors with the value of the vessel.

Aaron Thompson, for appellants.

An executor is bound to protect perishable property of the estate. He is not a voluntary bailee, but one for hire or compensation, and his compensation is oftentimes measured by the degree of trouble, risk, and vigilance he encounters and exercises. The accountant was guilty of supine negligence in risking, without any insurance upon the schooner, the coasting perils from fire and water, storm and flood.

No testimony was brought up, nor was there any before the Orphans' Court; and when it was stated by the learned Judge that the executors were requested by the widow and legatees not to insure, it was mere *obiter dictum*. Therefore, the finding of the auditor upon the facts should not be disturbed.

Gilbert's App., 28 Sm. 266.

Geo. Junkin, for appellee.

Whether the executors were in duty bound to insure, was a question of wisdom and prudence under all the circumstances of the case. It is not a question of law, as the auditor supposed, but one of fact; and he has not reported a single fact to show negligence.

An executor is not to be charged with a loss except in a clear case.

McNair's App., 4 R. 147.
Calhoun's Est., 6 W. 185.

In the present case the executors consulted the widow and legatees, and they urged him not to insure. Under these circumstances it would be very unjust to hold the executors for the loss of the schooner.

Jan. 22. THE COURT. The Judge below found the fact expressly that the widow and heirs of the decedent requested the executor not to insure the vessel, and that the decedent himself was not in the habit of insuring, and also that the vessel was sailed by a son-in-law, the husband of one of the heirs, so-called, to whom the vessel was bequeathed, if not sold.

Under these circumstances it would be a hardship to hold the executor guilty of gross negligence in not insuring. The fact that the son-in-law returned the freights earned to the executor, who accounted for them faithfully, does not vary the fact, as to negligence, under the circumstances stated.

Decree affirmed, with costs to be paid by the appellant, and appeal dismissed.

PER CURIAM. WILLIAMS, J., absent.

[See Ewing's Estate, 2 WEEKLY NOTES, 31; Derbyshire's Estate, Id. 344.]

July, '76, 20. **Jones v. Freyer.** Jan. 18, 1877.

Amendments—Act of 14 March, 1872—Omission to file declaration—When cured by verdict and judgment—Practice.

In debt on a bond plaintiff filed a copy of the instrument but no declaration. Defendant pleaded *nil debet*, and a trial was had, resulting in a verdict for plaintiff, on which the Court below entered judgment.

Held, that under the Act of 14th March, 1872, the verdict could not be set aside for want of a declaration, and that the Court below having had the power to order the filing of a declaration after verdict, the Supreme Court would consider such amendment made.

Error to the Common Pleas No. 2, of Philadelphia County.

Debt by Jones, the assignee of a bond against Freyer, the maker of it. Plaintiff filed a copy of the bond and subsequently a rule to plead. The defendant pleaded payment and *nil debet*, and the plaintiff filed a replication.

A trial was had, which resulted in a verdict for the plaintiff for $922.50.

The defendant moved in arrest of judgment because, (1) no declaration was filed; (2) there was no issue for the jury to try; (3) there was nothing on the record showing for what cause of complaint the jury rendered their verdict.

The Court below dismissed this motion in arrest of judgment, and entered judgment for the plaintiff on the verdict. The defendant took out this writ, assigning for error, the dismissal of his motion and the entry of judgment.

McElwee, for plaintiff in error.

There being no declaration in this case, no issue was raised by the pleadings, and nothing was tried by the jury.

In Whitall *v.* Morse (5 S. & R. 358), it is said "a verdict will not aid the want of consideration in the declaration in an action of assumpsit."

In Griffin *v.* Pratt (3 Conn. 572), it is said "the omission to allege a matter in the pleadings essential to the action, unless it may be implied from the allegation made, is never cured by the verdict." See also—

Tidds' Practice, Amer. Notes, vol. 2, p. 918.

Jerome Carty, for defendant in error.

The Act of 21 March, 1806 (Purdon's Dig. 68, pl. 1), applies to such a case as this.*

Allen *v.* Irvin, 1 S. & R. 555.

---

* This Act provides that, "In all actions brought or hereafter to be brought in the several Courts of this Commonwealth, no verdict shall be set aside by reason of the want of a declaration or plea, or from defectiveness or indefiniteness in the form of said verdict, but the Court in which such verdict shall have been rendered shall have power at any time to direct the filing of a declaration, the entering of a plea, and the filing of all such descriptions or amended description, if in an action of ejectment, as in the judgment of the Court shall make the pleadings and record conform to what was tried before the jury and found by the verdict."

Digitized by Google

Jan. 29. THE COURT. The Act of 14th March, 1872, § 1 (Brightly's Purd. Dig. p. 70, pl. 7), cures the alleged error in this case. It was in the power of the Court under that Act to order a declaration to be filed. After verdict, and in this Court the practice is to consider an amendment as made, which is of course as in this case.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

July, '76, 78. **Palmer v. Paul.** Jan. 18.

Mechanic's lien — Irregularities in claim — When not inquired into, after trial on the merits.

Error to Court of Common Pleas No. 4, of Philadelphia County.

Scire facias sur mechanic's claim filed by D. V. Paul against Emma Palmer, owner or reputed owner and contractor, for work done and materials furnished for and about the alteration and repair of a brick house No. 1118 Vine Street.

Pleas, *nil debet*, set-off, payment with leave, etc.

The claim was filed against Emma Palmer, but in the body of the claim she was by a clerical error described as Emma *V. Paul*, owner or reputed owner, etc. There were also certain irregularities in the bills of particulars for work alleged to have been done by sub-contractors, such bills failing in some instances to set out particularly the items, and particular kind and amount of certain work and material charged for, specifications of which had not been furnished to the defendant.

On the trial the defendant requested the Court to charge that the error in the name of the defendant, in the body of the claim, was fatal, and that the charges in the claim of the sub-contractors were invalid in not setting forth the items. The Court declined these points, and charged that the proof must be directed to the items in the claim, and must be satisfactory to the jury.

Verdict and judgment for plaintiff. Defendant took this writ, assigning for error the refusal of the Court to charge as requested.

John A. Clark, for plaintiff in error.

Thomas J. Diehl, for defendant in error.

Jan. 29. THE COURT. There was a trial on the merits in this case, and sufficient evidence to establish the debt claimed. Mere irregularities in the filing of the lien will not be inquired into after such a trial. There was no question of the invalidity of the entire lien, as being filed out of time, or against the wrong property.

We discover no errors to be corrected.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

[*Cf.* Moore *v.* Hotel Co., *ante*, 289.]

Jan. '76, 302. **Prevost v. Gorrell.** Jan. 18.

Jurisdiction — Venue — Pleading — Local and transitory actions—Action on the case for nuisance to real estate—Act of 4 March, 1862.

An action on the case for injuries in the nature of a nuisance to land, is local.

Error to Court of Common Pleas No. 2, of Philadelphia County.

Case by Prevost, the lessee of Centralia Colliery, in Columbia County, against Gorrell, the lessee of an adjoining colliery, to recover damages for injuries suffered by plaintiff by reason of water, filth, and rubbish, flowing into his colliery from the colliery of defendant. The action was brought in Philadelphia County, and the question raised in the Court below, by a demurrer to a plea to the jurisdiction, was whether the action was local, and therefore confined to the county where the lands were situated.

The Court below decided that the action was local, and entered judgment for the defendant on the demurrer. The pleadings, arguments of counsel, and opinion of HARE, P. J., are fully set forth in the report of the case in the Court below, 2 WEEKLY NOTES, 440. Plaintiff took this writ of error, assigning for error the entry of judgment for defendant.

George W. Biddle and *A. Sydney Biddle* (*Lin Bartholomew* with them), for plaintiff in error.

Benjamin Harris Brewster and *Rudolph M. Schick* (*A. P. Spinney* and *James Ryon* with them), contra.

Jan. 29. THE COURT. The opinion of the learned Court below, and the Act of 4th March, 1862, § 1 (1 Brightly's Purd. Dig. 44, pl. 10), render it unnecessary to discuss the question presented in this record. We are of opinion that action on the case for what would be a nuisance to land, is local.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

July, '76, 107. Jan. 18.

Enderiss v. Harkness.

Will—Devise—Active trust—Execution—Devise of property until cestui que trust should attain a certain age—When not sufficient to prevent a sale under execution against him.

By her will a testatrix devised to H., in trust for her son M., his heirs and assignees, certain houses until M. should attain the age of twenty-five years. She

Digitized by Google

further provided that should M. die, before attaining that age, without lawful issue, the house should be sold by her executor, and the proceeds paid to certain institutions. She also directed her executor to keep the houses in good repair and appointed H. her executor and guardian of her son M. After her death and when M. was twenty-two years of age, one of the houses was levied on and sold under a judgment against him. In ejectment by the purchaser:

Held, that the will created no trust sufficient to prevent the sale of the premises as the property of M. under the execution against him.

Error to the Court of Common Pleas No. 1, of Philadelphia County.

Ejectment by Thomas Harkness against G. F. Enderiss, Lewis Mayers, and J. B. Michaels, to recover a property on the west side of Lancaster Street forty feet west of Marion Street. Plea, Not guilty.

At the trial the plaintiff showed a good title in Louisa Mayers at the time of her death. He then offered in evidence a copy of her will, dated 31 Jan. 1868, proved 20 July, 1869, under which the executor was directed among other things to divide the lot fronting on Keefe Street, so as to extend the yards of five houses fronting on Lancaster Street and leave an alley way; and to pay off the ground rents on the estate as soon as there were sufficient funds to spare for that purpose without injury to any of the parties interested in the will. After a devise of the property on Keefe Street to Mary Norris, the will contained the following clause:—

"I give, devise, and bequeath to James Horner in trust for my adopted son Lewis Mayers, his heirs, and assigns all my remaining real estate to wit [describing the five properties on Lancaster Street, one of which was the property in suit], until my adopted son Lewis Mayers, attains the age of twenty-five years. Should the aforesaid Lewis Mayers die before he attains the age of twenty-five years, and without lawful issue or heirs, then the aforesaid five houses and lots of ground shall be sold by my executor at public sale, without application to any court for that purpose, and the net proceeds divided equally, to wit, one-third to the Roman Catholic Orphans' Asylum, one-third to the Protestant Orphans' Asylum, and one-third to the Union School. I desire after my decease that my executor will keep the above five houses in good repair. . . . . And I hereby nominate and appoint James Horner, of the city of Philadelphia, executor of this my last will and testament; and I hereby nominate and appoint my executor guardian of my adopted son Lewis Mayers. . ."

The plaintiff then showed that he had become the purchaser of the property in suit at a sheriff's sale, under a judgment against Mayers. It was admitted that at the time of this sale Mayers was only twenty-two years old.

The defendant requested the Court to charge, that under the above will Mayers had no estate in the land, legal or equitable, which could be sold by execution on a judgment against him; that under the will there was an active trust which remained in the trustee until Mayers arrived at the age of twenty-five years, and that, Mayers not having arrived at that age, no title passed by the sheriff's sale. The Court refused so to charge, and directed the jury to find for the plaintiff, reserving the question of law raised in the defendant's point. Judgment on the reserved point was subsequently entered for the plaintiff, and the defendants took out this writ, assigning for error, *inter alia*, the refusal of the Court to charge as requested, and the entry of judgment for the plaintiff on the reserved point.

Edgar E. Petit, for the plaintiff in error.

Horner was made executor and also trustee and guardian. As executor certain duties only were imposed upon him, but the will is silent on the subject of collecting rents. Such a duty does not devolve on an executor as such, and consequently must be performed by a trustee. Horner thus had active duties to perform. However slight those duties may be, the trust must be sustained.

Ashhurst *v.* Given, 5 W. & S. 323.
Kay *v.* Scates, 1 Wr. 31.
Barnett's Appeal, 10 Wr. 392.
Shankland's Appeal, 11 Wr. 113.
Bulm's Appeal, 7 Sm. 504.
Parker's Appeal, 11 Sm. 484.

There was an intention to protect the estate against the improvidence of the adopted son, and to carry out this intention the trust should be upheld.

Vaux *v.* Parke, 7 W. & S. 19–26.

The duties imposed by the will leave it uncertain who was to perform them, and the law will distinguish as to the duties of executor, trustee, and guardian.

Keeping the property in repair is a duty for a trustee.

H. McIntyre, for defendant in error.

To Horner, as trustee for Mayers, was given no right to receive rents, etc.; no discretion, and the property was not given so as not to be liable for the debts of Mayers, who took a fee under the will.

Preston on Estates, pp. 277 and 278.
Nicholson *v.* Bettle, 7 Sm. 384.

As trustee Horner had no active duties.

Phillips's Appeal, 2 Weekly Notes, 483.
Ashhurst's Appeal, 1 Id. 410.

Jan. 29. The Court. We discover no trust in this case such as would prevent a judicial sale of the premises as the property of the defendant in the execution referred to.

Per Curiam. Judgment affirmed. Williams, J., absent.

Digitized by Google

Common Pleas—Law.

C. P. No. 1. **Nachod v. Kunkel.** Feb. 3.

Affidavit of defence—Sufficiency—Release.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit for goods sold and delivered.

The affidavit of defence set forth that the goods were purchased for the purpose of furnishing the premises called South Broad Street Schutzen Park. That after the purchase, the plaintiff agreed with defendant that if she would execute a bill of sale of the good-will and fixtures of the said park to one Walters, and if he would assume defendant's indebtedness, then the plaintiff would accept the said Walters as his debtor, in lieu of the defendant, and release her from any further claim, and that the defendant had executed such a bill of sale to Walters, and he had agreed to assume the indebtedness.

McKeehan, for rule.

Though defendant executed the bill of sale, she failed to carry it out by a delivery of possession.

McKinley, contra.

The agreement was to execute the bill of sale. For a failure to comply with the contract of sale, Walters had a right of action, but defendant had done all she agreed to in order to entitle her to a release from the present plaintiff.

Rule discharged.

C. P. No. 1. **Tunis et al. v. Baker et al.** Feb. 3.

Pleading—The pendency of an attachment execution does not prevent the entry of judgment for plaintiff—It cannot be pleaded in bar or abatement—It may be specially pleaded.

Rule to strike off special plea.

Assumpsit for work and labor done under contract.

The declaration contained a special count and the common counts. Pleas, Non-assumpsit, set off, payment with leave, etc., and a special plea setting forth "a pending attachment execution against the defendants as garnishees of plaintiff." Replication, *non-solvit*, no set-off, and issue.

The plaintiff subsequently obtained the present rule.

Stone, for the rule.

The special plea is either surplusage, or else it is insufficient in not setting forth the name of plaintiff in the attachment. It is contrary to all practice to allow a plea to be upon the record that is not traversable.

[PEIRCE, J. The pendency of the attachment is no bar to the prosecution of your claim.]*

Price, contra.

By filing a general replication, the plaintiffs waived their right to object to the special plea. Such a plea is admissible to place the facts upon the record, thereby giving notice of the claim and enabling the Court to mould the judgment so as to protect all parties.

Kase *v.* Kase, 10 Casey, 128.
Brown *v.* Scott, 1 Sm. 362.
Derham *v.* Berry, 5 Phila. 475.

Rule discharged.

* See several cases in 1 WEEKLY NOTES, Index, tit. "Attachment."]

Orphans' Court.

Steger's Estate. Oct. 24, 1876.

Estate to wife until second marriage, with power of appointment—Power to mortgage for debts of testator—Mortgage by minor—Re-acknowledgment without consideration—Commissions, when forfeited.

Sur exceptions to adjudication.

The testator by his will directed as follows:—

"My wife shall, after my decease, be the sole heir of my entire property; she shall administer everything to her best knowledge and ability, and she shall have the right and authority to dispose of said property entirely or partially if she should deem it to her own and to our children's advantage. She shall have the right of providing for her own decease to dispose by will of our common property in favor of our beloved children or their heirs in equal or unequal portions, as she may see fit and proper; and in case all our children should die without heirs before the decease of my wife, then and then only, she shall have the right to dispose of our common property in favor of other relatives or individuals."

In the succeeding clause, testator provided, "in case my wife should marry again, the above provision of this my will shall be so altered that she shall receive one-third of my property as prescribed by law, and the remaining two-thirds shall be divided in equal portions among our surviving children or their heirs."

The decedent left a widow whom he appointed executrix, and four children, three of whom were minors. After her husband's death Mrs. Steger executed a mortgage to one Reyenthaler, a creditor of the testator, and to whom she had also become indebted, both of which debts the mortgage was made to secure. It was executed by the widow, by her son who was of age, and by a married daughter, a minor, whose husband also joined in its execution. When the daughter be-

Digitized by Google

came of age, she and her husband re-acknowledged the instrument. Mrs. Steger shortly after remarried.

The personalty proving insufficient to pay the debts of the estate, an order for the sale of real estate was granted. The auditor appointed to distribute the fund arising from the sale refused payment of the mortgage executed to Reyenthaler, holding that the daughter, being a minor, could not bind her interest thereby, and a re-acknowledgment by herself and husband after she became of age was void and inoperative for want of consideration.

Among the real estate sold was a property subject to a mortgage to a building association, and at the time of testator's death a balance on the mortgage remained unpaid. The purchaser of the mortgaged premises, at the instance of the executrix, paid this balance, and the mortgage was satisfied of record. He claimed to be reimbursed out of the fund, which the auditor refused, holding that the purchaser had bought subject to the mortgage, and thereby made the debt his own.

The auditor also refused to allow commissions to the executrix on account of carelessness and inattention.

To these findings exceptions were filed on behalf of the mortgage creditor and the accountant.

Shapley and *Ledyard*, for exceptants.

James D. Lee, for accountant.

Nov. 18. THE COURT, after stating the facts in the case, said:—

"It will be seen that while the testator gives to his wife the absolute disposition of his estate, yet it is upon condition that she remain his widow, for he expressly declares, that in case of her marriage the previous provision made for her 'shall be so altered that she shall receive one-third of my property as prescribed by law.' The quantity of her estate being limited, the executrix had no authority to convey or encumber the estate without proceeding in the manner provided by law, and obtaining the sanction of the proper court, whereby the interests of all parties would be protected. She was a trustee for herself and children (Walter *v.* Quigg, 6 Watts, 87), the trust being determined by her marriage, which took place in July, 1874, shortly after executing the last mortgage. It is clear testator never contemplated that his widow should have the unrestricted power to mortgage his entire real estate, apply the proceeds to her own purposes, immediately thereafter re marry, and despoil his children of their inheritance. She having assumed an authority not conferred by the will, the natural consequences must fall upon those who dealt with her. For it is equally incumbent upon a mortgagee to be assured of the validity of his mortgage, as for a vendee to accept only a good and marketable title from his vendor. Until the marriage of executrix the children of testator had but an estate in expectancy, and those who joined in the mortgages with her of course could only create a lien upon their undivided share. While, therefore, the mortgages executed by testator's son, with the executrix, would be entitled to payment out of his share of the fund realized by the sale for payment of debts, according to their priority, yet the mortgage in which testator's daughter joined, she being at the time a minor and a feme covert, is void as to her. In Schrader *v.* Decker (9 Barr, 14) it is held that a deed by an infant feme covert, executed during infancy, and regularly acknowledged, though dated after she became of age, is void. Here, neither the minor, nor her husband, received any consideration for the mortgage; it was not to secure his indebtedness, which in Chandler *v.* McKinley (6 Michigan Reports, 217) was held to render the mortgage absolutely void, but was given to secure a debt of testator, and also an antecedent debt of the executrix. And although the minor, after attaining lawful age, re-acknowledged the mortgage, under a threat of the mortgagee to sell the property of her husband under an execution, yet the re-acknowledgment was more than a year subsequent to the date of the mortgage, and after the premises therein described had been sold by order of court for payment of testator's debts. The re-acknowledgment, therefore, was of no avail, and could not give to the instrument any binding effect as against the daughter of testator or her representatives, she being now deceased. Nor was it such a ratification of even a voidable conveyance or contract as would bind an infant after becoming of age. (Curtin *v.* Patton, 11 Sergeant & Rawle, 311; Smith *v.* Eisenlord, 2 Phila. Rep. 353.) The mortgagee must therefore be remitted to his remedy, if any, upon the bond signed by the husband of the late minor.

"Exceptions were also filed by accountant to the refusal to allow her commissions. As has frequently been said, compensation is allowed to the faithful, not the unfaithful trustee. It is a reward for meritorious services, or onerous labors and responsibilities. Negligence, inattention, and use of the estate for personal benefit, though unaccompanied with fraud, are sufficient to deprive an executor or other trustee of all compensation. In this case the executrix, through ignorance, inattention, and perhaps improper advice, though not chargeable to counsel, has mismanaged the estate, jeopardized the interests of her children, delayed creditors, and, as far as we can discover, failed to perform any services for which she is entitled to compensation out of the estate. These exceptions are therefore dismissed.

"It also appeared that testator in his lifetime had executed a mortgage to a building association, which constituted the first encumbrance

Digitized by Google

upon his real estate. Subsequently to the sale for payment of debts, the purchaser, at the request of accountant, paid the balance due upon the mortgage, and it was satisfied of record. At the audit he and accountant both claimed that the amount paid should be allowed out of the fund, but the claim was rejected. If the accountant had, out of the personal estate of testator, and prior to the sale, satisfied the mortgage, she would have been entitled to a credit therefor, as having discharged a debt of testator, or if she had advanced her own moneys for the purpose, she would have been subrogated to the rights of the creditor; but the balance due upon the mortgage having been paid by the purchaser, the payment was in liquidation of his own debt, as the sale for payment of debts did not discharge the mortgage. The claim for reimbursement was therefore properly disallowed.

"The exceptions having been in part sustained, the adjudication will be corrected in the decree filed herewith, and, as modified, is confirmed."

Opinion by HANNA, J.

Mealey's Estate. Nov. 20, 1876.

Will—Demand for issue—Form of issue on appeal from Register—Practice—What constitutes sufficient acknowledgment of will—Probate of will—What proof sufficient—Undue influence.

Sur appeal from Register, and demand for an issue.

Margaret Mealey died April 24th, 1875, leaving a will dated June 26th, 1867, which was duly admitted to probate. An appeal was taken from the decision of the Register admitting the will to probate, upon the ground of undue influence, testamentary incapacity, and insufficient execution of the paper.

It appeared that Miss Mealey's eyesight was weak, and on that account she depended very much upon Mrs. Lentz (the principal devisee under the will). The will was in the hand-writing of the executor, Mr. J. S. Snyder, and was signed with testatrix's mark. Mr. Snyder called the witnesses in to attest the will. The sole surviving witness declared herself unable to remember anything that occurred at the time except her own signing and her husband's, and that the will was not read to Miss Mealey in their presence.

As to undue influence, there was evidence to show that the will had been executed by the testatrix while under the influence of passion against her heir-at-law and nephew, Mr. Baum, excited by the executor Mr. Snyder, who acted as Miss Mealey's business agent. Mr. Snyder had treated Mr. Baum unjustly, as Mr. Baum alleged, in some business transactions with Miss Mealey, and Baum complained to Miss Mealey that he was swindled. Miss Mealey became very angry, and said immediately afterwards that she meant to make a will, that Mrs. Lentz was as near to her as Baum was, because she had been with her so many years. No evidence of testamentary incapacity was produced.

A. M. Burton, for the appellants.

It is incumbent upon the parties propounding a will to prove it free from suspicion, and that it was the free act of the testator.

Harrison *v.* Rowan, 3 W. C. C. R. 580.
Boyd *v.* Boyd, 16 Sm. 283.

A will must be proved by two witnesses; separately and completely by each one.

Derr *v.* Greenawalt, 26 Sm. 239.
Charles *v.* Huber, 28 Sm. 448.

There ought in a case like this to be proof that the will was read over to the testatrix, and that she knew and approved the contents of the will.

Davis *v.* Rogers, 1 Houston (Del.), 44.
Hastilow *v.* Stobie, L. R. 1 Prob. & Div. 64.
Watterson *v.* Watterson, 1 Head. 1.

A. V. Parsons, contra. No fact is stated in the petition before the Register why the will should be set aside. A mere allegation that the paper is not a will is insufficient.

Cauffman *v.* Long, 2 WEEKLY NOTES, 695.

To avoid a will upon the ground of undue influence, the constraint must act on the testator's mind at the time of making the will. A man may, by fair argument and persuasion, induce another to make a will in his favor.

Burton, in reply. The credibility of Mr. Snyder is in question, and that is a question for a jury; therefore we have a right to an issue.

[DWIGHT, J. How would you frame your issue for the jury?]

Whether the paper purporting to be a will is the legally executed will of Margaret Mealey.

December 9, 1876. THE COURT. In disposing of this appeal from the decision of the register in admitting the will of decedent to probate, and of the demand for an issue to determine its validity, we have not been unmindful of the wise determination of the Supreme Court, as announced by PAXSON, J., in Cauffman *v.* Long (2 WEEKLY NOTES, 695, and 33 Legal Intelligencer, 212). It is there said: "The growing disposition of courts and juries to set aside last wills and testaments, and substitute in lieu thereof their own notions as to what a testator should do with his property, is not to be encouraged." And "where a man has sufficient memory and understanding to make a will, and such instrument is not the result of undue influence, but is the uncontrolled act of his own mind, it is not to be set aside in Pennsylvania without sufficient evidence, nor upon any sentimental notions of equality."

Digitized by Google

It is alleged, as grounds for the appeal and demand for an issue, that the paper-writing admitted to probate is not the last will and testament of decedent; that before and at the time of its execution she was not of sufficient mind, memory, and understanding to make a will; that decedent did not make, execute, or publish in due form of law said paper-writing as her last will and testament; and that the alleged will was procured by undue influence, imposition, and duress. According to proper practice the appellants should have presented the form of the issues they demanded; but in their petition mere naked allegations are made, leaving the Court to determine, after argument and examination of a ponderous volume of testimony, not only whether there is cause shown for an issue, but its form, and the particular questions to be submitted to a jury, to be the subjects of future consideration. Notwithstanding this irregularity, we have considered the allegations of appellants as embodying the issues demanded. We therefore find they present issues both of law and fact. But the former are solely within the province of the Court, and the latter, only, to be passed upon by a jury. So far as they relate to the execution of the will by testatrix, we have no doubt that all the requirements of the law were complied with, and the will properly executed. The testatrix, through want of education, was unable to write, but was able to read until within three or four years prior to her death, when her vision became much impaired. She therefore signed the paper-writing by making a mark or cross, in the presence of three witnesses, two of whom were subscribing witnesses. One of the latter having subsequently died in the lifetime of testatrix, upon proof of his signature, together with the testimony of the surviving witness, the will was admitted to probate.

Upon the testimony of this witness being taken before the examiner, it appeared that after the lapse of more than eight years she could not remember seeing testatrix use the pen or make her mark, but recollected distinctly being called upon to witness, together with her husband, the execution of the will; that testatrix stated she had made her will, and requested them to sign their names to it, which they thereupon did, in the presence of testatrix, the executor, and of each other. The contents of the will were not read over to testatrix in the presence of subscribing witnesses, nor was this necessary. But prior to the execution, and before testatrix requested the attendance of the witnesses, the contents of the will were read to her by the executor. It is not requisite that the subscribing witnesses should actually see the testator write his signature or mark to be his. And although there be subscribing witnesses, yet if, as in this case, one be dead at the date of probate, and the survivor, through lapse of time or defective memory, fail to testify to all the circumstances attending the execution of the will, yet where the attestation is fully proved, the law will presume, in the absence of fraud or imposition, that all the requisites of a valid execution were observed. (Vernon *v.* Kirk, 6 Casey, 218; McKee *v.* White, 14 Wright, 334.)

After a careful examination of the testimony, we are unable to discover any evidence of undue influence, imposition or duress. The testatrix, although apparently uneducated, was possessed of considerable intelligence and familiarity with business affairs. Nor is there any evidence of mental incapacity. On the contrary, as long as her physical strength permitted, she personally attended to the management of her estate, and from her force of character, there was little probability of her mind being operated upon to dispose of her property in any other direction than the one which her judgment approved and inclination prompted. Her will was prepared by the executor at her request, and without the knowledge, solicitation, or suggestion of any one, and after its execution, remained in the custody of the executor for nearly eight years, during all which period testatrix had constant opportunities of revocation, had she been so disposed. And this fact alone is almost conclusive in disposing of the allegation of undue influence. But in addition, as has been well settled, even if there is any evidence of undue influence in the procurement of the will, it must be shown to exist at the time of the execution, and must be a present restraint, operating on the mind of the testator in the very act of making the testament, (Will of Ellen De B. Shaw, 1 WEEKLY NOTES 332.) Here the occurrences proved as constituting undue influence all transpired months prior to the date of the will. In view of the testimony, it would not only be unjust, but contrary to established precedent, to sustain this appeal.

The demand for an issue is therefore refused, the appeal dismissed, and appellants are ordered to pay the costs.

Opinion by HANNA, J.

Frey's Estate. Dec. 18, 1876.

Lunatic—Committee—One who has been found a lunatic under an inquisition in the Common Pleas, may not present a petition in the Orphans' Court, notwithstanding that a traverse to the inquisition is pending and undetermined in the Common Pleas—Jurisdiction of Common Pleas over estate of lunatic—Practice.

Decedent's estate—When jurisdiction of Orphans' Court ceases, and that of Common Pleas attaches.

Sur petition for an allowance, and answer.

Sophia Frey filed a petition against the exe-

Digitized by Google

cutors of her mother's estate for an allowance for her support. It appeared, by the record of the Court of Common Pleas No. 2, that the petitioner had been adjudged a lunatic, and a committee of her estate had been appointed. This finding of the jury had, however, been traversed, and the traverse is still undetermined.

The executors, in their answer, denied the right of the petitioner to file the petition.

Flint, for the petitioner.

Hopple, contra.

Jan. 6. THE COURT. The estate of decedent having been accounted for by her executors, their account came in to be audited, and a balance found to be in accountant's hands was awarded to petitioner. It is the office of the Orphans' Court, when an account is before it for audit and adjustment, to ascertain the expenses of administration, and then to determine such claims as creditors may make against the estate. Up to this point the estate is that of the decedent. When the cost of administration has been settled, and claims, if any, allowed, the balance ceases in law to be the estate of the decedent, and becomes the estate of the heirs or other parties succeeding in interest. The award or decree of distribution is in the nature of a judgment, which fixes the legal title of the new owners.

The balance in the executors' hands thus became the property of Sophia Frey. But she has been found by due process of law to be a lunatic, and the Court of Common Pleas, in pursuance of its statutory powers, has appointed a committee of her person and estate. The committee, by virtue of his office, has the management of the real and personal estate of the lunatic. The inquisition of lunacy has been traversed. But this does not supersede the powers of the committee; for, by the Act of June 13, 1836, § 13 (Purd. 982, pl. 16), "it shall be lawful for the Court" of Common Pleas, "notwithstanding any traverse that may be pending, to make such orders touching the care and custody of the person and management and safe keeping of the estate of any person so found to be a lunatic as they shall think necessary and proper."

In our opinion this statute causes the jurisdiction of the Court of Common Pleas to attach to the balance now in the disposition of this Court, and it is our duty to respect the authority of that tribunal, and to co-operate in making it efficient. Should we grant the petition of Sophia Frey, we should exercise that control over the fund which, as it seems to us, can now be exercised only by the Court of Common Pleas. We must, therefore, refuse the petition.

Opinion by DWIGHT, J.

U. S. Circuit Court—Law.

April, '75, 45. Oct. 4, 1876.

Juillard v. Remington.

A special plea in assumpsit, averring that the contract was entered into in another State, by the law of which it was usurious, is in Pennsylvania good on special demurrer

Sur demurrer to special plea.

Assumpsit upon a promissory note for $8120, made by Beckman Remington to the order of A. D. Juillard. Special plea: That the contract was a usurious one; that it had been made in the State of New York and was therefore subject to the law of that State, which provided that all contracts for a greater rate of interest than seven per cent. per annum should be wholly void.

Demurrer, on the ground that the special plea amounted to the general issue.

A. Sydney Biddle and *R. C. McMurtrie*, for the demurrer, argued that the plea was argumentative in that it merely went to show that there was no *legal promise*, and amounted to a general denial of the plaintiff's cause of action as declared on. Evidence in support of the alleged defence would be admissible under the general issue, and in such case a plaintiff is not required to submit to a special plea, which on special demurrer is bad.

Hallett *v.* Dowdall, 18 Q. B. 16.
Morgan *v.* Pebrer, 3 Bing., N. C. 457.
Dawson *v.* Pynsent, 4 Yeates, 349.
Stansbury *v.* Marks, 4 Dall. 130.
Gew *v.* Walcott, 10 Barr, 43.
Beals *v.* See, Id. 56.

Frank C. Fallon and *John Fallon*, contra.

That the contract was made in New York, and that the New York law is different from that in this State, were properly pleaded specially.

Stephen on Pleading, 285–9.
Mostyn *v.* Fabrigas, 2 Sm., L. C. 1037.
1 Chitty on Pleading, 214–221.
Van Auken *v.* Dunning, 3 WEEKLY NOTES, 15.
Strawn *v.* Park,* 1 Phila. Rep. 178.

THE COURT (MCKENNAN and CADWALADER, JJ.) entered judgment for the defendant on the demurrer.

(No opinion.)

---

* [In the statement by SHARSWOOD, J., of the rule in regard to special pleading, in the report of this case in 1 Phila. Rep., there is an accidental omission of the word *not*. See 8 Leg. Int. 63, 1851.]

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, MARCH* 1, 1877. [No. 22.

Supreme Court.

Jan. '75, 203. Jan. 19, 1877.

Maule et al. v. Stokes et al.

Legal tender—Old ground-rent payable in "current silver money of the United States"—Tender of silver dimes insufficient.

A ground-rent created in 1806 was payable in "current silver money of the United States." In 1875 the tenant tendered an instalment of the rent in silver dimes:

Held, that the tender was insufficient, it being payable only in silver money of the United States which at the time of payment is a legal tender for the amount of the rent.

Error to the Common Pleas No. 2, of Philadelphia County.

Covenant by Stokes *et al.* against Harrison *et al.* to recover two instalments of ground-rent, due January 1 and July 1, 1875, under a certain ground-rent deed made by James Pemberton and wife to the defendants, dated Dec. 3, 1806, "Reserving a yearly ground-rent of $100 *current silver money of the United States*, payable half yearly." Returns of *nihil habet*, posting and advertising, were made by the sheriff. The terre-tenant, Maule, filed an affidavit of defence setting forth that he had tendered to the plaintiffs, upon their demand for payment, the amount of the instalment due January 1, 1875, with interest thereon to the time of the tender, and the amount of the instalment due July 1, 1875, on the day it became due, both in "current silver money of the United States," which (in order to raise fairly the real question between the litigants) the affidavit admitted "was in silver coins, coined at the Mint of the United States, of the denomination of one dime each, and that many of said coins were so coined since the 21st day of February, 1853."

The terre-tenant obtained a rule to show cause why the money tendered should not be paid into Court, which was discharged (2 WEEKLY NOTES, 332), and a rule taken by plaintiffs for judgment for want of a sufficient affidavit of defence, was made absolute.

The defendants took this writ of error, assigning for error the entry of said judgment.

N. H. Sharpless, for plaintiffs in error.

At the time of the creation of the ground-rent in this case, the United States Statute of April 2, 1792 (Brightly's Dig. Laws U. S. p. 151, pl. 1) was in force, providing for a gold and silver coinage from eagles down to half dimes, each and all to be a legal-tender for debts of any amount whatever. Matters so continued until the Act of 18th June, 1837 (Id., p. 152), when the weight of the silver coins was slightly altered, but the new coins down to half dimes were again declared legal tenders in payment of debts for any amount. This so remained until the 21st of February, 1853 (with the exception of the passage of an intermediate Act of March 3d, 1851, authorizing the coinage of three cent pieces, not to be a legal tender for more than thirty cents), when an Act of Congress was passed, the first section again changing the weight of the silver coins of the denomination of half dollars and less, the second section of which declared that silver coins issued in conformity with the first section, should be legal tender in payment of debts not exceeding five dollars (Act 21 Feb. 1853, Brightly's Dig. Laws U. S., 152, pl. 13). It is under this last Act that the difficulty, if any, arises. If these silver coins, coined by the United States at the Mint thereof, and put in general circulation from that place under the Act of February 21st, 1853, are not "current silver money of the United States," what are they? The silver *dollars* with the exception of the new trade-dollar, which is not a legal tender, have disappeared, there being a profit in recoining them into the smaller coins. The result is that the half dollar and smaller coins issued under the Act of Februrary 21st, 1853, are not only the "current" but they are the only "silver money of the United States," and if we cannot pay in them we must pay in gold.

John G. Johnson, for defendants in error.

We submit that the tender was insufficient.

(1) The contract was to pay in *dollars*, not in *dimes*.

(2) The tendered dimes were not money.

We contend that the grantor stipulated for something which should be "money," and that silver dimes, by the Act of 12th February, 1873, c. 131, § 15, are declared not to be within that category.*

The legal tender Acts are inapplicable to this contract, because of its being one for coined money, and by these Acts debts payable in one species of coined money are solvable in any coins which are legal tenders. There is no unreversed case, however, which holds that a debt solvable in coined money may be paid in such silver coins as, beyond $5 in amount, have never been monetized by any of the Acts which provided for their issue.

Much is made, by the defendant, of the word

* The provisions of § 15, Act 12 February, 1873, are embraced in sect. 3586 Rev. Stat. U. S., which reads as follows: "The silver coins of the United States shall be a legal tender at their nominal value for any amount not exceeding five dollars in any one payment."

Digitized by Google

"current," but the construction he places upon it denies any force to the quality of "money" also stipulated for. Had the deed called for dollars "current silver," there might be room for his contention; but it went far beyond that requirement. So long as the silver tendered was "money," the covenantee agreed to take it, but no longer.

Jan. 29. THE COURT. The words in this ground-rent deed mean such current silver money of the United States as will, at the time of the tender, lawfully pay a sum of one hundred dollars, the amount of the rent reserved. The reservation was of *money*, not of specific pieces, and therefore the contract could not mean that which was not competent money, at the will of the debtor, to pay the debt. Dimes were not competent money at the will of the debtor to pay a debt of this sum at the time of the tenders. The tenders therefore were not good.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

[The above decision practically overrules that of the Court of Common Pleas No. 4, in Kohler *v.* Parrish, 2 WEEKLY NOTES, 488, in which it was held that a mortgage created in 1846, for the payment of $5000 in lawful silver money of the United States, could be paid in silver half dollars.

For a table of the Acts of Congress regulating the values of gold and silver coins, see Morris *v.* Bancroft, 1 WEEKLY NOTES, 223.]

July '75, 47 to 49, 97 to 104. Jan. 12, 1877.

Millett v. Allen.

Mechanic's lien—Materials furnished indiscriminately to several houses under an entire contract—Right to apportion amount due on each house, and file separate liens therefor—Houses situated in different blocks—Evidence—Book entries—Admissibility in evidence when not designating the materials furnished to each house.

Where materials are furnished indiscriminately for a number of houses, under an entire contract, the material man has the right to apportion the amount due on each house and to file separate liens therefor.

Whether the right of apportionment exists where the houses do not adjoin but are situated in different blocks, not decided.

On the trial of a *scire facias* upon a separate apportioned lien, claimant's book of original entries, containing entries of the items furnished to all the buildings without designating the precise materials furnished to each building, is admissible in evidence.

Error to the Common Pleas No. 2, of Philadelphia County.

Scire facias sur mechanic's claims filed by William S. Allen & Co. for materials furnished for the construction of eleven houses under an entire contract with Fonrose Millett, the owner. The houses were in two blocks, one of five and the other of six houses. The houses in each block adjoined each other, but the blocks were separated by a large intervening space of ground. Claimants filed a separate lien against each house. Annexed to each claim was a bill of particulars to the amount of $3022.40, at the end of which was an averment of the following character:—

The materials, etc., mentioned in the foregoing bill of particulars were furnished for and used about the joint construction as well of the building mentioned in the annexed lien, as of ten buildings; three of which are adjoining buildings, situate on the south side of Diamond Street, commencing at the distance of 36 feet 5 inches east of Third Street. Two of which adjoin the herein described building to the south, and five of which are adjoining buildings, situate on the east side of Third Street, commencing at the distance of 212 feet 3½ inches south of Diamond Street; and of all of which the said Fonrose Millett is the owner or reputed owner and contractor; and against all of which buildings a lien is filed to the present June Term, 1872, of this Court; and the annexed lien is filed for an equally apportioned pro rata of the above sum of $3022.40.

Writs of *scire facias* were issued on each claim, and the cases were tried together. On the trial (before MITCHELL, J.) claimant's book of original entries was offered in evidence, containing the following entry:—

Fonrose Millett's houses on Third Street below Diamond and Diamond below Third.

Then followed the items set forth in the bills of particulars. Defendant objected to the book because the entries did not designate the precise materials furnished to each house. Objection overruled. Exception. The defendant waived any question on the facts of the case, but requested the Court to charge, "that, as each claim filed does not designate the specific materials furnished on the credit of the house described in the *scire facias*, the verdict must be for the defendant." The Court declined so to charge, and directed the jury to find for the plaintiff.

Verdict and judgment for plaintiff in each case for the amount of the respective claims. Defendant took this writ, assigning for error the admission of the book account and the refusal of the Court to charge as requested.

David W. Sellers and *William A. Manderson*, for plaintiff in error.

The "kind and amount of materials furnished" to each house are not set forth. This makes the claim incurably defective.

Act of June 16, 1836, Purd. Dig. 1032, pl. 43.
Singerly *v.* Cawley, 2 Cas. 248.

In cases in which the same owner is erecting several houses, the material man must furnish an apportioned claim under the Acts authorizing such claims.

Digitized by Google

Purd. Dig. 1033, pl. 41, 42, 43.
Taylor v. Montgomery, 8 Harris, 445.
Fitzpatrick v. Allen, 2 WEEKLY NOTES, 265.

In the case of Davis v. Farr (1 Har. 168), the adjoining houses belonged to separate owners and no joint claims could be filed.

George W. Thorn (with whom was *Bowers*), contra.

The Acts authorizing joint liens are not imperative, and notwithstanding these statutes the material man may still file separate claims whether the buildings are contiguous or not.

Pennock v. Hoover, 5 Rawle, 313.

In the present case a joint lien could not have been filed, for the reason that an intervening space which was not annexed to either block of buildings separates them from each other. This is well settled.

Chambers v. Yarnall, 3 H. 265.
Goepp v. Gatriser, 11 C. 130.
Fitzpatrick v. Allen, 2 WEEKLY NOTES, 265.

The question then recurs: Where materials are furnished indiscriminately, under one contract, to two or more buildings which *do not* adjoin, in what form is the mechanic to obtain the benefit of the statutes which authorize a claim to be filed for materials which are furnished for or about the erection of every building?

It is evident that he must file a several claim against each building, and designate the amount which he claims on each, as, under the decisions, he can have no other. See, on this point—

Davis v. Farr, 1 H. 167.
Harper v. Keely, 5 H. 234.

A book of original entries charging for materials delivered to two or more buildings would be good evidence against one. This has been everyday practice.

Jan. 22. THE COURT. The book account was evidence of the items in the account, and was admissible.

The right to apportion as between even different owners, where the account is joint and furnished to the same contractor for all the buildings indiscriminately, and to file separate liens therefor, is settled in Davis v. Farr (1 Harris, 167), and Harper v. Keely (5 Harris, 234).

The assignments of error do not raise the question whether the eleven buildings for which the bill was furnished were situate in different blocks.

We see no error in the record, and no bill of exceptions was taken as to the alleged blocks.

The same judgment to be entered in each case, eleven cases.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

[See Rush v. Bank, 2 WEEKLY NOTES. 263; Armbrust v. Galloway, Id. 585; Moore v. Hotel Co., *ante*, 289.]

Oct. & Nov. '76, 40. Nov. 23, 1876.

Croasdell v. Tallant.

Judgment note—Warrant of attorney to confess judgment—Joint warrant attached to a joint and several obligation—Effect of the death of one of the obligors—Judgment against the survivor—Modification of English law by Pennsylvania legislation.

A judgment note, containing a joint and several obligation but with only a joint warrant of attorney, was executed by three persons, one of whom subsequently died.

Held, that the warrant of attorney was not revoked, but that judgment could be entered thereon against the survivors.

Gee v. Lane, 15 East, 592, not followed.

PER CURIAM. The theory of judgments according to the English law has been so greatly changed in Pennsylvania by legislation, it will not do to follow English precedents too implicitly. We must treat this case as one to be governed by the intent of the warrant rather than by the English decisions.

Error to the Common Pleas of Crawford Co.

This was a judgment entered in the Court below upon the following judgment note:—

$832. MEADVILLE, PA., Dec. 6th, 1873.

Six months after date, for value received, *we, or either of us*, promise to pay to *Miss Jane Tallant*, or order, *eight hundred and thirty-two* dollars, with interest, *money borrowed*, and in case of default of payment at maturity, an additional *five* per cent. for the Attorney's fees for collection of the same. And *we* empower any Attorney of Record in this Commonwealth, or elswhere, to appear for *us* and confess judgment against *us* for the above sum, together with the 5 per cent. additional, with costs of suit, release of errors, and without stay of execution; and for value received do waive the right and benefit of any law of this or any State exempting property, real or personal, from sale, and if levy be made on land, do also waive the right of inquisition, and consent to the condemnation thereof, with full liberty to sell the same on fi. fa., with release of errors thereon.

The words "*either of us*" interlined before signing.

Witness, Joseph Deuch. GEO. GRAY,
JOHN T. CROASDELL,
Due June 6th, 1874. E. B. R. SACKET.

(The italics represent the writing in the note, the rest being printed.)

Gray died in April, 1874. Afterwards judgment was entered upon the note against Croasdell and Sacket as survivors. Croasdell obtained a rule to show cause why it should not be stricken off for the reason "that the power to confess judgment was a joint power, and, after the death of Gray, did not authorize the entry or confession of judgment against Croasdell and Sacket, or either of them, as survivors."

This rule was discharged, and the Court below refused to strike off the judgment. Croasdell took this writ, assigning for error such refusal.

Digitized by Google

H. L. Richmond & Son, for plaintiff in error.

The note and the power to confess judgment, though embodied in one paper, are separate and distinct instruments. And the power being joint only, the death of Gray worked its revocation, and there was no authority for entering judgment against the two who survived or either of them.

1 Tron. & Ha. Pr. 401.
Raw *v.* Alderson, 7 Taunt. 453.

It makes no difference that the note is several. This point is expressly decided in—

Gee *v.* Lane, 15 East, 592.

If the makers of this note had intended the power to be several, they would have said so by interlining the words "or either of us" in it also. But not having done so, there is no better established principle than that the intention of the donor of a power must be strictly followed.

Tiffany & Bullard on Trusts, &c., 370.

Thomas Roddy (*J. B. Brawley* with him), contra.

The obligation given by defendants, together with the warrant, is one instrument, and must be so construed.

Such is evidently the intent of the parties, else why should "either of us" have been interlined. Wherever there is the slightest indication of intention to create a severalty, it is permitted to alter the legal result; and it is the duty of the Court to give effect to every instrument according to its intent, however inartificially it may be drawn.

Besore *et al.* *v.* Potter, 12 S. & R. 164.
Wood *v.* Hummel, 4 Watts, 51.

Taking the instrument in its entirety, we may fill in the ellipses, and fairly arrive at its true intent.

Geddis *et al.* *v.* Hawks, 10 S. & R. 38.

The case cited by the plaintiff in error (Gee *v.* Lane, 15 East, 592), is not analogous to this case, for the reason that the bond and warrant there were separate instruments. And even if it were similar, the spirit of our Courts is to construe such matters more liberally than is done in England. An agreement to pay money, signed by two, but which in the body of it provides for the payment by one of them only, is joint and several.

Klapp *v.* Kleckner, 3 W. & S. 519.

The same principle is to be found in—

Knisely *v.* Shenberger, 7 Watts, 193.
Leith *v.* Bush *et al.*, 11 P. F. Smith, 395.

Nov. 24. THE COURT. The warrant of attorney in this case was treated as joint by the plaintiff, and judgment entered against the two survivors. The obligation, however, was joint and several, and the warrant of attorney a part of it, and a mere continuation of the instrument before the signatures. It would scarcely be a departure from its true intent to construe the warrant to be several as well as joint. But treating it as joint, as the plaintiff did, we are not disposed to follow the English case of Gee *v.* Lane (15 East, 592). The theory of judgments according to the English law, has been so greatly changed in Pennsylvania by legislation, it will not do to follow English precedents too implicitly. The Act of 21st March, 1772, required the day of the month and year to be noted by the person signing judgments, and gave them effect only from that time, contrary to the custom by which they related to the first day of the term. By the Act of 6th April, 1830, judgment against one of several joint obligors, copartners, promissors, etc., shall not bar suit against those not served, nor shall amicable confessions bar. By the Act of August 2, 1842, § 6, judgments against defendants at different times are made valid, and a *scire facias* issued to revive them as of the day of the last entry. And by the Act of 11th April, 1848, § 5, a judgment recovered against one of several copartners, joint and several obligors, etc., without a plea in abatement, shall not bar a subsequent suit against others not parties; and by the 3d section, the death of one of the defendants shall not discharge his estate. Looking then to the wide departure of our law from the English rules affecting judgments, and also to the fact that the Prothonotary may, under the Act of 1806, enter judgment on a bond and warrant of attorney without the intervention of an attorney and confession of the judgment, we must treat this case as one to be governed by the intent of the warrant rather than by English decisions.

PER CURIAM. Judgment affirmed. WILLIAMS and MERCUR, JJ., absent.

Oct. & Nov. '76, 244. Nov. 16, 1876.

Commonwealth, ex rel. Attorney-General, v. Walter.

Constitutional law—Art. VIII. § 9 of the Constitution interpreted—Disqualification of officer on account of bribery or frauds against the election laws—Quo warranto—Previous conviction in the Quarter Sessions not essential—Practice—Attorney-General entitled to the writ without a previous rule to show cause.

Under Article VIII., Section 9 of the Constitution, a quo warranto may issue against a public officer for bribery, fraud, or wilful violation of any election law, and the fact of his guilt need not have been established by a conviction in the Quarter Sessions, but may be tried in the proceedings under the quo warranto.

When the Commonwealth through her attorney-

Digitized by Google

general applies for a writ of quo warranto, she is entitled to it without a previous rule to show cause; *aliter* as to a private relator.

Error to the Common Pleas of Butler County.

Quo warranto issued at the relation of the attorney-general against the defendant, George Walter, requiring him to show by what warrant he claimed to use, exercise, and enjoy the office of high sheriff of Butler County.

The suggestion of the attorney-general charged that defendant was a candidate for the office in 1875; that he was returned as elected thereto at the general election held in November of that year; and that while he was a candidate for said office he "was wilfully and corruptly guilty of bribery, fraud, and the wilful violation of the election laws of this Commonwealth." The suggestion then proceeded to charge specific violations of the election laws, and the further offence of perjury in taking the oath of office Upon the filing of this suggestion, the Court below entered a rule on respondent to show cause why a writ of quo warranto should not issue. An answer was filed by the respondent in which the charges set forth in the information were specifically denied.

After argument, the Court below (BREDIN, P. J.) delivered an opinion, holding, that the mischief intended to be remedied by Articles VII. and VIII. of the Constitution was that, before its adoption, the Governor could only remove an officer for misbehavior in office, or upon *conviction* of an *infamous crime*, and it had been held that bribery was not an infamous crime; that to remedy this, the seventh article of the Constitution required the officer to take an oath that he had not committed bribery, and provided that if he should be *convicted* of having sworn falsely, he should be guilty of perjury, and be disqualified from holding office; that perjury being an infamous crime, the Governor could, upon a conviction under this article, remove the officer from office; that the ninth section of Article VIII.* was intended only to extend the disqualification to hold office to unsuccessful as well as successful candidates, who should commit bribery, but was not intended to dispense with the necessity of a conviction before an incumbent could be deprived of office. The Court, therefore, entered the following decree May 6, 1876:—

"After hearing, the Court is of opinion that defendant should be legally adjudged guilty of the crimes charged in the information before proceedings can be instituted to remove him from office, and therefore discharge the rule, but at request of Attorney for Commonwealth do direct the writ to issue *pro forma* as of date of rule to show cause, and do enter judgment quashing the writ."

The Commonwealth then took this writ, assigning for error the not issuing the writ of quo warranto on the suggestion of the attorney-general, on motion, and the entry of judgment quashing the writ.

George Lear, attorney-general (with him *S. H. Piersol* and *Thomas Robinson*), for the Commonwealth.

The Act of 14 June, 1836 (Purd. Dig. 1206, pl. 2), provides that writs of quo warranto may issue in case any person shall usurp, intrude into or unlawfully hold or exercise any office, or in case any person duly elected or appointed to any such office shall have done, suffered or omitted to do any act or thing whereby a forfeiture of his office shall by law be created.

This act and the first clause of Art. VIII. § 9 of Constitution cover this case, the latter declaring the offences and penalty, the former the remedy.

But if the opinion of the Court below be correct, that a prior conviction is necessary before the issuing of the writ, and that the offender may then be removed by the Governor, either the attorney-general will be divested of his prerogative of inquiring by what authority officers hold their offices, as it would then belong to the Quarter Sessions and Governor, or else two trials and two condemnations are necessary for the same offence. The latter method cannot be the one intended, as it would involve too closely a contested race between the term of office and the proceedings at law.

Is then conviction an essential prerequisite in proceedings by quo warranto? Quo warranto is a proceeding at law, and the fact of defendant's right to office is triable by a jury. Conviction is unnecessary to give jurisdiction.

Commonwealth *v.* Allen *et al*, 20 Sm. 465.

It certainly was not essential at common law, and it is not required by the Act of 1836, regulating such proceedings. Does the Constitution require it? Only if the word "*adjudged*" be interpolated before "*guilty*," in the first clause of sec. 9. If this be necessary, why should "*convicted*" be used in the second clause? The word *guilty* is there used in its ordinary, popular sense, or else why was the phraseology of the last clause changed? The latter embraces a larger class of individuals.

Defendant's constitutional rights in the case are simply trial by due process of law, and this an information in the nature of a quo warranto affords

* Art. VIII., § 9 of the Constitution, is as follows: "Any person who shall, while a candidate for office, be guilty of bribery, fraud or wilful violation of any election law, shall be forever disqualified from holding any office of trust or profit in this Commonwealth, and any person convicted of wilful violation of the election laws, shall, in addition to any penalties provided by law, be deprived of the right of suffrage, absolutely, for a term of four years."

Digitized by Google

without attaching any permanent disability in case of eviction, as the effect of the judgment is merely an ouster.

High's Ex. Legal Rem., Sec. 603.

Commonwealth *v.* McCaskey, 1 Rawle, 381.

Charles McCandless, John M. Thompson, John N. Purviance, and *Lewis T. Mitchell,* contra.

The allegations here all charge crime, merging in perjury. If they be true, they work a substantial disqualification, but very different from a disqualification *per se,* as in Commonwealth *v.* Allen (*supra*). Here the proceeding is entirely under the Constitution where no provision is made for trying the accused. Quo warranto is not the provision, for the disqualification is the crime itself, not the giving of money, the making of promises, etc., but the being proved guilty. How is this to be ascertained otherwise than in a Court of Quarter Sessions? Can the term *guilty* be applied to any citizen till he has been adjudged so by a jury? And that is what the Constitution means. "Guilty" means legally guilty, not might be guilty. If the Commonwealth's theory be correct, the accused's common law right of trial by his peers is swept away, and he will be adjudged guilty of perjury by a Court of Common Pleas without his rights of challenge, etc. Moreover, if he is subject to a civil trial, the legal anomaly might arise of a man's being held guilty by one Court and innocent by another upon the same charge.

And the defendant here has taken his oath of office, is thereby commissioned, and therefore not a usurper. But by the Act of 1836, quo warranto lies only against usurpers. Therefore, the only way to oust him in this instance is to prove him guilty of perjury before a Court of Quarter Sessions.

Nov. 24, 1876. THE COURT. This was a writ of quo warranto, issued at the relation of the attorney-general, against the defendant, requiring him to show by what warrant he claims to use, exercise, and enjoy the office of high sheriff of Butler County. The information charges that the said defendant was a candidate for said office in the year 1875; that he was returned as elected at the general election held in November of that year; that while the said defendant was a candidate for said office he "was wilfully and corruptly guilty of bribery, fraud, and the wilful violation of the election laws of this commonwealth." The information then proceeds to charge specific violation of the election laws, and the further offence of perjury in taking the oath of office. An answer was filed by the defendant in which the charges set forth in the information are specifically denied. All this took place upon a rule why the writ of quo warranto should not go out. The learned Judge of the Court below was of opinion that the case was not one in which the writ should issue and discharged the rule, yet on the request of the counsel for the commonwealth directed the writ to be issued *pro forma,* and immediately quashed it.

It is proper to remark, as a matter of practice, that when the Commonwealth, through her attorney-general, applies for a writ of quo warranto, she is entitled to it without a previous rule to show cause. It is not to be presumed that the law officer of the Commonwealth would apply for this high prerogative writ for personal or private ends. He is supposed to be impartial, and to seek out the vindication of the rights of the State. It is not so in the case of a private relator, who is usually put to his rule to show cause. It might not be so where the attorney-general merely allows private counsel to use his name, as is sometimes done to procure the writ. But where the attorney-general or his recognized deputy assumes the responsibility, the writ should issue in the first instance.

Under the Act of June 14, 1836, the writ of quo warranto is the appropriate remedy where any person shall usurp, intrude into, or unlawfully hold or exercise any county or township office within the respective county; "or where any person duly elected to any such office, shall have done, suffered, or omitted to do, any act, matter, or thing whereby a forfeiture of his office shall be created." It is not pretended that we have any statute which declares a forfeiture of either of the offices aforesaid by reason of any of the acts charged in the information. But the ninth section of the eighth article of the Constitution provides that "any person who shall, while a candidate for office, be guilty of bribery, fraud, or wilful violation of any election law, shall be forever disqualified from holding any office of trust or profit in this Commonwealth; and any person convicted of wilful violation of the election laws shall, in addition to any penalties provided by law, be deprived of the right of suffrage absolutely for a term of four years." The object of this provision in our fundamental law is manifest. The frequency and extent of election frauds were beginning to awaken serious apprehension for the future, unless promptly checked. A fraud upon the ballot is a crime against the nation. Hence it was that the framers of the Constitution sought to arrest the evil by embodying in the fundamental laws the provision referred to. It is our duty to give it such a construction as will carry out the intent apparent on its face, and the object which the people had in adopting it.

It will be seen that by the express and clear language of the section, any person who shall, while a candidate for office, be guilty of any of the prohibited acts, is *ipso facto* forever thereafter

Digitized by Google

disqualified from holding any office of trust or profit in the Commonwealth. It follows that if this defendant, while a candidate for the office of high sheriff of Butler County, was guilty of "bribery, fraud, or a wilful violation of any election law," he is forever disqualified from holding his present office, or any other of trust or profit.

We have here an allegation on the part of the Commonwealth of the existence of certain facts which, if true, amount to a disqualification. Whether the defendant has committed the alleged acts, would seem to be a proper subject of inquiry upon a quo warranto. But it was urged, on behalf of the defendant, that it was not the doing of the prohibited acts which disqualified, but the being guilty of them; that such guilt could only be legally ascertained by a criminal prosecution in the Quarter Sessions, where the defendant would be tried by a jury of his peers. This was substantially the ground upon which the Court below quashed the writ.

We are to presume that the framers of the constitution used the word "guilty" in its ordinary or popular signification. That they had in view the distinction between being guilty of an offence, and being convicted of an offence, is clear from their employing both words in the section referred to.

In the concluding paragraph thereof, they say "any person *convicted* of wilful violation of the election laws shall, in addition to any penalties provided by law, be deprived of the right of suffrage absolutely, for a term of four years." The word "guilty" is defined by our best lexicographers to mean "having guilt; justly chargeable with a crime; not innocent; criminal." Hence we say that a man is guilty of an offence when he has committed such offence. We say he has been convicted of an offence when he has been found guilty by the verdict of a jury. We need not elaborate so plain a proposition. But it was strongly urged, on behalf of the defendant, that great injustice would be done him if the question of his guilt was not first settled in the Quarter Sessions; that he is really charged with crime, and of such a nature as to blacken his reputation. We do not see the hardship; there are but two roads; the one leads to the penitentiary in case of conviction, the other merely to a disqualification from holding office. If we send him upon the latter path, surely he has no just cause of complaint. It is his right to have the issues of fact raised upon the quo warranto tried by a jury. He has therefore a trial by his peers in the latter proceeding. An adverse verdict deprives him of neither life, liberty, nor property. It merely prevents his holding an office which he would have no right to hold, by reason of disqualifying acts committed by himself. The effect of requiring a previous conviction in the Quarter Sessions would be to give the defendant two jury trials. For such conviction could not deprive him of his rights to a jury trial in the quo warwanto. So that by the time the Commonwealth had followed the defendant to the end of his sinuous path, the contest might become of little real importance, and the victory, if obtained, a barren one. The construction claimed for this section of the Constitution, if adopted, would render the said section of little practical value.

We do not see any sufficient reason why the questions of fact raised in this proceeding should not be settled as such issues are usually determined in cases of quo warranto.

The order of the Court below quashing the writ of quo warranto is reversed and set aside, and a procedendo awarded.

Opinion by PAXSON, J. WILLIAMS and MERCUR, JJ., absent.

[See Com'th *ex rel.* Atty. Gen. *v.* Daily, *ante*, 133.]

Jan. '76, 187. **Lane's Appeal.** June 8, 1876.

Contract—Agreement to be signed by all creditors—Not binding if all do not join—Assignment for the benefit of creditors—Failure to record within thirty days—Act of 24 *March,* 1818—*Execution—Estoppel.*

An agreement of creditors, reciting that it was made "in consideration that all the said creditors agree hereto," provided for the execution by the debtor of an assignment of his property to trustees for the benefit of the creditors. This agreement was signed by most, but not all, of the creditors. The assignment was not recorded until thirty-nine days after its execution. The trustees took possession, and expended a large amount of their own money in the execution of the trust. Subsequently one of the creditors who had signed the agreement obtained judgment on his claim, and issued execution, under which, and under other executions, was sold the personal property in the hands of the trustees. There was no evidence that the creditor knew of the execution of the assignment or the proceedings of the trustees.

Held, that as against the trustees he was entitled to the proceeds of his execution.

Certiorari to the Common Pleas of Elk Co.

This case was heard in the Court below upon exceptions to the report of an auditor appointed to distribute the proceeds arising from a sheriff's sale of property belonging to M. M. Brockway. The evidence before the auditor disclosed the following facts:—

Brockway, a lumber merchant, becoming embarrassed in business, on November 10, 1873, entered into an agreement with certain of his creditors, reciting that Brockway was indebted to them in various sums, which, owing to a litigation with one Hyde, he was unable to pay, and

Digitized by Google

that to allow him to go voluntarily or to force him into bankruptcy would absorb too much of his assets and be otherwise detrimental to the creditors, and providing that "we agree, in consideration that all the said creditors agree hereto, that said Brockway shall make an assignment of all his property and choses in action" to N. B. Lane, C. A. Wilcox, and others, for the benefit of his creditors. The agreement further provided that the assignees should collect the debts, and after deducting expenses pay over the balance to the creditors proportionately. That if enough was realized to pay all in full, the balance was to be handed to Brockway, who agreed to aid in managing the property and in conducting the Hyde litigation. This agreement was signed by James McFarlin and twenty-eight others of Brockway's creditors. In accordance with this, Brockway on the 20th of December, 1873, made an assignment of all his property, including the Hyde contracts which were in suit, to Lane and the other parties named in the agreement of November 10, which was recited as part of the consideration. This assignment was not recorded until some thirty-nine days after its execution. Brockway, after the assignment, continued in possession of the property, and took charge of the business for the assignees, no change being made in the books. The assignees advanced money from their own pockets for the manufacture of the lumber which was afterwards levied upon, conducted the litigation against Hyde, and paid off with their private funds a number of judgments against Brockway. Two creditors, Hale and Moore, who had not signed the agreement of Nov. 10, procured judgments against Brockway, and issued executions thereon. McFarlin, another creditor who had signed the agreement, also procured a judgment and issued execution. By virtue of these writs the sheriff levied upon and sold certain of the personal property, horses, wagons, etc. of Brockway, together with his interest in a lot of pine and hemlock boards and logs.

It further appeared that all the creditors had not signed the agreement of Nov. 10. Most of the creditors who did not sign were judgment creditors, and some of them assented to it without signing, and others neither signed nor assented.

McFarlin and Powell, who had also signed the agreement of November 10, testified that they understood that it was not to be binding unless all Brockway's creditors signed, and upon the faith of this they signed it. There was no evidence that McFarlin knew of the assignment or of the acts of the trustees under it, except a deposition of one Calderbank, taken after the auditor's report had been filed, and which stated that McFarlin must have known of the assignment, as he had worked for the assignees and been paid therefor by the deponent, their bookkeeper. Lane and the other assignees claimed the fund remaining after the claims of certain preferred creditors (employés) were satisfied.

The auditor, expressing some doubt as to his right to consider the question, reported that the assignment of Dec. 20 was void, it not having been recorded within thirty days after execution; that only such claims as were a lien on the fund could be paid out of it, and that, even if the assignees had a valid title to the logs levied on, their remedy was by an action to try the title, and not by a claim on the fund. He accordingly distributed the residue of the fund, after payment of the preferred claims, among the execution creditors, paying Hale and Moore in full and awarding the balance to McFarlin, who he found had executed the agreement of November 10 with the understanding that it would be void unless all the creditors executed it.

To this report the assignees excepted, and the Court below (WETMORE, P. J.) dismissed the exceptions and confirmed the report. From this decree this appeal was taken by the assignees.

A. L. Gordon (with him *Jenks & Clark*, *Powers* and *Corbett*), for the appellants.

At the time McFarlin obtained judgment against Brockway, the assignment was on record, and was notice to him. Even, therefore, if it was within the Act of 24 March, 1818 (Purd. Dig. 92, pl. 7), requiring assignments to be recorded, it was good as to him.

Lippincott *v.* Barker, 2 Binn. 174.
Coe *v.* Hutton, 1 S. & R. 397.
Chaffees *v.* Risk, 12 H. 432.

But the assignment was not within that Act. It was not a voluntary assignment, but made at the request and upon the agreement of creditors. It refers by name to the creditors, and was in effect an assignment directly to them. Such an assignment need not be recorded.

Henderson's Appeal, 7 C. 502.
Vallance *v.* Ins. Co., 6 Wr. 441.
Clafflin *v.* Maglaughlin, 15 Sm. 492.

McFarlin, having had notice of the assignment, and having stood by and suffered the trustees to spend their time and money in carrying on the business under it, cannot now step in and reap the fruit of their labor and means by his execution.

Gray *v.* Bell, 4 W. 410.
Ayer's Appeal, 4 C. 179.
Guiterman *v.* Landis, 1 WEEKLY NOTES, 622.
Appeal of Lebanon Nat. Bank, 1 WEEKLY NOTES, 627.

Hall (with whom was *McCauley*), contra.

The authorities cited by the counsel for the appellants prove very clearly that it is an assignment within the Act of 1818 if it be an assignment in trust, and that it is not within that Act if it be an assignment directly to the creditors.

Digitized by Google

The distinction between these two classes of assignments is made clear in Chaffees *v.* Risk (12 H. 432) as follows: "A trust is where the legal estate is in one person and the equitable estate is in another. But in the case of an assignment to a creditor for the payment of his own debt, the legal estate and equitable interest are vested in one and the same person." Tried by this test the assignment in this case is clearly a deed of trust, in which the legal estate is vested in trustees to convert the assigned property and pay the proceeds first to the creditors and then the surplus to the debtor. It therefore fell within the Act of 1818, and was rendered void by the failure to record it in thirty days.

The agreement of Nov. 10, 1873, was not binding upon McFarlin until all the creditors agreed thereto.

Lower *v.* Clement, 1 C. 64.
Fertig *v.* Bucher, 3 Barr, 309.
Kerner *v.* Crago, 32 Leg. Int. 258.
Clawson *v.* Clawson, 33 Leg. Int. 102.

Nor was he estopped by his subsequent silence, since there was no evidence that he knew of the assignment or of the subsequent acts of the assignees, except the deposition of Calderbank, which was not taken until after the exceptions to the report of the auditor had been argued in the Court below.

Oct. 10. THE COURT. The condition in the agreement of the 10th of Nov. 1873, and the trust character of the assignment for the benefit of creditors of the 20th of Dec. 1873, made in pursuance of the agreement of the 10th of Nov. 1873, prevented these instruments from standing in the way of execution creditors, who chose to levy and sell the property of N. M. Brockway. The property was levied and sold by the sheriff by virtue of the executions of other creditors, besides James McFarlin, who had not become bound by the agreement of Nov. 10, 1873. The sale was not disputed, so that in this proceeding the distribution to the execution of McFarlin cannot be questioned, unless he is barred by estoppel from coming in upon the fund. But there is no evidence that he either knew of or participated in the proceedings of the trustees named in the deed of assignment, or did any act to estop himself. We perceive no error in the decree, and it is therefore affirmed with costs and the appeal dismissed.

Per CURIAM. SHARSWOOD and WILLIAMS, JJ., absent. GORDON, J., having been concerned as counsel in the case, did not sit.

[*Cf.* Robins & Co. *v.* The Church, 2 WEEKLY NOTES, 592.]

Jan. '75, 110. **Clarke v. Adams.** Jan. 18, 1877.

Evidence—Latent ambiguities—Guaranty of covenants "in foregoing agreement" delivered without being annexed to the agreement—Parol evidence of what took place at its execution—Admissibility of.

A. agreed with P. and M. to sell them his interest in a partnership; they agreeing to give notes with approved endorsement in payment, and to give an obligation of indemnity against debts, the settlement under the agreement to be made before a certain day. C. signed a guaranty for the "faithful performance of the covenants on the part of P. and M. in the foregoing agreement set forth." Later, on the same day, P. and M. delivered to A. the agreement of purchase and sale, the bond of indemnity and C.'s guaranty. The papers were then separated but were afterwards fastened together. Upon a breach of the indemnity bond, and a suit by A. against C. on the guaranty:

Held (reversing the judgment of the Court below), that evidence of what took place at the signing of the guaranty was admissible to show to what agreement it applied.

Error to the Common Pleas No. 1, of Philadelphia County.

Covenant brought by Robert H Adams against E. Bradford Clarke, on a guaranty

Pleas, *non est factum, non infregit conventionem.*

It appeared in evidence that prior to the 27th day of February, 1872, Robert H. Adams (the plaintiff), A. F. Percival, and R. A. Morrison were partners trading under the firm name of Percival, Morrison & Co. In February, 1872, negotiations were pending between them for the purchase by Percival and Morrison of Adams's interest in the concern, in pursuance of which certain papers were executed

At the trial the plaintiff offered in evidence three paper writings fastened together, each under seal and each bearing date the 27th day of February, 1872, viz: (1) An agreement of dissolution of partnership between Robert H. Adams, the plaintiff, A. F. Percival and R. A. Morrison, whereby plaintiff agreed to sell his interest in the business to Percival & Morrison for $10,500 to be paid by promissory notes of Percival & Morrison, endorsed by Joseph F. Tobias, the settlement to be effected on or before March 1, 1872, and Percival & Morrison to execute an obligation to plaintiff to save and keep him harmless from all claims growing out of the business carried on prior to the purchase. (2) The obligation of indemnity by Percival & Morrison to plaintiff, provided for in the above agreement. (3) The following paper:—

For a valuable consideration to me in hand paid by Robert H. Adams, I do hereby guarantee the faithful performance of the covenants and agreements on the

Digitized by Google

part of A. F. Percival and R. A. Morrison in the foregoing agreement set forth.

Witness my hand and seal this 27th day of February, A. D. 1872.

E. BRADFORD CLARKE, [SEAL.]

Plaintiff then called Wm. F. Johnson, Esq., the attorney for Percival & Morrison, who testified that the papers were all in his handwriting; that Nos. 1 and 2 were executed in his presence, but that No. 3 was not; that all three papers were delivered at his office to the plaintiff by Percival & Morrison on the day they bore date; that they were not then fastened together; and that on the same day the notes endorsed by Tobias were given to plaintiff, who thereupon executed a bill of sale to Percival & Morrison for his interest in the business. Plaintiff then called Morrison, who testified that he was present at the signing of paper No. 3 at Clarke's store, where he had taken the paper for signature, and that he had with him at that time the agreement of purchase and sale (paper No. 1). The plaintiff then proved that since the execution of the agreement he had paid a judgment for $732.60 recovered against him for a debt due by the old firm.

Defendant Clarke was then called as a witness and offered to prove what took place when he executed the guaranty (paper No. 3), what it was intended to guarantee, and the conversation between him and Morrison. Objected to. Objection sustained. Defendant then recalled Mr. Johnson, the attorney for Percival & Morrison, who testified that he did not know to what the guaranty related, but that it was given to secure the price. Defendant then called Morrison, who testified that he took the guaranty (paper No. 3) to Clarke and asked for his signature, showing him the agreement of purchase and sale (paper No. 1). Defendant's counsel then asked the witness whether Clarke "refused to sign," and also offered to prove the conversation and what took place at the execution of the guaranty. Objected to. Objection sustained. Exception. Defendant also put in evidence the following letter:—

February 27, '72.

E. BRADFORD CLARKE, Esq.

DEAR SIR: Messrs. Percival & Morrison having complied with the contract entered into with Robert H. Adams, the faithful performance of which you guaranteed on their part, your said guarantee has been met and is discharged. There is no further obligation upon you in the premises.

Respectfully, etc.,

W. F. JOHNSON, Att'y for P. & M.

Verdict and judgment for the plaintiff for $787. Defendant took this writ, assigning for error the exclusion of the evidence offered by him.

Walter J. Budd, for plaintiff in error.

There were two agreements entered into by Percival & Morrison with Adams—the agreement of sale and the obligation of indemnity. The only question was to which of the agreements did the guaranty of Clarke refer. Standing alone it is unintelligible, and parol evidence was clearly admissible to explain that which was doubtful.

Wm. Ernst, contra.

The papers naturally must be all read together. No guaranty was needed for effecting the sale, for Adams had the bill of sale in his possession and could have retained it until the notes were given him. The guaranty was delivered to Adams, and though Clarke was informed that his liability had terminated, he acquiesced in the delivery by never demanding the guaranty.

Evidence of that which took place at the execution of the guaranty was inadmissible. The guaranty acted from its delivery.

Feb. 5. THE COURT. Robert H. Adams, the plaintiff below, A. F. Percival, and R. A. Morrison were partners, composing the firm of Percival, Morrison & Co., on the 27th February, 1872. As the result of previous negotiations the firm was that day dissolved. A written agreement was executed by the partners, stipulating that the plaintiff should sell his interest in the business to Percival & Morrison for $10,500, for which they should pay in eight promissory notes, to be signed by them and endorsed by Joseph F. Tobias. The agreement contained a provision that a settlement under it should be made by the first of March, and provided also that Percival & Morrison should "execute an obligation to Adams to save and keep him harmless from all claim, demand, suit, or charge for or by reason of any debt due or to grow due, in or out of the business." A bill of sale of his interest was made and delivered by the plaintiff to Percival & Morrison, and they executed the obligation of indemnity which the agreement required. With the other papers handed to the plaintiff was the instrument on which this suit was brought. It was executed under seal by E. Bradford Clarke, and was in these words: "For a valuable consideration to me in hand paid by Robert H. Adams, I do hereby guarantee the faithful performance of the covenants and agreements on the part of A. F. Percival and R. A. Morrison in the foregoing agreement set forth." All the papers were dated the 27th February, 1872, and were delivered respectively to the parties in the afternoon of that day. When the agreement, the obligation of indemnity, and the guaranty were delivered, however, they were detached and separate instruments, and were fastened together afterwards by the plaintiff's counsel in his office. In 1873 a judgment was recovered against the plaintiff for the amount of a debt due by the former partnership, and having paid it, he brought this action on the guaranty of the defendant.

On the trial the defendant proposed to show "what took place at the execution by him of the

Digitized by Google

guaranty, what it was he was to guarantee, and the conversation that took place between him and R. A. Morrison." While the precise facts it was sought to establish were not specifically set out, the purpose of the offer is indicated by the testimony contained in the bill of exceptions, and especially by the testimony of Mr. Johnson. The general allegation was that Morrison called on the defendant in the afternoon of the 26th or on the morning of the 27th of February, showed him the agreement for the sale of the plaintiff's interest in the firm, and requested him to sign the guaranty, upon the assurance that it provided for nothing more than the performance by Percival & Morrison by the first day of March of the stipulations of the agreement. It was denied on his behalf that he had any knowledge of the existence of the obligation to indemnify the plaintiff, or that he undertook to bind himself to any duty which that obligation involved. The offer of the testimony was rejected, and the single inquiry here is, whether the ruling was accurate or erroneous.

That some foundation of fact existed for the theory of defence was indicated by the letter of Mr. Johnson, written on the day when the transaction was closed, in which the defendant was told that Percival & Morrison had complied with the contract entered into with Adams, that the guaranty had been met and discharged, and that no further obligation rested upon him. So far as the circumstances of the case were disclosed, no imputation of bad faith can be made against either of these parties. It did not appear that the plaintiff had any knowledge of what occurred between Morrison and the defendant when the guaranty was executed, and there is no reason to doubt that he supposed himself entitled to receive and hold it for his security. But the mere act of signing the instrument bound the defendant to nothing except the duty which the exhibition of the contract of sale and the explanation of Morrison disclosed.

The stipulation for the obligation of indemnity did not contain a provision for a surety, and there was nothing on the face of the contract to show the possibility that the guaranty could be put to any ulterior use. If the defendant became answerable for the stipulations of the obligation of indemnity, therefore, it must be on some ground of negligence or estoppel that could only be shown after his evidence had been heard. He undertook to guaranty the faithful performance of the covenants in what was called "the foregoing agreement."

He had the right to show what that agreement was, for the fact of execution, standing alone, made him the guarantor of that and of nothing else.

There is no foundation for the objection that the admission of the testimony would have been to permit a parol contradiction of a written instrument. The guaranty was signed while it was detached from all other papers. It did not describe the "foregoing agreement" to which it referred. By its own terms it was insensible, and to give it vitality and application required extrinsic proof. There is ample authority to warrant the reception of such evidence. In Aldridge *v.* Eshelman (10 Wright, 420), where an agreement had been made to become "responsible for merchandise bought," parol evidence was admitted to show that both past and future sales had been comprehended in the agreement. In Wagner's Appeal (7 Wright, 102) parol evidence was allowed, to determine a question of doubt as to who was a legatee, and to show that a name had been inserted by mistake. In McCullough *v.* Wainright (2 Harris, 171) it was said, that, where a writing possesses an ambiguity arising from reference to extrinsic objects, it may be explained by parol testimony relative to the nature, situation, and circumstances of those objects at the time of contract. The same rule was illustrated in Doe *v.* Burt (1 Term Rep. 701), Bertsch *v.* The Lehigh Coal and Navigation Company (4 Rawle, 130), and Barnhart *v.* Riddle (5 Casey, 92).

Upon his theory of the case the defendant became bound by the paper he signed, just as he would have been bound if the paper had been attached to the agreement for the sale by the plaintiff to his partners. All that he asked in the rejected offers was to prove the extent and limit of his original undertaking. He was certainly entitled, in the first instance, to give this evidence. Its eventual effect might possibly be controlled by considerations which it would be unwise now to anticipate. Whether, with the facts fairly developed, there would be room for the application of the principle that, where a loss must fall on one of two innocent parties, it must be borne by him whose act has caused it, and whether there was fault or negligence in the act of the defendant in signing the detached guaranty, or fault or negligence in the act of the plaintiff in accepting the three instruments in their detached form, are questions which this record does not raise.

Judgment reversed, and *venire facias de novo* awarded.

Opinion by WOODWARD, J. WILLIAMS, J., absent.

Digitized by Google

Common Pleas—Equity.

C. P. No. 2. Feb. 3 and 10, 1877.

Harrison et al. v. St. Mark's Church.

Nuisance—Injunction—Nuisance by noise alone—Bell-ringing—Church bells in a city—Ringing enjoined at suit of neighbors disturbed thereby.

As the atmosphere cannot rightfully be infected with noxious smells or exhalations, so it should not be caused to vibrate in a way that will wound the sense of hearing.

Noise caused by the ringing of church bells, if sufficient to annoy and disturb residents of the neighborhood in their homes and occupations, is a nuisance, and will be enjoined.

Motion for special injunction.

The bill, filed by George L. Harrison and others against the Rector, Church Wardens, and Vestry of St. Mark's Protestant Episcopal Church, a corporation holding the church building and premises situate on the north side of Locust Street, between Sixteenth and Seventeenth Streets, set forth—

(1) That the complainants were owners or occupants of dwelling-houses in the vicinity of the church, within a radius of an eighth of a mile from the corner of Locust and Sixteenth Streets; that no bells had been used in St. Mark's church from the time of its erection in 1849 until June, 1876, when the defendants caused to be placed in the tower of the church four large bells, and had caused them to be rung regularly before each and every service on each and every day of the week, the strokes averaging between seventy-five and ninety-four a minute, and prolonged continuously for a period of between ten minutes and half an hour at each of such times—that is to say, on Sundays, before early service, at 7 o'clock A. M., for fifteen minutes; and before each of the three other Sunday services, at 10.30 A. M., 4 and 7.30 P. M. for half an hour; on week-days, before daily services, at 9 A. M. and 5 P. M. for between ten and fifteen minutes; and on festivals and saints'-days to announce still additional services; that, in response to a special appeal by a physician, in behalf of an ill patient, the early Sunday morning ringing had been *temporarily* discontinued.

(2) That the noise of such ringing was "harsh, loud, high, sharp, clanging, discordant," producing a nuisance which disturbed rest and sleep, distracted the mind from any serious employment, interfered with conversation in the immediate neighborhood, lessened or destroyed social and domestic intercourse, peace, and happiness; and, in particular, was detrimental to the health and comfort of invalids, children, and persons whose nervous systems are delicately organized; that the effect was not limited to the periods of actual ringing, but the anticipation of its beginning produced a nervousness and excitement which to all is painful, and to some intolerable.

(3) That such nuisance affected injuriously the value of complainants' property.

The bill further averred that, prior to this suit, private and personal appeals having proved ineffectual, the complainants, with many others, presented to defendants, on November 1, 1876, a formal communication, calling attention, in respectful terms, to the nuisance and the necessity of its abatement, stating that they did not thereby intend "to prefer a request to discontinue the ringing of the bells excepting for a single service, viz., for what is called the early morning service; but for this relief they most earnestly appeal to you. . . . This concession, and a reduction of the time given to bell-ringing at the other services, will, we believe, compose the irritation, and obviate the objections which disturb so many of the neighbors and well-wishers of St. Mark's church." In response to this communication, the Vestry passed a resolution, in which they "utterly denied the right of the residents in the vicinity to regulate in any way the manner or the time of ringing the bells"—stating, however, that they would always be ready, through the Rector, "to hear and consider any special appeal that may be made for stopping the ringing of the bells in any specified case of illness."

The bill prayed an injunction to restrain the defendants from ringing the bells at all, or from ringing them at any other hours or periods of time than such as the Court should declare to be reasonable.

The answer averred—

(1) That the church was built in 1848–49, long before the erection of complainants' houses, and the tower was originally designed as a belfry, of which fact the complainants had notice before they built or purchased, not only by the patent external appearance of the tower, but by public notice that the design of introducing a chime of bells was in process of being carried out, notices of special collections for a "bell fund" having been distributed and posted on the church doors as early as 1869. That many of the complainants were tenants only, and therefore had no standing in court as property owners.

(2) That the chiming complained of is neither a public nor private nuisance, being in truth and fact "musical, mellow, soft, well-pitched, sweet, and harmonious," and "of such an agreeable character that it has grown to constitute one of

Digitized by Google

the chief attractions of the neighborhood, and has materially added to, rather than detracted from, the enjoyment of social and domestic life among those residing in the vicinity." That the bells were manufactured by one of the best bell-founders in the world, and were pronounced by experts to be perfect in tune and of good tone; that they are a peal of medium weight, and less in size than other church bells in this and many other cities, the largest weighing 2006 pounds, and the smallest 983 pounds, arranged on the diatonic scale, and constituting the tetrachord *F, G, A,* and *B flat;* hung sixty-seven feet above the curb, which is as high as the roofs of the highest houses occupied by complainants, and twenty feet higher than the chimes of at least five other churches in Philadelphia; the distance from the tower of the church to the opposite houses being 61 feet 9 inches.

(3) That bell-ringing is part of the ordinary and usual sounds of city life, the chiming complained of being far less calculated to disturb ordinary citizens than the customary bell-ringing in factories, schools, and some other churches, or the noises of cars, wagons, steam-whistles, and other sounds incident to a city; and that even if they produced on some persons, when first heard, a temporary annoyance, the hearers would soon get so accustomed to the sound that they would not notice it, except where an imaginary or trifling annoyance is fostered by wilful prejudice or heightened by nervous excitability. That while the defendants' conduct, in and about the ringing complained of, has been a reasonable, decent, and customary exercise of a legal right, yet they have been willing, in special cases, from motives of charity and neighborly kindness, to suspend the exercise of said rights, and that they did so suspend them in favor of these complainants.

(4) That the chiming of bells, as conducted by defendants, is in accordance with the ancient modes of announcing divine worship in the Christian churches throughout the civilized world for more than twelve hundred years, and so practised in this city for more than a century.

Several hundred affidavits and counter affidavits were produced in support of the allegations of the bill and answer. They covered a wide field and were classified as clerical and theological, medical and physiological, scientific, expert, relating to the value of real estate, the effect of the bells upon the numerous affiants, invalids, etc. etc. On all these points the testimony was conflicting. Different members of the same household gave affidavits of an opposite tenor, and several persons who originally gave affidavits on one side subsequently gave counter-affidavits on the other. On behalf of the complainants there was positive testimony, however, that the bell-ringing had caused loss of sleep and annoyance to some of the complainants, and had produced bad effects on certain invalids; one witness testifying: "In the case of my wife's late mother, who died two months ago, great misery was caused to her from the bell-ringing, and great unhappiness to us from seeing her suffer . . . I have often heard her cry out 'Oh! I wish those bells would stop!' Her sufferings were greatly increased, and the tension of her nerves aggravated by the ringing, as she was often awakened by the bells from sleep which was most necessary to her, and into which she had been induced after much effort." Witnesses in good health testified to the effect that the sounds, coming so rapidly and continuously one upon another, mingled together in a constant whirr of discordant clangor, which, striking the opposite walls, seemed to rebound from side to side, producing an intolerable nuisance. A livery-stable keeper in the neighborhood deposed that the bells startle his horses very much. "One of them has broken his halter several times through the fright which it gave him."

On the other hand, very many witnesses for the defendants testified to the effect that, so far from the bells being a nuisance, they greatly enjoyed the sweet sounds, and would miss them very much if they were stopped. "The longer we hear them the more we like to hear them;" "I am delighted to hear them ring, and think it would be a great pity to have them interfered with;" "cannot understand how any one can complain of them, unless it be those opposed to all bells;" "they add cheerfulness to the neighborhood, and are very convenient for fixing the time;" "they have improved the value of the real estate in the neighborhood;" "I have refused a substantial advance for my house since the bells were put in the tower." As to their effect on invalids there were many affidavits of an opposite tenor to those given on behalf of complainants. One gentleman said: "My daughter died on the 18th of October last, and was very ill for about three months previous to that time. During her illness the windows were always open in her room. She was not in the least annoyed by the bells, even when rung at seven o'clock on Sunday morning. On the contrary, she enjoyed listening to them, even to the day of her death, and waited impatiently for and eagerly anticipated their ringing."

The Rector (Rev. Eugene Aug's Hoffman, D. D.) testified: . . . . . "The bells are well made in every particular, and as perfect in tone as any to which I ever listened. They are lighter in weight than bells which are usually placed in city churches, and cannot be heard as far as it is desirable they should be. . . . In the vestry room attached to the church building, when the assist-

Digitized by Google

ant clergy and I have been preparing for divine service, we have been compelled to cease conversing with each other to listen whether the bells have stopped or not."

Wm. Henry Rawle (*R. C. M'Murtrie* with him), for complainants.

The jurisdiction is unquestionable. Two essentially similar cases, in which injunctions were granted, are now actually pending in co-ordinate branches of this Court.

Sellers *v.* Pa. R. R. Co. (Abattoir case), 1 WEEKLY NOTES, 295.
Children's Hospital *v.* Bumm (Gas Nuisance case), C. P. No. 3, Dec. T. 1875, No. 1047.

It is now well settled that *noise alone*, unaccompanied with smoke, noxious vapors or noisome smells, may create a nuisance, and be the subject of an injunction.

Wood on Nuisances, ch. xvi. tit. "Noise and Vibration," § 542, p. 582 *et seq.*, and cases there cited.
Bispham on Equity, § 441, § 439.
Walter *v.* Selfe, 4 De Gex & Smale, 322.
Crump *v.* Lambert, L. R. 3 Eq. Cas. 409.
Cleveland *v.* Citizens' Gas. Co., 5 C. E. Green, 201.
Bradley *v.* Gill, Lutwyche Rep. 69.
Robertson *v.* Campbell, 13 Fac. Coll. (Scotch) 61.
Ball *v.* Ray, Law Rep. 8 Ch. App. 467.
Brodes *v.* Saillard, Law Rep. 1 Chan. Div. 692.
Dargan *v.* Waddle, 9 Iredell (N. C.) 244.
Bishop *v.* Banks, 33 Conn. 118.
Roskell *v.* Whitworth, 19 Weekly Reporter, 804.
Scott *v.* Firth, 10 Law Times (N. S.), 240.
Fish *v.* Dodge, 4 Denio, 311.
Dennis *v.* Eckhardt, 3 Grant Cas. 390.

In many of the cases cited, the noises enjoined were those caused by a useful and otherwise legitimate business. *A fortiori*, will the jurisdiction be exercised when the noise is unnecessary. Bell-ringing is neither a secular work for business purposes, nor is it a necessary part of divine worship or ritual; for a large majority of churches have no bells. Its original object, to call worshippers to prayer, has long since been practically superseded by the general introduction of clocks and watches. That it is an established custom of the church is no defence, if in a particular case it create a nuisance. No custom, rite, belief, privilege, or the like, ever justifies a violation of law.

Wood on Nuisances, p. 587, § 549.
Rex *v.* Smith, Strange, 704.
Inchbald *v.* Barrington, Law Rep. 4 Ch. App. 338.
Walker *v.* Brewster, Law Rep. 5 Eq. Cas. 25.

That some persons do not object to the bells, is no evidence that they are not a nuisance to the complainants.

The ringing of church bells has been enjoined in England at the suit of a single private person disturbed thereby, and also at the suit of several joined as co-complainants.

Martin *v.* Nutkin, 2 P. Wms. 266.
Saltau *v.* DeHeld, 2 Simons, N. R. 133; S. C., 9 Eng. Law & Eq. Rep. 133. (A. D. 1851.)

P. Pemberton Morris (with whom were *Geo. W. Biddle* and *Geo. Tucker Bispham*), for defendants.

The jurisdiction is not denied. But it does not apply to this case. Bell-ringing is not of itself unlawful, nor a nuisance *per se*. The test is, if the act is a lawful one generally, are you exercising it in a reasonable way and for such purposes as, from the nature of the subject matter, were contemplated? A nuisance by noise is emphatically a question *of degree*, and this should be passed upon by a jury in an action at law.

The whole weight of historical evidence is opposed to the idea that church bells, in however populous a city, can ever be a nuisance, restrainable in equity. The two English cases cited by plaintiffs' counsel will be found to rest on special grounds, one being in violation of a special covenant, in aid of which the injunction was granted, and the other was held not to be a church, and "to have no legal privilege of having bells in the same way as a parish church has." That no other precedents can be found is, to a legal mind, clear evidence that the mere ringing of church bells will not be specially enjoined, particularly upon unsatisfactory and contradictory affidavit evidence. The cases relied on by plaintiffs do not conflict with these positions, which have been sufficiently established by numerous analogous authorities.

Gaunt *v.* Fynney, L. R. 8 Ch. App. 8, 11, 12.
Ball *v.* Ray, L. R. 8 Ch. App. 468, 471.
Blanchard *v.* Reyburn, 1 WEEKLY NOTES, 529, per THAYER, P. J.
Sparhawk *v.* Passenger R. W. Co., 4 Sm. 427, per THOMPSON, Ch. J.
Crump *v.* Lambert, L. R. 3 Eq. 411.
Atty. Gen. *v.* Gas Co., 19 Eng. L. & Eq. Rep. 639, 652.
Huckenstein's App., 20 Sm. 103.
Rhodes *v.* Dunbar, 7 Sm. 274.
Richard's App., 7 Sm. 105.
St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 650.
Kerr on Injunctions, 208–9.
Eaden *v.* Frith, 1 Hem. & M. 573.
Gaslight Co. *v.* Broadbent, 7 H. L. Cas. 371.

The allegation of depreciation in value of complainants' property is not a ground for equitable interference.

[HARE, P. J. The Court does not desire to hear argument on that question, on this motion for an injunction. Such depreciation could only be through the effects of the ringing on the persons of the complainants, making the property less desirable for residences; and as the annoyance to the persons directly is sufficient ground for injunction, if proved, the secondary injury to property is immaterial.]

George W. Biddle, on the same side, argued that no one has a right to expect rural serenity in a populous city, where the law recognizes a surrender of some things, even to annoyance, in

Digitized by Google

return for conveniences. To invoke a remedy by injunction, there must be a substantial injury to comfort and to property; such as plain people really feel. It must be measured by a rough practical standard, according to the known habits, usage, and custom of the particular community. While all reasonable rights of persons and property are to be protected, the aid of a chancellor cannot be invoked to gratify the whims, caprices, or personal antipathies of a few exceptionally sensitive, hyper-critical people, whose imaginary evils have been fostered, perhaps, by a spirit of factious opposition. A nervous or prepossessed listener may exaggerate sounds which, ordinarily, would pass unnoticed, into new significance, thus originating within himself the very impression of nuisance of which he complains.

I admit that noise, under certain circumstances, may be the subject of regulation by the Courts. But where the extraordinary remedy of injunction is sought, the case must be so free from all doubt as to render a trial by jury quite unnecessary. Here the affidavits are, to say the least, evenly balanced. And before you strike a blow at what has existed for a thousand years, you must consider custom, and even allow something for sentiment. In the tinsmith's case (Dennis *v.* Eckert, 3 Grant Cas. 390), and in the trip-hammer case (Roskell *v.* Whitworth, 19 Weekly Reporter, 804) the Court allowed the noisy work to go on from 7 A. M. to 6 P. M., only restraining it at unreasonable hours. The defendants have voluntarily discontinued the early Sunday morning bell, and only claim the right to ring the chimes at reasonable hours of the day.

The complainants cannot sue jointly. The injury, if any, must necessarily be several.

Hudson *v.* Madison, 12 Sim. 418.
Davidson *v.* Isham, 1 Stockt. 186.

As "the intensity of sound varies inversely with the square of the distance," and as no two of the complainants live at the same distance from the bells, no two can be affected alike.

R. C. McMurtrie, in reply.

Two grounds, on which there can be no dispute as to the facts, are conclusive of the propriety of granting the injunction in this case. (1) There is no purpose connected with the bell-ringing except amusement, religious recreation, or æsthetic enjoyment. (2) Whatever the effect may be on persons residing at a greater or less distance, there is no doubt that it is a nuisance as to those who own and occupy the residences directly opposite, that is, on the south side of Locust Street, between Sixteenth and Seventeenth. There is no conflict of testimony among them—not one of the immediate neighbors say they like it—*all in that square unite in this proceeding*, either as complainants, or affiants in support of the bill.

The defendants attempt to justify on the ground of "ancient usage" But, in order to avail of this, they must show that heretofore the same effect has been produced. See remarks of SERGEANT, J., in—

Commonwealth *v.* Van Sickle, Brightly's Rep. 69.

All the cases relied on by defendants have involved some question of business, profit, or useful occupation, and even those have been wholly or partially enjoined. This case is far stronger, in that it involves only a question of pleasure. The defendants say the bells are a call to prayer. But put it stronger. Suppose these bells were a call to work. Is there any doubt that *such* ringing would be enjoined? But there is no distinction between the right of a religious association and that of anybody else, so far as any action of theirs relates to or interferes with the comfort, property, or rights of others.

The doctrine that complainants cannot sue jointly has been exploded.

Spencer *v.* London Railway Co., 8 Simons, 193.
Cleveland *v.* Gas Co., 5 C. E. Green, 201.
Umfreville *v.* Johnson, 10 Chanc. Ap. L. R. 580.
Wier's Appeal, 24 Sm. 230.

C. A. V.

Feb. 24. THE COURT. The case presented on either side of this controversy is one calculated to arrest attention. On the part of the complainants, it is averred that the defendants have caused four large bells to be hung in the church tower of St. Mark's, at a distance of not more than twenty yards from the houses on the opposite side of Locust Street, and nearly on a level with the roofs; that the tower is in the immediate vicinity of the complainants' residences, and that the bells are rung at various times during the week and on Sundays, and produce a sound which is so overpowering as to cause not only annoyance, but serious injury to the complainants; that they are all much disturbed, and that in the case of some of them, who are invalids, needful repose has been broken, and acute attacks of nervous pain have been brought on or aggravated by the discordancy and volume of the sound, while others of them have suffered in the persons of their parents, wives, or children. The statements are sustained and corroborated by the testimony of physicians of high standing, who concur in saying that such effects may naturally arise from such a cause, and Dr. Da Costa and Dr. Mitchell add that they know from observations made in the course of their own practice that the sound of St. Mark's bells has been at times, during illness, a source not only of suffering, but of danger.

It is alleged, on the other hand, by the defendants, that bell-ringing and the chiming of bells date from a remote period in the Christian Church; that they have been received with general favor and acceptance, and that it would be difficult to find any great poet, from Dante down

Digitized by Google

to our own times, whose verse does not bear witness to this truth; that the sounds so much complained of are not a mere accidental accompaniment, but have from associations become an integral part, of the celebration of the Sunday, which brings an opportunity for rest to all; and that the Court should be slow to believe that a custom hallowed by the observance and sanctioned by the assent of successive generations of worshippers can be injurious; and that, in fact, in the present case, as will be apparent on examining the testimony, if some persons inveigh against the bells which give occasion for this suit, other and not less numerous voices are raised in their behalf. The Court is, consequently, asked to infer that, if the sufferings for which the bill seeks relief are not imaginary, they are the inevitable offspring or accompaniment of nervous disease, although a morbid or excited fancy attributes them to the peals issuing from the tower of defendants' church.

It seems, from what has been said, that the case may conveniently be considered under two heads: First, is the injury complained of real, and do the complainants suffer from the cause alleged? Secondly, if the answer to this inquiry is in favor of the bill, are the defendants entitled to continue the ringing, notwithstanding the suffering which it may produce?

The former inquiry is not so much one of law as of fact, and therefore imposes a painful responsibility on the Court by carrying it into a vague and boundless region, where laymen and lawyers meet on a common ground, and all well-considered opinions have an equal claim to respect. It is, moreover, the material inquiry as covering the moral ground on which every legal determination must ultimately rest. If the act of the defendants in setting up these bells and causing them to be rung be one that must in the ordinary course of events be a source of pain and suffering, the defendants will, we are convinced, be among the first to acknowledge that no right should be so exercised, and we are equally sure that such would be their judgment, although the chief sufferers from it were the aged, the infirm, and women in the perils of childbirth, and young children. This, then, is a point upon which all else turns, and in determining it we can fortunately appeal to rules which give little scope to the mere personal views or inclination of the Judge. When a witness who denies is confronted with another of equal credibility who affirms, and the negation is not necessarily inconsistent with the existence of a fact which must be true unless the affirmation is false, that conclusion should be adopted which reconciles both statements. A bystander asserts that the bell of a locomotive was rung as the train approached a railway crossing; another maintains the contrary, but on being cross-examined, admits that all he knows of the matter is that no such sound reached his ear. The just inference is that both speak the truth; and if so, the bell was rung. Few rules for determining the result of conflicting evidence are more frequent in occurrence or more satisfactory in practice than this.

Applying a like test to the case in hand, where the witnesses in certain houses say that they were pleasurably affected by sounds which the witnesses in other houses describe as a cause of pain, it will appear that such testimony is not necessarily conflicting, and that we are not reduced to the disagreeable necessity of supposing that either statement is inaccurate. This would be true if the affiants resided in the same mansion, and were all in the normal condition which attends on health, and applies *a fortiori* to the testimony which comes from Walnut Street as contrasted with that borne by the inhabitants of Locust Street, between Sixteenth and Seventeenth Streets, and relating to the effects upon those among them who are subject to the pressure of disease. The similarity which exists among mankind while they are well, and authorizes us to infer that like causes will produce the same results, is replaced under the influence of ill-health by divergences which not only render the sufferer unlike his fellows, but may for the time being seem to render him a denizen of some other world. The senses of one patient may be dulled by his malady, while those of another become preternaturally acute, and are tortured by that which brings pleasing reminiscences to the first.

In like manner the complaints of the owners and occupiers of the houses in Locust Street would not be sufficiently answered by the affidavits from Erety and Chancellor Streets if all the testimony from those quarters were to the same effect, which is by no means the case. The laws of sound are uniform, but their operation is controlled by causes that cannot always be readily ascertained. A recent paper by Mr. Tyndall gives some remarkable instances of this phenomenon, and I believe that the most expert man of science would hesitate to declare beforehand in what spot echo would best or oftenest reflect the voice. One circumstance is apparent in this case even to an unscientific eye, that the houses in Locust Street, rising as they do nearly to the level of the belfry, are exposed to the full force of the waves of sound which pour forth from its windows, and which pass over the humbler roofs in Erety Street, although only, according to the affidavits of Thomas and Mary Dentry, to break resonantly on the dwellings which they occupy further on in Chancellor Street. The truth is that a casual or uninterested observer can no more predict or account for the seemingly wayward course of the vibrations which constitute

Digitized by Google

sound than he can tell where the undertow renders it dangerous to venture into the surf, or than the mariner can anticipate which of the coming seas will rise above the rest and break on board his vessel.

It does not necessarily detract from the force of these considerations if, as the defendants contend, the chiming of St. Mark's bells does not affect persons whose nerves have not been touched by disease. The question in every case should be: Do the acts complained of tend by a natural sequence to produce injury? and not what is the condition of persons who suffer from the wrong? Disease and age come as certainly in the course of nature as life and health, and are a reason why the Court should extend rather than withdraw its protecting arm.

Upon the first branch of the case, therefore, we are unable to avoid the conclusion, after an examination of the testimony on both sides, that the sound of these bells does cause annoyance and suffering which is not merely imaginary, or felt only by the hyper-sensitive, but is real and substantial, and extends to several classes of persons—the very young, the aged, the sick, and those who, though not invalids, have somewhat declined from the fortunate condition of robust health, who are found in all places and among all conditions of life, and whose rights in all neighborhoods the law should sedulously guard.

The remaining inquiry is whether, regarding the defendants' acts as prejudicial, they are done in pursuance of a right that cannot be questioned or restrained. To answer this question we have only to consider what their conduct is and the way in which it operates. The rule, *sic utere tuo ut alienum non lædas*, is not of universal application, and it has been said "that there are many cases in which a man may lawfully use his own property so as to cause damage to his neighbor if it be not *damnum injuriosum*." (Acton *v.* Blundell, 12 M. & W. 324, 341.) Where no contract, custom, or statutory rule prohibits, one may dig a trench on his own land, although the effect is to render the adjacent land incapable of sustaining a wall or house which has been built on it; but it also seems that "if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbor digs in his soil, so as to occasion mine to fall in, he may be liable to an action." (Wyatt *v.* Harrison, 3 B. & Ad. 71; Humphries *v.* Brogden, 15 Q. B. 739, 744; Harris *v.* Ryding, 5 M. & W. 60; Wakefield *v.* Buccleuch, 4 Eq. Cases L. R. 613.)

However this may be, and whether damage occasioned by the exercise of an absolute or exclusive right be or be not a cause of action, it is clear that rights which others share should be exercised with a due regard for their interest. A man may do ordinarily what he will with his ground, but he has no such dominion over the streams that pass through or the air that floats over it. The air and water are so far common property, that no one can be entitled to do that which will render them a source of injury, or unfit for the general use. As the atmosphere cannot rightfully be infected with noxious smells or exhalations, so it should not be caused to vibrate in a way that will wound the not less delicate sense of hearing. Light may be shut out, and odors measurably excluded, but sound is all pervading.

What, then, it may be asked, is bell-ringing forbidden? The answer is, certainly not, unless the circumstances require it. It does not, as I suppose, enter into the imagination of any man, and certainly can never be the purpose of a court, to suppress the chimes which, properly attuned and regulated, are a melodious and grateful form of sacred music. Sunday, as observed by the English-speaking races, teaches in the street as well as in the church; and the church bells should lend grace and gladness to a lesson that might otherwise seem too austere. But while bell-ringing may be a fruitful source of good, it may also be practised in a way to produce injurious consequences. The situation of the bell is of little moment if, like that of Calvary Church, in Locust Street below Sixteenth, it is only sounded six times in a minute; but if the strokes are to be multiplied until they reach ninety per minute, as in the case in hand, the bells should be hung in some open square or place, or high above the roofs of the adjacent dwellings, so that the notes may be softened and modulated as they descend. Such are the belfries of the Gothic cathedrals, and such the Italian campaniles. If these precautions are not observed, the vibrations may be intense near at hand, and yet inaudible at a short distance. Accordingly, while numerous and credible witnesses affirm that the chiming of St. Mark's bells "is distressing" and "intolerable" in Locust Street, we learn from the defendants' affidavits that the sound cannot be heard at 1620 Spruce Street, "unless one listens for it." The explanation of this seeming discrepancy is, according to Dr. Wm. Thompson, that the houses on the south side of Spruce Street are screened from the sound by the intervening buildings, as they would be in shadow if a calcium light were substituted for the bells. In other words, it is because the force of the impact is spent on the complainants' dwellings that persons who live in the next street are not disturbed.

The conclusion to which we are brought by a review of the testimony is, that from the level at which the bells of St. Mark's are hung, and from their proximity to the surrounding buildings—and it may be from other circumstances which are not accurately known or determined—they

Digitized by Google

cannot be chimed or rung without causing an annoyance to the dwellers in the neighborhood, which, in the case of some of them who stand most in need of care, amounts to a serious injury, and should consequently be abated by an injunction. Whether the prohibition shall be absolute will depend on circumstances. It is no part of our design to impose any restraint on the defendants that is not essential to protect the complainants, and if a mode of chiming can be devised that will not be attended with injurious consequences, we shall be glad to sanction it by a decree. We, moreover, earnestly desire not to hinder such moderate tolling or ringing on Sunday, before morning and evening service, as may be satisfactory to both parties, and trust that counsel will come to some arrangement by which this will be accomplished.

The following decree was entered :—

And now, this twenty-fourth day of February, A. D. 1877, this cause came on to be heard on a motion for a special injunction, and was argued by counsel. Whereupon, in consideration thereof, it is ordered and decreed that upon security being entered in the sum of one thousand dollars, an injunction issue restraining the defendants from ringing the bells of St. Mark's Church, or otherwise using the same so as to cause nuisance or annoyance, by sound or noise, to the complainants or any of them within their respective houses.

Opinion by HARE, P. J. PRATT, J., absent.

Common Pleas—Law.

C. P. No. 4. Jan. 28.

Kerns, Admr. etc., v. New Jersey Mutual Life Insurance Co.

Life insurance—Policy—Receipt for premium note, effect of condition in—Non-payment of note for first premium—Whether risk attached under the policy.

Rule to show cause why judgment should not be opened and the defendant be let into a defence.

Debt on a policy of life insurance. Judgment had been entered for want of an affidavit of defence. The affidavit in support of the present rule set forth the following facts: The plaintiff's decedent, Edward L. Kerns, made application through one Kramer, who was the agent of the company defendant in Lehigh County from December, 1874, until the summer of 1875, for an insurance on his life. The company, defendant, in due course forwarded the policy to Kramer, who, after some delay, caused by Kerns' inability to pay the premium, agreed to make an abatement of 25 per cent. of the premium, and for the balance to accept a premium note in the following form :—

$82.76, Newark, New Jersey, April 12th, 1875, value received, ninety days after date I promise to pay to the New Jersey Mutual Life Insurance Company or order at Second National Bank of Allentown, Pennsylvania, eighty-two dollars and seventy-six cents, being for insurance premium of policy No. 19,994 issued to me by said company, it being understood and agreed that if this note shall not be paid at maturity, said policy No. 19,994 shall be cancelled, and become null and void, and be surrendered to said company and the pro rata premium for the risk thereon incurred paid to them on demand. EDWARD L. KERNS.

Upon the execution of this note in April, 1875, the policy was delivered to Kerns. The note was not paid at maturity, and Kerns died within the year covered by the policy.

S. C. Perkins showed cause. There is nothing in the affidavit to show that the contract of insurance did not become binding immediately upon the delivery of the policy and acceptance of the note. The policy acknowledged receipt of the payment of the premium. Although, in point of fact, it was paid by a note, which note has not been paid, yet the company could have brought suit on the note, and recovered its amount at any time. The provision in the note that unless paid at maturity, the policy should become void, was a condition subsequent, which required some affirmative action on the part of the company to enforce the forfeiture, of which there is no allegation. The equity of the case can be reached by deducting the amount of the note, with interest, from the insurance money, and when the breach of a condition subsequent can be compensated in money, the Courts lean against forfeiture.

Brinklé, for the rule, was not heard.

THE COURT. Without expressing any decided opinion now, our present judgment is that this receipt is part of the contract, and that the policy was delivered with the express condition in it. This condition declares that the policy shall cease to be in force if the note is not paid on maturity. The last words of the receipt are all that make us hesitate, viz.: "and be surrendered to said company, and the *pro rata* premium for the risk thereon incurred paid to them on demand," which seem to imply that the risk had been begun and partially incurred. Our doubt is so strong that we now will enter no judgment. We therefore open judgment, and the case will go on in the usual course.

Rule absolute.

Oral opinion by THAYER, P. J., BRIGGS, J., concurring.

Digitized by Google

Orphans' Court.

Hellerman's Estate. Feb. 10, 1877.

Allowance for support of minors—When granted—Reimbursement of mother for past maintenance—Practice—What proof necessary to support petition.

Sur petition of guardian to be allowed to expend a portion of the principal of minors' estate.

The guardian set forth in his petition that the father of the minors died in 1871 intestate, leaving his widow and four children surviving; that his personal estate consisted of a few articles of household furniture, not exceeding in value $200; that previous to his death he had purchased for $900 a small dwelling house, which was subject to a ground rent of $54 per annum; that the debts owing by him at his death were paid by the widow, who for that purpose borrowed the sum of $400; that since the death of her husband she has kept a trimming-store, by means of which, and her own labor, she has supported herself and family, and paid the taxes and ground rent on said real estate, until within about one year past, when on account of the dulness in business and the scarcity of work she has been unable to pay the same. That there is due at present the following:—

One year's ground rent . .	$ 54	
One year's taxes . . .	45	
Loan to pay decedent's debts and int.	406	$505

That the minors are 19, 16, 12, and 8 years of age respectively, in need of clothing, and are not of sufficient age to support themselves. Wherefore the guardian prayed to be allowed to expend out of the fund in his hands the said sum of $505, and the further sum of $60 to purchase clothing for said minors.

The petition was accompanied by the affidavit of the mother of the minors, that the facts alleged by the guardian were true; that she has had charge of the minors since their father's death, and by her personal labor at sewing, and by attending to her store, clothed, boarded, and partially educated her children, paid the ground rent and taxes on their real estate and kept the same in repair; that she was obliged to borrow $400 to pay certain debts of her husband, in order to retain the premises wherein she and her family have resided since his death; that the children are in want of new clothing, and the sum of $60 is actually required for that purpose.

Wm. Hall Waxler, for the petitioner.

Feb. 14. THE COURT. The petition is defective in not stating the amount of money the guardian has in his possession belonging to each minor. While the facts alleged present a very meritorious case, yet we do not feel justified in authorizing the expenditure of comparatively so large a sum out of what may be a very inconsiderable estate, upon the unsupported petition of the guardian. The mother of the minors desires to be reimbursed moneys asserted to have been borrowed and expended by her for the benefit of her minor children. But there is no evidence that she has done either. In Estate of Pennock Minors (32 Legal Intelligencer, 169), we have adverted to the practice to be followed in order to obtain an allowance for past expenditures made by a parent or guardian.

Under the circumstances we would refer this petition to an examiner, to take proofs and report upon the propriety of granting the application, but we have no desire to impose this expense upon the minors. Still we cannot grant the petition without being further informed as to all the circumstances of the case. This information may be furnished by depositions, sustaining the allegations of the petitioner, by proof of the loan to the widow, how in what manner the money was expended by her, and such other facts connected with the condition and circumstances of the minors as will show the propriety of expending their estate for the purposes mentioned in the petition.

The petition may be withdrawn, and again presented when amended as above indicated.

Opinion by HANNA, J.

[See Pennock's Estate, 1 WEEKLY NOTES, 196, 434.]

Secker's Estate. Feb. 17, 1877.

Guardian—Triennial accounts—Final account—Act of March 29, 1832—Partial accounts filed in Orphans' Court are "for information of the Court and the parties"—Final account on arrival of ward at age, filed in Register's office, is alone the subject of audit by the Court—Right of one of several minors, on arriving of age, to demand final account of his share—Orphans' Court practice.

Sur petition to order guardian's account upon audit list.

The petition set forth that the guardian was appointed in 1868, and more than three years having elapsed during which he had neglected to file any account in the office of the clerk of the Court, a citation was issued on September 30, 1876, commanding him to appear and show cause why he should not file an account; that the guardian having failed to appear and answer the citation, a peremptory order was granted by the Court commanding him to file his account, whereupon

Digitized by Google

he filed his account as guardian of his wards on November 4, 1876. The petitioner further averred that she attained lawful age February 7, 1877, and prayed the Court to audit the account aforesaid, and make distribution to her of her share in said estate.

Stanislaus Remak and *Gustavus Remak*, for the petitioner.

THE COURT. It appears that the petitioner, who is now of full age, was one of eight minors. The guardian neglected to file his triennial account as required by the Act of Assembly, and never exhibited any account of his care and management of the estate of his wards until November 4, 1876, eight years subsequent to his appointment. At the date of filing, his wards were all in their minority, so that the account was but a partial and not a final account. It was intended, "for the information of the Court, and the inspection of all parties concerned." (Act of March 29, 1832, Purd. Dig. 413, pl. 42.) Triennial or partial accounts are filed in the office of the clerk of the Orphans' Court, and not in the Register's office. Final accounts are filed with the Register. The latter only are to be audited and passed upon by the Court.

The account filed by the guardian is of the estate of all the minors, whereas the only account which can at present be settled, is of the estate of the petitioner, she having reached her majority. She is now in a position to require the guardian to file his final account as to her estate alone.

For the reasons stated, this petition is refused.

Opinion by HANNA, J.

Chew's Estate. Feb. 17, 1877.

Attachment for contempt—Practice—Affidavit of counsel to petition—Order to pay—Return—Proof of service.

Sur rule for attachment for contempt.

The petition was signed by the counsel of the parties named as petitioners, but no affidavit was appended of the truth of the facts stated. It alleged that on January 13, 1877, the Court granted an order upon the executors of decedent to pay certain sums of money awarded to the parties named therein, before January 27, 1877; that one of the executors had been notified personally of said order, and has repeatedly promised payment of the moneys awarded, but has thus far neglected to pay the same or any portion thereof. Wherefore, petitioners by their attorney prayed for a rule on said executor to show cause why an attachment should not issue against him for contempt in disobeying the mandate of the Court.

Wm. H. Browne, for the rule.

Feb. 19. THE COURT. If the counsel is the attorney *in fact* of the parties named as petitioners, it should be so stated in the petition. If he is not, then the petition is contrary to the practice we have required to be observed. It should be signed by the client and not by counsel, and the former should make the affidavit. Counsel should not make himself a party to the record, by being a petitioner or affiant in the stead of his client. Such a procedure is irregular, and does not tend to elevate counsel in the estimation of the client. This petition is further defective because there is no return annexed of the order to pay, nor is there any evidence of personal service of a certified copy upon the executor. That he "has been notified personally of said order," is not sufficient. He may have been notified by counsel, or by the claimants. A certified copy of the order should have been served personally upon the executors, and a return made under oath or affirmation of the time and mode of service.

Rule refused.

Opinion by HANNA, J.

[See McKinney's Estate, 2 WEEKLY NOTES, 156; Killiam's Estate, Id. 684; Peters's Estate, 1 Id. 526.]

Ralston's Estate. Feb. 17, 1877.

Guardian, appointment of—Jurisdiction of Orphans' Court where a minor is a non-resident of the county in which the estate is situated—Act of March 29, 1832.

Sur petition to be allowed to select a guardian.

The petition of the minor set forth, *inter alia*, that she is above the age of fourteen years, and resides in West Chester, county of Chester, in this State; that she formerly resided in Philadelphia, and at that time the Orphans' Court appointed a guardian of her estate, but he is now deceased. Wherefore, she prayed the Court to permit her to make choice of a guardian.

The minor appeared in open Court, and selected The Philadelphia Insurance, Trust, and Safe Deposit Company, as the guardian of her estate.

Edward Shippen, for the petitioner.

THE COURT. We have no jurisdiction to ratify and approve the selection of the minor, and appoint the proposed guardian. She is a resident of another county, and by the Act of Assembly of March 29, 1832 (Purd. Dig. 411, pl. 31), the Orphans' Court of her domicil alone can entertain her petition. It must therefore be presented to the Orphans' Court of the county of Chester.

Petition refused.

Opinion by O'BRIEN, J.

Digitized by Google

Weekly Notes of Cases.

Vol. III.] *THURSDAY, MARCH* 8, 1877. [No. 23.

Supreme Court.

Oct. & Nov. '76. 192. Oct. 3, 1876.

Com'th, ex rel. Snyder et al., v. Mitchell et al.

Contracts for municipal works, awarding of—Powers of the city authorities under Act of May 23, 1874—Discretionary, not merely ministerial—Exercise thereof not reviewable except on account of fraud—Construction of words, "lowest responsible bidder"—They do not refer merely to pecuniary responsibility—Mandamus—When it lies.

In awarding contracts for municipal works under the Act of May 23, 1874 (P. L. 230), to the "lowest responsible bidder," the city authorities have not merely ministerial powers, but those which are deliberative and discretionary. They can inquire further than as to the mere pecuniary ability of the competing bidder, and their decisions, even through manifestly erroneous, cannot be reversed except on account of fraud.

The writ of mandamus lies only when the suitor has a well-defined right to enforce, which is specific, complete and legal, for which there is no other specific legal remedy, and which is independent of the rights which he holds in common with the public at large. The mere sending in sealed proposals under the above mentioned Act, confers no right on the lowest bidder to compel, by mandamus, the award of the contract to him.

Error to the Common Pleas No. 1, of Allegheny County.

This case was heard in the Court below upon a petition for a writ of mandamus, filed by the Commonwealth, ex relatione N. Snyder, T. Havelock, M. Ryan, and J. A. Jacobs, trading as N. Snyder & Co., to compel T. S. Mitchell *et al.*, the City Councils of the City of Pittsburgh and the Water Committee thereof, to award the contract for certain "wrought-iron forcing mains" to the relators.

The petition set forth that the relators were citizens of Pittsburgh and owners of taxable property therein; that the Water Committee of the Councils of the city, having in charge the construction of its new water-works, duly advertised, in accordance with the Act of May 23, 1874, for sealed proposals for certain "wrought-iron forcing mains," which proposals were to be received until September 15, 1874, when they were to be opened, and the contract awarded within ten days thereafter unless all of the bids should be rejected; that the relators, being "expert and responsible iron workers," delivered proposals, the bid in which was some $5000 lower than that of any other bidder, and that their proposals were accompanied by a bond with two responsible sureties, conditioned for the performance of the work; that, under these circumstances, it was the duty of the Water Committee and the City Councils, if they accepted any of the proposals, to award the contract to the relators, the lowest responsible bidders; but that, notwithstanding these facts, they awarded the contract to the firm of Jared M. Brush & Co., at a higher bid than that of the relators.

The petitioners prayed that a mandamus might issue to the said Water Committee and City Councils, commanding them to award the contract to the relators; or that a rule might be granted, to show cause why such a mandamus should not be issued, and such further relief given as the case might require.

The Court granted the rule to show cause, and the defendants filed an answer, admitting all the facts set forth in the petition, except the responsibility and competency of N. Snyder & Co., which they denied, on the ground that in a former contract with the Water Committee, the said firm perpetrated a gross deceit by surreptitiously striking from the printed specifications the words "mud-drums;" that Mr. Snyder was a man of intemperate habits, and that he had attempted to bribe the mechanical engineer of the Water-Works, who was, by virtue of his office, the inspecting officer under the said contracts.

The relators joined issue on the facts alleged in the answer, and J. G. McConnell was appointed a commissioner to take testimony. On the filing of his report, trial by jury was dispensed with by agreement of counsel, under the provisions of Art. V., § 27, of the new Constitution, and the Act of Assembly of April 22, 1874, passed in accordance therewith; and the facts were submitted to the determination of the Court, with right to writ of error as by the statute provided.

The Court (Stowe, A. L. J.) delivered an opinion, finding that the facts set forth in the petition were true, and that the allegations in the answer were wholly without foundation, but that the committee fully believed them to be true; and refusing the mandamus on the ground that, in the absence of fraud on the part of the defendants, the exercise of their discretionary powers in deciding who was the lowest responsible bidder, could not be reviewed by the Court.

Judgment was accordingly entered for the defendants, and the petition was dismissed. The Commonwealth took this writ, assigning for error the decision that, under the Statute of May 23,

Digitized by Google

1874, the city had a right to look beyond the mere pecuniary responsibility of the competing bidders; and the refusal to issue a peremotory mandamus.

A. M. Brown (with him *W. H. & A. N. Sutton*), for plaintiffs in error.

In construing statutes, words must be taken in their usual and ordinary meaning. For this reason pre-eminently, and also because the words "lowest responsible bidder" were advisedly used instead of "lowest and best bidders," because in a prior statute the latter phrase had been construed to let in inquiries as to personal and professional fitness, the Court should construe *responsible* as referring merely to pecuniary responsibility.

Jackson *v.* Lewis, 17 Johnson, 475.
Newell *v.* People, 7 N. Y. 109.
Farley *v.* Day, 6 Foster (N. H.), 527.

The awarding of the contract was in no sense a discretionary act, but a ministerial duty, clearly defined by the statute. The lowest responsible bidder, who complied with the printed specifications by his proposals, had a plain legal right to the contract, enforceable by mandamus.

People *v.* Flagg, 17 N. Y. 59.
Dillon's Municipal Corporations, § 62.
Turnpike Co. *v.* Miller, Johnson's Ch. R. 113.
Mason *v.* Fearson, 9 Howard, 248.
Com'th *v.* Pittsburgh, 3 Am. L. Reg. 392.
Supervisors *v.* U. S., 4 Wallace, 435.
Com'th *v.* Select and Common Councils of Pittsburgh, 10 Cas. 496, 513.
Bowen & Yurkes *v.* Commissioners of Darke Co., 21 Ohio, 311.
People *v.* Contracting Board, 49 Barbour, 254.
May *v.* Detroit, 12 Am. L. Reg. (U. S.) 149.
Mayor, etc., of Baltimore *v.* Marriott, 9 Md. 174.
McCarthy *v.* Syracuse, 46 N. Y. 190.

Slagle & Wiley (with them *T. S. Bigelow*), contra.

The word "responsible," as used here, implies much more than mere pecuniary ability.

May *v.* Detroit, *supra*.
Fairman *v.* Commissioners of Darke Co., 21 Ohio, 311.
State *v.* Commissioners, 18 Id. 386.
Adam *v.* Looz, 2 N. Y. Weekly Dig. 27

Nov. 6, 1876. THE COURT. This is a petition by Nicholas Snyder *et al.*, members of the firm of N. Snyder & Co., for a writ of mandamus against the Water Committee and Councils of the City of Pittsburgh. The petition sets forth, *inter alia*, that the committee having in charge the erection of water-works for the aforesaid city, did some time in the year 1874 invite sealed proposals for the construction and delivery, in place, of certain "wrought iron forcing mains." That the relators, "expert and responsible iron workers," among others, did deliver to the said commissioners sealed proposals for the manufacture and delivery of the proposed work, and that the bid, therein contained, was lower by some five thousand dollars than that of any other bidder. That said proposals and bid were accompanied by a bond in due form as security for the proper execution of the work designated, signed by two responsible sureties. That, notwithstanding these facts, the said Water Commissioners awarded the contract to the firm of J. M. Brush & Co., at a higher bid than that of the relators; thus unjustly and unlawfully passing by and refusing to accept their bid. The answer of the defendants admits the facts as set forth in the petition, but denies the responsibility of Snyder & Co., and their competency and ability to perform the proposed work and to fulfil the required contract. It also sets out and specifies the facts on which these allegations are based as follows: "That it is within the knowledge and full belief of the said committee that N. Snyder & Co., by some means or other, attempted and did perpetrate a gross deceit and wrong upon said committee in surreptitiously departing from the specifications for a certain contract for the construction of boilers for the new water-works by striking therefrom, without the knowledge or consent of said committee, the words 'mud-drums,' whereby said committee have suffered considerable vexation and annoyance, and whereby said city will, in all probability, be compelled to litigate with the said N. Snyder & Co., resulting in considerable loss to said city; that it is within the knowledge of some, if not all, of the members of the Water Committee that N. Snyder, the senior member of the firm of N. Snyder & Co., was a man of intemperate habits, whose character for sobriety was not such as would warrant the committee in giving said firm such a responsible contract; that said N. Snyder also had attempted to bribe the mechanical engineer of the water-works, who was, by virtue of his office, the inspecting officer of said contract; and that said N. Snyder & Co. were otherwise disqualified for the proper fulfilment of the requirements of the proposed contract."

The learned Judge, who, as the mouth-piece of the Court to which this case was submitted, under the provisions of the Act of April 22, 1874, delivered the opinion, finds that the facts stated in the petition are true, and that the allegations contained in the answer, as above set forth, are wholly without foundation, but that notwithstanding this the committee fully believed that what was asserted in the answer was true.

We must take this opinion of the Court as to the belief of the respondents to be correct, not only because we are bound by their finding, as though it were that of a jury, but because we cannot suppose the gentlemen composing the committee would state anything that they did not believe; nevertheless, it does somewhat surprise us that this body of men, intrusted with so important a

Digitized by Google

duty, should have rested so contentedly under a delusion which a little inquiry in the right direction would have dissipated, and thus saved a handsome sum of money to the city treasury.

The facts, as above stated, having been found in favor of the relators, we next have to consider the Act of Assembly under which this case arises. It reads thus: "All stationery, printing, paper, and fuel used in the councils and in other departments of the city government, and all work and materials required by the city, shall be furnished, and the printing and all other kind of work to be done for the city shall be performed under contract to be given to the lowest responsible bidder, under such regulations as shall be prescribed by ordinance." (Act 23d May, 1874, P. L. 230.) Now the Court below, though they found, under the evidence, that the relators were responsible in all points in which the city had a right to inquire, yet they held that the word "responsible," as employed in the Act, when applied to contracts, requiring for their execution, not only pecuniary ability, but also judgment and skill, imposes, not merely a ministerial duty upon the city authorities, such as would result did their powers extend no further than to ascertain whose was the lowest bid and the pecuniary responsility of the bidder and his sureties, but also duties and powers which are deliberative and discretionary. In this we concur with the Court below. For it is scarcely open to doubt that the word under consideration, as it is used in the statute, means something more than pecuniary ability. In a contract such as the one in controversy, the work must be promptly, faithfully, and well done; it must or ought to be conscientious work; to do such work requires prompt, skilful, and faithful men. A dishonest contractor may impose work upon the city, in spite of the utmost caution of the superintending engineer, apparently good and even capable of bearing its duty for a time, which in the end may prove to be a total failure and even worse than useless. Granted that from such a contractor pecuniary damages may be recovered by an action at law; this is at best but a last resort, that often produces more vexation than profit; a mere patch upon a bad job, an exceedingly meagre compensation at best, for the delay and incalculable damage resulting to a great city from the want of a competent supply of water. The city requires honest work, not law-suits.

Were we to accept the interpretation insisted upon by the relators, the difference of a single dollar, in a bid for a most important contract, might determine the question in favor of some unskilful rogue as against an upright and skilful mechanic. Again, we know that, as a rule, cheap work and cheap workmen are but convertible terms for poor work and poor workmen, and if the city, for the mere sake of cheapness, must put up with these, it is indeed in a most unfortunate position. It is unnecessary, therefore, to resort to authority for the condemnation of the interpretation, by which the ruling of the Court below is sought to be overturned, for it is opposed to the unbiased judgment of all reflecting men, whether lawyers or laymen, and its adoption would be productive of far more evil than good.

Agreeing then, as we do, with the Common Pleas that the duty imposed upon the respondents was deliberative and discretionary, we must also admit the conclusion reached by that Court, to wit, that the writ of mandamus will not lie. For it is settled beyond controversy, that where the complaint is against a person or body that has a discretionary or deliberative function to exercise, and that person or body has exercised that function, according to the best of his or its judgment, the writ of mandamus will not be granted to compel the undoing of that which has been done. (Griffith *v.* Cochran, 5 Binn. 87; Com'th *ex rel.* Watt *v.* Perkins, 7 Barr, 42.) In the case in hand the respondents have performed their prescribed duty, not indeed in a manner satisfactory to the Judge who delivered the opinion of the Court below, and whose opinion we fully endorse, nor with much profit to the city treasury, but, nevertheless, not fraudulently or corruptly, and so we must let the matter stand.

There is another aspect of this case, and which is quite as fatal to the rights of the relators as that just discussed. It is a well-established rule that he who sues for the writ of mandamus must have some well-defined right to enforce, which is specific, complete, and legal, and for which there is no other specific legal remedy, and the right, which he claims, must be independent of that which he holds in common with the public at large. (Heffner *v.* The Commonwealth, 4 Ca. 108.) But Snyder & Co. had no such right as above stated. By their bid they proposed to contract for certain work; that bid was not accepted. It was a mere proposal that bound neither party, and as it never was consummated by a contract, the city acquired no right against the relators nor they against the city. Snyder & Co. are wanting in a specific remedy only because they have failed to establish a legal right. The injury, if any, resulting from the rejection of their bid, fell upon the public and not upon them personally. It may be that, if they had obtained the contract, they might have made a profit, but the law takes cognizance of neither speculative contracts nor speculative damages, but only such as are fixed and definite. Where there is no contract there is no law; *legem enim contractus dat.* Judgment affirmed.

Opinion by GORDON, J. WILLIAMS, J., absent.

[See Com'th *v.* Phila., 2 WEEKLY NOTES, 124; Com'th *v.* Beaver Co., *ante*, 182.]

Digitized by Google

July, '76, 27 **Biddle's Appeal.** Jan. 25, 1877.
Nicklin's Appeal.

Trusts and trustees—Compensation for management of real estate—When payable out of corpus—Commissions—Counsel fees.

While commissions, as such, will not be allowed to trustees on the value of real estate remaining unsold at the termination of the trust, yet compensation out of the *corpus* of the estate will be made to them proportioned to their responsibility and trouble, when the regular commission on the rents is insufficient for that purpose.

An estate consisting of city and suburban real estate was devised to trustees to pay the income to certain persons for life. The trustees' commissions on the income amounted to about $200 per annum, which they received. They held and managed the estate for nineteen years, and at the expiration of the trust the bulk of the estate, valued at $204,000, remained unsold.

Held, that the trustees were entitled to compensation out of the corpus of the estate for their care and trouble in its management, and that $2000 was a proper allowance therefor.

Appeal from the Orphans' Court of Philadelphia County.

This was an appeal by George W. Biddle and Chapman Biddle, trustees under the will of Julia M. Nicklin, deceased, from a decree dismissing their exceptions to the adjudication of the Judge upon the audit of their account, and sustaining those of the party in remainder.

Mrs. Nicklin died in 1855, leaving her estate, which consisted principally of two stores on Chestnut Street, two houses on China Street, and a suburban tract of sixty acres, known as "Stouton Farm," to the appellants, in trust to pay over the net income thereof to her two sisters during their lives, and after the death of the survivor, then in trust to convey the entire estate to the descendants of both, with a power in the trustees to sell with the consent of their *cestuis que trustent*. One of these last died in 1870, without issue, and the other in 1874, leaving one daughter, Mrs. Horner, the appellee in this case. After the termination of the trust, the trustees filed their account, by which it appeared that all the real estate, except a few acres of the farm, remained unsold. At the audit they claimed a commission of three per cent. on the value of the real estate unsold ($204,000) on account of extraordinary trouble and responsibility in the management thereof, particularly in the case of "Stouton Farm." It appeared that this tract, now comprising fifty acres, lay on the outskirts of the city, in the twenty-fifth ward, that during the nineteen years of the trust the city had been gradually built up to it on two sides, that streets had been opened through the property, and that various municipal improvements, such as paving, curbing, and laying of water-pipe, had been made, requiring much time and care on the part of the trustees, while their average commission on the rent amounted to $35 only in each year. The value of the farm was about $140,000. The average commission on the whole yearly income was $209.15. Legal services, especially in matters before road juries, had been rendered by the accountants themselves in every case, except one, thus saving to the estate charges of this nature.

Mrs. Horner objected to the allowance to the trustees of any commission on the *corpus* of the estate, and asked that they might be surcharged with the difference between the rent they received for "Stouton" and a higher rent which was offered, and also, inasmuch as they negligently permitted the property to be assessed for taxes as "suburban" instead of "farm land," that they be surcharged with the difference.

It was shown that the trustees had offered to refer the matter to Joseph A. Clay, Esq., and that Mrs. Horner had declined the offer, although advised by her counsel to do so.

The auditing Judge (O'Brien, J.) disallowed the accountants' claim for commissions on the *corpus* of the estate, but allowed them as compensation for their services the sum of $2000. He also allowed them a counsel fee of $250, and overruled the appellee's claim for surcharge. To this adjudication both parties excepted.

The Court below (Hanna, J., delivering the opinion) struck out the item of $2000 compensation to the trustees, and reduced the counsel fee to $175, whereupon the trustees took this appeal. (The case, in the Court below, is fully reported 2 Weekly Notes, 495.)

S. S. Hollingsworth and *Hon. W. A. Porter*, for the appellants, argued that in this State trustees are entitled to compensation for their risk and trouble out of the *corpus* of the estate, whether it be personal or real property. It is nowhere laid down that they are not to be compensated when the trust property consists of unsold real estate. In Twaddell's Appeal (1 Weekly Notes, 227) the sum of $1000 out of the *corpus* was allowed. But it may be said that in trusts of real estate the trustees are limited to the commission on the rents. This doctrine, however, means either that the right to compensation is dependent on the nature of the trust property, which is not law, or that there is no responsibility or trouble in the management of real estate, which is notoriously untrue.

The rate of commission which has been established by practice in Philadelphia where real estate has been converted, is three per cent.

E. Spencer Miller, contra. There is no reported case sustaining the position of the appellants that the right to commission on unsold real

Digitized by Google

estate exists. The compensation of the trustees should come solely out of the increase.

Spangler's Estate, 9 Harris, 335.

The services rendered are for the benefit of the tenant for life, whose duty it always is to keep up the estate. The trustees have no responsibility in this case to the remainder-men; a chattel may be lost or destroyed, but the land remains. The principles laid down in McCausland's Appeal (2 Wr. 466) rule this case.

Feb. 5, 1877. THE COURT. This record presents the question whether trustees of real estate who have had the care of it for several years, and received a commission upon the income, are entitled to further commissions or compensation out of the corpus of the estate when they come to hand it over to those entitled in remainder upon the termination of the trust The learned Judge of the Orphans' Court who made the adjudication at chambers allowed the appellants $2000 as such compensation. Exceptions were filed to this allowance, whereupon the Orphans' Court reversed the action of the Judge at chambers, and rejected the claim. This ruling is assigned here for error.

The claim of the appellants is resisted mainly upon two grounds, viz.: First, because no case can be found in which such a claim has been allowed; and, secondly, because the estate in the hands of the remainder-men is not liable to any charge for commissions, the same being payable exclusively out of the income. The first objection, while entitled to weight, is not conclusive. In the absence of authority it is sometimes necessary to decide cases upon principle; when so decided they become precedents for subsequent cases. It is no sufficient answer to a valid claim to say that no adjudicated case can be found which is precisely in point. We see no difficulty in disposing of this question both upon reason and authority. In Twaddell's Appeal (1 WEEKLY NOTES, 227) it was held, that, where no sale of the real estate had been made by the trustee, he was not entitled to charge commissions as such. But it was also held that he had a right to compensation. In that case the trustee was merely the donee of a power. The power was never exercised. The parties in interest elected to take the real estate devised, as land. The trustee had advertised the property for sale, and had planted some trees. The Orphans' Court awarded him $1000 as compensation, and upon appeal to this Court the decree was affirmed. The general rule running through all the cases is, that a trustee should receive a compensation adequate to his care and trouble. Such compensation is proportioned to responsibility incurred, and to the labor and care bestowed. (Pusey v. Clemson, 9 S. & R. 207; McIlhenny's Appeal, 10 Wright, 347.) In the case last cited there is a distinct recognition of the principle that commissions on the income of real estate may be wholly inadequate compensation for its care and management. It must be conceded that if the appellants in this case had sold the real estate at the commencement of the trust they would have been entitled to the usual commissions upon such sale. They did not sell, but held it for nearly nineteen years, to the great advantage of those in remainder, and to the manifest increase of their own care and trouble. There is neither authority nor reason for a rule which would give liberal commissions upon a sale, and yet deny all compensation for years of careful management. The fact that the appellants received a commission upon the income is not to the purpose. It does not affect the principle. It bears merely upon the amount of compensation. In some instances a commission upon the income of real estate would be a full compensation for the care of it; in others it would be wholly inadequate.

The second ground of objection, that compensation for care and management can only be taken out of income is equally untenable. Had the trustees sold the realty, the commissions would have come out of the corpus of the estate. They did sell a portion of it, and took out their commissions without objection. That they did not sell the residue was for the benefit of those in remainder. They should, therefore, pay for the care and management. The life-tenants paid for the collection of the rents, which were for their benefit. It would be unjust to require them to pay for the care and management of the property for several years when their interests would have been greatly promoted by its sale. Spangler's Appeal (9 Harris, 335) is not in point. The question there was whether the trustee, the *cestui que trust* being an annuitant, should deduct his commissions out of the income as it was paid over. If the appellants here had paid over the gross income to the life-tenants, we do not think they could successfully claim commissions on such income out of the corpus of the estate. But for so much of their care and management of the real estate as was directly and palpably for the interest of the remainder-men, we think they are entitled to be paid. The learned Judge who made the adjudication allowed the appellants $2000. We would not be disposed to reverse his decision upon the question of amount unless for clear error. The testimony reported by him as to the extent of the care and labor bestowed is not full. Yet as to a portion of the real estate it is not difficult to see that a commission on the rents would not be an adequate compensation for its management. Stouton farm, by far the most valuable portion of this estate, is located on the outskirts of the city. It is in the immediate vicinity of improve-

Digitized by Google

ments, and streets have been opened through portions of it. There is no class of property that requires more constant care than rural property in the outlying wards of a large city. The opening of streets through this property required attendance upon road juries, and involved claims for damages and assessments for benefits. There was responsibility also. The liability of such property to municipal liens requires constant vigilance. The title may be swept away by a judicial sale upon a judgment recovered without notice to the real owner, upon a claim filed against an unknown reputed owner. The pittance received by the appellants as a commission on the rents of this valuable property is no proper compensation for the care and management of it for nineteen years. We think, therefore, that it was error to set aside the adjudication. From the facts as presented the amount fixed by the learned Judge appears reasonable. We are asked by the appellants to increase it. We do not feel justified upon the evidence in doing so.

We think the Court below also erred in reducing the amount allowed for counsel fees. The accountants were put upon the defensive by an attempt on the part of the *cestuis que trustent* to overcharge them with a large sum for alleged laches in the matter of rent and taxes. This attempt failed, and very properly. The entire claim of the accountants for the care of the corpus of the estate was also resisted. This claim has been allowed in part. An offer was made by the accountants to refer the question of their commissions to the arbitrament of Joseph A. Clay, Esq., an Orphans' Court lawyer of ripe experience. This offer the *cestuis que trustent* declined, although advised by their counsel to accept it. It thus appears that the charge for counsel fees was the result of their own unsuccessful litigation. Their own conduct rendered it a necessity. Nor is the amount unreasonable. It is but just to the appellants to say that this estate appears to have been managed not only with care and fidelity, but also with economy. We notice no charge for professional services during the continuance of the trust except one of $23.50 in an injunction case. The litigation incident to opening streets through the farm appears to have been conducted without cost to the estate for counsel fees. Under the circumstances the amount claimed was moderate, and ought to have been allowed.

The decree is reversed and set aside; the adjudication made at chambers is approved and confirmed, and distribution ordered to be made in accordance therewith. The costs of this appeal to be paid by the appellees.

Opinion by PAXSON, J. WILLIAMS, J., absent.

July, '75, 241. Jan. 18, 1877.

Morgan et al. v. Tener et al.

Attorney and client—Collection agency—Forwarding of claim to another attorney—Liability for fraud of such attorney—Statute of Limitations—When it commences to run—Effect of incorrect and misleading answers to inquiries made by party against whom the Statute would run.

In 1857 M. placed a claim in the hands of T. for collection, and received a receipt for it "to be forwarded by us for collection by suit or otherwise at our discretion." T. forwarded the claim to R., who in 1859, without T.'s knowledge, compromised the claim and fraudulently retained the proceeds. M. made frequent inquiries of T., who, in good faith and in ignorance of R.'s action, replied that the claim was uncollectable. In 1869 M., learning the real facts, brought suit against T. for the amount of the claim:

Held (reversing the judgment of the Court below), that T. was not merely a forwarder of the claim, but that it was in his hands for collection, and he was therefore liable for the fraud of R.

Held further, that M., having been misled by the answers of T. to his inquiries, the Statute of Limitations did not commence to run against him until his discovery of the fraud.

Bradstreet *v.* Everson, 22 Sm. 133, approved.

Error to the Common Pleas No. 4, of Philadelphia County.

Assumpsit by Morgan & Stidfole against Tener & Davis, to recover the amount of three promissory notes left with the defendants for collection.

Pleas, the general issue and the Statute of Limitations. Replications, *assumpserunt infra sex annos* and fraud. Whereupon the defendants joined issue.

At the trial (before BRIGGS, J.) plaintiffs' evidence was to the following effect: In September, 1857, plaintiffs, who were merchants in Philadelphia, placed in the hands of defendants, who were collection agents, three promissory notes for collection, and received the following receipt:—

"Tener & Davis. Collections made in all parts of United States and Canada.

No. 491. PHILADELPHIA, Sept. 28th, 1857.

Received of Messrs. Morgan & Stidfole the claim below described, to be forwarded by us for collection, by suit or otherwise, at our discretion:—

Note of T. Nuttle, September 30th, 1856, six months, $1505.03.

Note of T. Nuttle, April 21st, 1857, three months, $603.20.

Note of T. Nuttle, April 20th, 1857, one day, $580.92.

TENER & DAVIS."

Defendants had been in the habit of making collections for plaintiffs, and no particular directions were given concerning this claim. Some time afterwards defendants notified plaintiffs that Nuttle had offered a compromise, but plaintiffs declined to entertain any such proposition. On

Digitized by Google

April 27, 1858, plaintiffs at defendants' request paid them fifty dollars as security for costs. Defendants afterwards notified plaintiffs that judgment had been obtained against Nuttle upon the notes, but in reply to inquiries made by plaintiffs from time to time reported that the claim was uncollectable. On December 28, 1866, defendants rendered to plaintiffs' successors in business a statement entitled "Annual statement of claims in hands of Tener & Davis belonging to Charles E. Morgan & Co.," and containing the following reference to the Nuttle notes:—

"No. 491. Tilghman Nuttle, Caroline Co., Maryland (M. & S. claim). Judgment uncollectable."

In 1869 plaintiffs, having received information which led them to believe that the claim could be collected, called on defendants, and inquired to whom they had sent the claim. Defendants then for the first time informed plaintiffs that they had sent the claim to George M. Russum, of Denton, Maryland. Subsequent inquiry developed the fact that Russum had, without the knowledge of defendants, employed one Atkinson, of Baltimore, who obtained judgment against Nuttle April 5, 1859; that after the judgment was obtained Russum had compromised the claim for twenty per cent., and caused the judgment to be satisfied. Defendants never received the twenty per cent., nor did they know of the satisfaction of the judgment. Upon receipt of the above information, plaintiffs, on October 30, 1869, brought this suit against defendants to recover the amount of the claim.

The learned Judge entered a non-suit, which the Court in banc refused to take off, Briggs, J., delivering the opinion of the Court, and holding that there being no evidence of fraud on the part of the defendants, the question was simply when the Statute began to run in their favor; that all the authorities showed the time was when the defendants became liable to answer or pay (Campbell's Administrators *v.* Boggs, 12 Wr. 524; Rhine's Administrators *v.* Evans, 16 Sm. 142), which in this case was the time of the satisfaction of the judgment by Russum in 1859. That the defendants' statements that the judgment was uncollectable would have taken the case out of the Statute if they had undertaken to collect the claim; but these statements could have no such force when the obligation was only to *forward* for collection.

The plaintiffs took out this writ, assigning for error the entry of judgment on the non-suit.

Chas. E. Morgan, Jr., and *R. H. McGrath*, for the plaintiffs in error.

The statute does not begin to run until the facts imputed as fraud are discovered.

Derrickson *v.* Cady, 7 Barr, 31.
McDowell *v.* Porter, 8 Barr, 190.
Riddle *v.* Murph, 7 S. & R. 2.5.
Rush *v.* Barr, 1 W. 120

Whether or not there was fraud should have been left to the jury.

Even if the defendants had been mere forwarders, the fraud of the defendants' agent was made out, and it was for them to show he enjoyed a good reputation when they employed him. But the evidence shows they were ordinary collectors, and the liability of attorneys sending claims to correspondents for collection is established in—

Bradstreet *v.* Everson, 22 Sm. 134. See also—
Riddle *v.* Hoffman's Ex., 3 Penna. 224.
Krause *v.* Dorrance, 10 Barr, 462.

G. Remak, for the defendants in error, relied upon the opinion of the Court below, and particularly on the force of the words in the receipt "to be forwarded," which he contended rendered the defendants liable only as forwarders of the claim for collection.

Jan. 29. The Court. Had the defendants been merely forwarders of the notes for collection, as the learned Judge below thought, the non-suit might be sustained. Their duty would then have been performed when they had transmitted them to Russum, their correspondent. Russum would have been the attorney of the plaintiffs, and they would have been bound to make inquiry and inform themselves of the state of the proceedings on the claim in his hands. We are of opinion, however, that this is not the true construction of the contract as evidenced by the receipt. Its terms are "to be forwarded by us for collection by suit or otherwise at our discretion." The defendants were to have the control and direction of the attorney to whom the notes should be forwarded. The proceeding was to be by suit or otherwise at their discretion. In the margin of the receipt after the names and address of the defendants, is the advertisement, "collections made in all parts of the United States and Canada." They recognized that the notes were still in their hands for collection after they had been forwarded by their return to the plaintiffs or their agents, the firm which had succeeded them in business. It is headed, "Annual statement of claims in hands of Tener and Davis belonging to Charles E. Morgan & Co.," in which is comprehended the claim against Nuttle marked as "M. & S.'s claim," to show that it belonged to the plaintiffs. The defendants were attorneys to collect, though of necessity it had to be by forwarding to another for collection. The receipt only expressed what was necessarily implied from the nature of the business. That an attorney employed to collect a claim, who places it in the hands of another, is liable in the absence of an express stipulation to the contrary, on the receipt of it, for misconduct by such other, is assumed as undoubted law in Krause *v.* Dor-

Digitized by Google

rance (10 Barr, 462), and is shown to be applicable to collecting agencies, where the necessity of employing attorneys at a distance is apparent, in the well considered judgment of this Court in Bradstreet *v.* Everson (22 P. F. Smith, 133).

The defendant then being liable, on the receipt of the money by Russum and his unauthorized satisfaction of the judgment, when did the statute of limitations commence to run against the plaintiffs? This question was fully considered in Rhines *v.* Evans (16 P. F. Smith, 195), and the law clearly and concisely stated as deduced from an examination of all the authorities by the present Chief Justice of this Court. "The right of action accrues and the statute begins to run from the time of the attorney's receipt of the money, even though he gives no notice of its collection, the law deeming it gross negligence on the part of the creditor to neglect to make inquiry for six years unless the attorney has been guilty of concealment or some act to put his client off his guard."

It was in evidence in this case that the clients had made frequent inquires of the defendants as to their claim, and were informed, both verbally and in writing, that it had been prosecuted to judgment and was "uncollectable." This certainly was well calculated to put the plaintiffs off their guard. If as we have seen, the defendants were liable when Russum satisfied the judgment for his misconduct or fraud, it is not material whether they made this answer to the plaintiffs innocently and in good faith or otherwise. It was sufficient to put them off their guard, and is, therefore, a good defence on their part to the plea of the statute, which began to run against them only from the time of their discovery of the fraud.

Judgment reversed and *procedendo* awarded.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

[See Wickersham *v.* Lee, below.]

July, '75, 30. Jan. 31, 1877.

Wickersham v. Lee et al., Executors.

Statute of limitations—Its running prevented by any conduct of debtor tending to mislead his creditor, and induce him to delay his action —Collection agent, duties of.

In 1860 A. entrusted to B. & C., a collection firm, the collection of a Kentucky claim. The Kentucky agents of B. & C. collected the money and forwarded it to their principals in 1863, together with other sums; but there was some doubt as to the proportion of the remittance to be applied to this claim, and a letter was written asking further information before anything was credited to A.'s account. Before an answer was received B. & C. sold out their business (their successors to settle the unfinished business of the firm), and B., the partner who had charge of A.'s claim, went abroad. The books showed no trace of the collection of the claim, and, when A. inquired from time to time, of B. & C.'s successors, how it was progressing, he was told at first that it was "regarded as good," and afterwards that there was "not much hope." In 1870 A., discovering the fact of the collection, brought suit against B. & C. B. pleaded the statute of limitations.

Held, that the question of fraud on B.'s part was rightly submitted to the jury on the above state of facts.

Held, further, that conduct of the defendants, tending to mislead the plaintiff and induce him to delay his action, even if not fraudulent, would prevent the statute of limitations from running.

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit brought April 30, 1870, by G. Lee and W. Lee, executors of Wetherill Lee, the surviving partner of the firm of Bancroft & Co., against O. W. Davis and M. S. Wickersham, late trading as Davis & Wickersham, to recover $574.29 with interest from April 14, 1863, money alleged to have been collected on that day by the defendants, as agents for Barcroft & Co., on a claim against L. L. Wrother & Co. The sheriff's return on the summons was "Service accepted as to Wickersham and *nihil habet* as to Davis." Wickersham pleaded non-assumpsit, payment with leave, etc., the statute of limitations, and a denial of partnership. The plaintiffs joined issue on each plea except that of the statute of limitations, as to which they filed a replication, alleging that the defendants not only did not pay over the sum collected from L. L. Wrother & Co., but fraudulently concealed the collection thereof from Barcroft & Co., and that the latter firm did not discover the fact of such fraudulent concealment until April 22, 1870. The defendant filed a rejoinder denying these allegations.

The facts of the case, as disclosed by the evidence offered at the trial, were as follows: Davis & Wickersham were engaged in the collection business in Philadelphia, and Barcroft & Co. placed in their hands this claim against L. L. Wrother & Co., a Kentucky firm. The money was collected by Bigger, Thompson & Stubblefield, the Kentucky agents of Davis & Wikersham, and remitted to the latter firm on April 14, 1863. The remittance was $648, and embraced collections on account of several claims; but the accompanying letter failed to state what amount was to be applied to each. A letter was therefore addressed to Bigger, Thompson & Stubblefield, asking for a statement showing how the amount was to be distributed, and the letter containing the remittance placed upon a file set apart for papers requiring explanation, until such statement should be received. On April 20, only a week later (no statement having been received in the interim), Davis & Wickersham sold out their

Digitized by Google

business to Ledyard & Barlow, and notice of this change was given to Barcroft & Co. about May 1. Soon after this Wickersham went abroad. Barcroft & Co. subsequently, from time to time, applied to Ledyard & Barlow for a statement of the condition of the claims, including that against L. D. Wrother & Co., and received from them replies in writing. Two of these replies were offered in evidence, one dated November 30, 1864, which, in answer to the inquiry as to the Wrother claim, said, "regarded as good;" the other, dated March 1869, which said, "not much hope." In March, 1870, Barcroft & Co. wrote to Stubblefield, who, they had been informed by Ledyard & Barlow, had charge of the collection of this claim, asking him to account to them only therefor, and received from him the reply that he had paid and overpaid Davis & Wickersham the said claim. Upon this information, which was the first notice they received of the collection of the money, Barcroft & Co. instituted this suit, in April, 1870.

The defendants submitted the following points: (1) There is no evidence of fraud on the part of the defendant Wickersham to take the case out of the statute of limitations, and therefore the verdict must be for the defendant. (2) Wickersham's omission to give notice of the receipt of the money from April 14, 1863, to May 1, 1863, is not such evidence of fraud on his part as to take the case out of the statute of limitations, and the verdict must be for the defendant. (3) If it were the duty of Ledyard and Barlow to notify Barcroft & Co., then omission to do so is no evidence of fraud on the part of Davis and Wickersham, and the verdict must be for the defendant.

Answer. All these points are refused because they include a binding direction to find for the defendant.

The Court (MITCHELL, J.) charged, *inter alia*, as follows: "If there was fraudulent concealment, then the law will not allow any person committing that fraud to take advantage of it, and if that fraud has been proved to you in this case, then the lapse of time is not a good defence. Now, the only question which you have to consider in this case is, whether or not the failure of Davis & Wickersham to pay over that money to Barcroft when it was collected in 1863, was a fraudulent concealment of the collection with an intent to appropriate the money, or whether it was one of those accidents which are perhaps incidental to all human business, and for which they were not responsible after six years. . . . Now that is the whole question you have to consider, gentlemen. If you find that this was a fraud, that there was an intention to conceal the collection of this money, then you will find a verdict for the plaintiff for the sum which ought to have been paid over, with interest to the present time."

Verdict for plaintiff for $943.26, and judgment thereon. Wickersham took this writ, assigning for error the answer to points, and the portions of the charge quoted.

G. M. Dallas (with him *D. R. Patterson*), for plaintiff in error.

The statute of limitations applies to a collection of money by an attorney for his client, and commences to run when the money is received, or, at the furthest, when the relation of attorney and client is dissolved.

Glenn *v.* Cuttle, 2 Grant's Cases, 273.
Campbell's Adm. *v.* Boggs, 12 Wr. 524.
Rhines' Adm. *v.* Evans, 16 Sm. 192.
Barton *v.* Dickens, 12 Wr. 518.

The only qualification to this rule is that where the attorney fraudulently conceals the collection, the statute begins to run only at the time when the fraud is discovered, but the *onus probandi* to take the case out of the statute, is on the plaintiff. In this case the evidence of fraud was so very slight that it was error to submit it to the jury.

Baisch *v.* Oakeley, 18 Sm. 92.
Express Co. *v.* Wile, 14 Id. 201.
Bank *v.* Bank, 1 WEEKLY NOTES, 462.
1 Greenleaf's Evidence, § 80.

L. C. Cleeman (with him *G. Cleeman*), contra.

The question of fraud was rightly submitted to the jury.

Reeves *v.* R. R. Co., 6 Casey, 460.
Dingee *v.* Jackson, 11 Har. 177.
Garrett *v.* Jackson, 8 Id. 336.
Auntzinger *v.* Harper, 8 Wr. 204.
Campbell's Adm. *v.* Boggs, 12 Wr. 524.
Rhines' Adm. *v.* Evans, 16 Sm. 192.

Besides, it was not essential to the plaintiff's case to prove fraud, for the statute of limitations was passed to promote diligence in the creditor, and any act of the debtor causing delay on the part of the creditor or misleading him, will prevent the running thereof.

Glenn *v.* Cuttle, 2 Grant's Ca. 273.
Rhines' Adm. *v.* Evans, 16 Sm. 192.

Feb. 12. THE COURT. The case of the plaintiff was, that his firm had placed their claim against a distant debtor in the hands of a collection agency, which forwarded it to an attorney in a distant State for collection. He collected and transmitted the money to this agency. The partner who received it, gave no notice to the creditors of the receipt of the money, did not note its collection upon the docket, where the receipt should appear, sold out their business to another firm which took their place and their books without notice of the receipt, and were therefore unable to give the desired information to the creditors, who called frequently to ascertain the state of the claim, and were informed first that it was good, and finally that it was hopeless. Now, without explanation, this statement of the plaintiff's case, would leave a very strong impression upon the mind that the money was purposely kept

Digitized by Google

and its receipt concealed from the creditors. Clearly these circumstances were to be submitted to the jury as evidence of an intentional concealment of the receipt of the money. But when the explanation came, fortunately for the reputation of the gentleman who received the money, a different case was presented. Then it appeared that in consequence of the meagre contents of the letter transmitting the money, this gentleman had to suspend his entries and write for further information, which was not returned by the distant correspondent, and within three weeks this gentleman went abroad. Hence it was not error to submit the question of wilful, in other words, fraudulent concealment of the money to the jury. They have found the fact in favor of the plaintiff, and this is sufficient for the case. But, independently of actual fraud, we hold that in such a case as this, where a collection agency is entrusted with a discretion as to the collection by law or otherwise of a distant claim, having its own undisclosed agents, there is a duty to give full and proper information to the creditor who has no other means of knowledge, and therefore, if the creditor calls from time to time, within the time of the running of the statute of limitations and receives from his agents information by which he is misled, the statute of limitations does not bar his action before knowledge of the receipt of the money by them. So long as they give him to understand that his claim is uncollected, he is put off his guard. The duty of inquiry lies on him, but having made inquiry of his agents, and being misinformed by them, they cannot set up the statute when they have misled him and thereby induced him to delay his action.

We see no error in this record.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

[See Morgan v. Tener, *ante*, p. 398.]

July,'75, 125. Jan. 26, 1877.

Miller v. Baschore.

Statute of limitations — What acknowledgment sufficient to take the case out of the operation of the statute.

To revive a claim barred by the statute of limitations, plaintiff relied on a letter from defendant, containing the following phrases: "I have received a letter from you some time ago, asking of me what I intend doing with balance of a note I owe you;" and after speaking of an arrangement to pay another creditor, with whom the defendant compromised, "and after he is paid I will pay you all I owe you, and if I can do anything for you before that time I will do so. You need not trouble yourself about me, that I will not pay you, for I expect to pay all I owe."

Held, that, as neither the claim, the balance, nor the amount of indebtedness was stated, there was not sufficient certainty and perspicuity in the acknowledgment to take the case out of the operation of the statute.

Weaver v. Weaver, 4 Sm. 152, affirmed.

Error to the Common Pleas No. 4, of Philadelphia County.

Assumpsit by Catharine Baschore against John W. Miller, upon a promissory note for $100, drawn by defendant to the order of plaintiff, dated December 28, 1859. Pleas, the general issue and the statute of limitations.

At the trial (before BRIGGS, J.) the plaintiff put in evidence, under objection, the note, on which suit was brought, with endorsement of payments on account, made in and before the year 1864. The plaintiff then put in evidence, under objection. the following letter:—

Philadelphia, March 23, 1869.

Mrs. Catharine Baschore:—

I have received a letter from you some time ago, asking of me to let you know what I intended doing with balance of a note I owe you. It is hardly necessary to tell you that I had a great deal to pay when I failed, for you know that I have paid off many of my old debts, and calculate to pay all I owe. Just now I cannot pay you anything; for one reason, I compromised with John Geo. Seltzer to pay him in instalments, of which I have paid one, and another is coming due on the 1st of April, which I must somehow arrange; and then I have to pay him one more note, which comes due April 1st, 1870; and after he is paid I will pay you all I owe you, and if I can do anything for you before that time I will do so. You need not trouble yourself about me, that I will not pay you, for I expect to pay all I owe. If you think I am not telling you the truth, you can ask J. G. Seltzer himself.

I remain your friend,

JOHN W. MILLER.

It was shown that John G. Seltzer, referred to in the foregoing letter, had been paid by the defendant.

The defendant, having moved for a non-suit, which was refused, testified that at the time he gave the note the plaintiff was indebted to him on a book account, which had never been settled; this the plaintiff denied.

The Judge charged the jury as follows: "The letter of 1869 declares that the defendant will pay what he owes the plaintiff, after he shall have paid Seltzer, and the defendant testifies that he has paid Seltzer; therefore his promise, then conditional, is now absolute. The question now is, what does he owe the plaintiff? Both the note in suit, and the defendant's claim for goods sold, were, at the time the letter was written, barred by the statute, and we cannot consider the promise without inquiring into the state of their accounts at that time. You should allow the defendant for the sum the plaintiff owed him at that time, and give her a verdict for the balance; and if you do not find a balance in plaintiff's favor, then give a verdict for defendant."

Digitized by Google

Verdict and judgment for plaintiff for $125.35.

Defendant took this writ, assigning for error the admission in evidence of the note of 1859, which was barred by the statute of limitations; the admission of the letter of 1869 as sufficient to revive the claim; and the charge of the Judge.

Wm. D. Wetherill, for plaintiff in error.

The promise to take a case out of the statute of limitations must be clear, unequivocal, and express, and so distinct in its extent and form as to preclude hesitation and doubt.

Morgan *v.* Walton, 4 Barr, 321.
Harbold's Ex'rs *v.* Kuntz, 4 Harris, 210.
Weaver *v.* Weaver, 4 Sm. 152.
Boss *v.* Long, 2 Weekly Notes, 694.

The promise must also be to pay on deman ; an immediate, unqualified promise to pay, without restrictions or conditions.

Bank *v.* Patton, 2 H. 479.
Tanner *v.* Smart, 6 Band. C. 549.
Hart *v.* Pendergrast, 14 M. & W. 741.
Boss *v.* Long, *supra.*

The instrument sued on must be clearly and distinctly identified, and there must be a distinct recognition of the amount due.

Shaffer *v.* Shaffer, 5 Wr. 51.
Johns *v.* Lantz, 13 Sm. 324.

In the present case the promise is not clear and unequivocal, and it is not to pay on demand; the instrument sued on is not identified; and, moreover, there is no evidence of an intent to pay the whole note, which would be required under—

Senseman *v.* Hershman, 2 Weekly Notes, 693.

Bispham, contra.

The letter satisfies the requirements of law as to certainty. It has been held that the phrase "I will settle" is insufficient, because by it the promissor does not show he understands for what amount he is liable. But the law is satisfied if the promissor shows he recognizes the debt as an existing liability.

It has never been decided in Pennsylvania that the promise must be for immediate payment. The mere circumstance that the time of payment s postponed is not material. (American note to Whitcomb *v.* Whiting, 1 Sm. L. C. 962.) But here the time of payment is pretty well fixed. It is to be after payment of a note falling due on April 1. As to the identification of the instrument sued on see Am. note to Whitcomb *v.* Whiting (1 Sm. L. C. 958). If recovery in this case is defeated, the existence of another debt of which there is no proof must be assumed.

This case can be distinguished from Senseman *v.* Hershman, *supra.* There there was no recognition of a certain balance. Here the balance is readily ascertainable from the credits on the back of the note.

Feb. 5. The Court. The evidence was not sufficient to relieve the claim of the plaintiff below from the effect of the statute of limitations. In order to effect such a result there must be a clear and definite acknowledgment of the debt, a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained, and an unequivocal promise to pay. In the case under consideration the acknowledgment and undertaking of the defendant lack these essential characteristics. He writes, "I have received a letter from you some time ago asking of me what I intended doing with balance of a note I owe you." In this there is nothing specific or definite, for it is not stated what note is referred to, neither is the amount of the balance indicated. The latter part of this letter is not less indefinite for, after speaking of an arrangement to pay another creditor with whom he had compromised, he says, "and after he is paid I will pay you all I owe you, and if I can do anything for you before that time I will do so. You need not trouble yourself about me that I will not pay you, for I expect to pay all I owe." If, in Weaver *v.* Weaver (4 Sm. 152), the writing by the debtor under an account stated, "I agree to settle with him for the above balance and any other just claim between us," was not sufficient to take the claim out of the operation of the statute, much less is the promise above stated. In the case cited the claim and the amount were fixed beyond doubt or cavil, the fault occurred in the want of a promise to pay the sum thus fixed; for the undertaking was not to liquidate the account stated, but only to settle that and any other just claim his creditor might have against him; it was, therefore, at best but a promise to pay what might appear to be due upon an adjustment of their several accounts. Applying the above stated doctrine to the case in hand, it is found to be utterly wanting in every element necessary to rescue it from the grasp of the statute. The defendant promises to pay a balance of a note, but neither note nor balance is stated. He promises to pay what he owes, but whether that is much or little we are not informed. There is in fact neither the required certainty nor perspicuity in the evidence produced to break down the defence, hence the attempt has resulted in failure.

The judgment is reversed, and a new *venire* ordered.

Opinion by Gordon, J. Williams, J., absent.

July, '76, 100½. Feb. 2, 1877

Harkinson v. Bacon et al.

Trust—When executed in cestui que trust.

W. conveyed to G. certain real estate in trust to pay over the rents and profits to the said W. for life, and after her death to convey to such persons as she should

Digitized by Google

appoint by her last will, under her hand and seal, and in default of appointment to her right heirs, reserving to herself a power of revocation. W. died leaving a will under seal, dated before the deed of trust, and a codicil, not under seal, dated after said deed of trust.

Held, That the trust was executed in W. during her lifetime, and therefore that the property passed to her devisees under the will.

Whether the will as republished by the codicil was an execution of the power of appointment reserved in the deed of trust, not decided.

Error to the Common Pleas No. 2, of Philadelphia County.

Case stated. The facts were as follows: On February 1, 1876, Abigal Harkinson contracted with William H. Bacon and George A. Warder, executors of Elizabeth F. Warder, deceased, to purchase from them for $792, *inter alia*, a certain ground-rent of $54 per annum reserved out of a certain lot on the north side of Coates St., and the executors agreed to convey a good title in fee simple thereto to said Abigail. Elizabeth F. Warder became seized and possessed of said ground-rent, with certain other ground-rents, and personal property of considerable amount, as the heir and next of kin of her brother, George W. Warder, who died at Philadelphia in 1866, or thereabouts, intestate.

On November 20, 1867, the said Elizabeth Warder conveyed to The Girard Life Insurance, Annuity, and Trust Company, of Philadelphia, all her estate and interest in the estate, real and personal, of which her brother, George W. Warder, died seised and possessed—

"In trust to pay over the rents, issues, and profits, interest, and income thereof, to the said Elizabeth F. Warder, for her sole and separate use for and during all the term of her natural life, and from and immediately after her decease then to grant and convey, assign, transfer, and set over the said trust estate and premises hereby granted and assigned and every part thereof unto such person or persons and for such use or uses, estate, and estates, as she, the said Elizabeth F. Warder shall, notwithstanding any coverture, by her last will and testament, or any instrument in the nature of a will, under her hand and seal, executed in the presence of two or more credible subscribing witnesses, direct, limit, and appoint, and, for want of such direction, limitation, or appointment, then to grant and convey, assign, transfer, and set over the said trust estate and premises hereby granted and assigned and every part thereof unto and to the use of the right heirs of her, the said Elizabeth F. Warder, their heirs, executors, administrators, and assigns forever, in such proportions as they would have been entitled to according to the intestate laws of Pennsylvania; provided, always, nevertheless, and it is hereby declared, understood, and agreed by and between the parties to these presents, that it shall and may be lawful to and for the said party of the second part, trustees aforesaid, at any time hereafter, during the life of the said Elizabeth F. Warder, in their sole discretion, to grant, bargain, and sell, assign, transfer, and convey the trust estate aforesaid, or any part thereof, unto any person or persons whomsoever, his, her, or their heirs, executors, administrators, and assigns forever, free, clear, and discharged of all trusts and limitations whatsoever, and without any liability to the purchaser or purchasers as to the application of the purchase-moneys. And in trust as to the moneys to be produced by such sales, as well as all other moneys belonging to the trust, to invest, change, and reinvest the same from time to time in such securities as they, the said trustees, may think proper, to be held by the said trustees upon the same trusts, and to and for the same uses, intents, and purposes as are hereinbefore mentioned, limited, and declared. And provided, further, that it shall and may be lawful to and for the said Elizabeth F. Warder, at any time or times hereafter during her life, by any deed or deeds, writing or writings, under her hand and seal, to revoke, alter, change, and make void all and every or any the uses, trusts, and estates hereinbefore limited and declared of and concerning the estate and premises hereby granted, assigned, and conveyed, or any part thereof, and to declare new and other uses of the same as to her may seem proper; anything hereinbefore contained to the contrary thereof in any wise notwithstanding."

The said deed of trust was not made in special contemplation of marriage. The trustees took possession of said real and personal estate until the decease of the said Elizabeth. She never revoked the said deed, nor the uses thereby declared, but died in May, 1874, a spinster, leaving a last will and testament and two codicils, which were duly proved, and letters testamentary were granted to the plaintiffs, who were named in said will as executors. The will was dated June 29, 1867 (before the execution of the deed of trust). It was under seal and executed in the presence of two subscribing witnesses. By it she gave her executors power to sell all of her real estate at public or private sale, and to seal, execute, and deliver all deeds or other instruments necesary for the purposes aforesaid. The codicils merely contained some additional bequests. They were both dated subsequently to the execution of the deed of trust, and were executed in the presence of two subscribing witnesses, but neither of said codicils was under seal.

Upon the foregoing statement of facts, the parties agreed that if, in the opinion of the Court, the plaintiffs were authorized to convey to the defendant a good title in fee simple to said ground-rent, judgment should be entered in favor of plaintiff for $792, conditioned upon their making a conveyance of the same to her, otherwise judgment should be entered in favor of the defendant.

The Court below entered judgment in favor of the plaintiffs. Defendant took this writ, assigning for error the entry of said judgment.

Edward Olmsted, for plaintiff in error.

This conveyance revoked the will of the testatrix. The will was not an execution of the power reserved in the deed of trust, for the latter did not then exist. It is true the will was republished by the codicils, but the latter were not under seal, and therefore could not, under the

Digitized by Google

terms of the deed of trust, operate as an execution of the power therein reserved.

Porter *et al.* *v.* Turner *et al.*, 3 S. & R. 108.
Hawkens *v.* Kemp, 3 East, 420.
Margaret Pepper's Will, 1 Parsons, 436.

The heirs of the testatrix are not parties, and a decision in their absence will not bind them.

John G. Johnson (*Charles Matlack* with him), contra.

Whenever a legal and beneficial end is to be subserved by the maintenance of a trust, and active duties are conferred upon the trustees, the Court will sustain it. In the present case, however, there is no possible reason for maintaining the trust. No desire to guard against improvidence or alienation is apparent. No active duties *quoad* the trustees are imposed. No special persons are contemplated as remainder men; for, in case of no execution of the unlimited power of appointment, it is the "right heirs" who are to take. An unrestricted power of revocation is reserved by the settlor. Will the Court, then, in order to work the injustice that is desired, hold that such an objectless trust shall be maintained?

Jan. 29. THE COURT. We find in the trusts declared in the deed of Elizabeth J. Warder to the Girard Life Insurance, Annuity, and Trust Company nothing to prevent them from being executed in her at her own will. Their purpose was to protect the estate for her separate use in case of marriage, and for nothing else disclosed in the case. She had not only a full power of appointment by will, but a power of revocation which could be exercised at any time, and if she died without a will the estate was to descend to her heirs generally, and not to special or indicated persons by way of purchase. She therefore died seized of a fee which would descend to her heirs, or go to her devisees by a valid will according to the laws of this State. The Wills Act of 8th April, 1833, § 10, is so comprehensive in its effect that it carries the intent of the devisor down to his death in all cases where it is not clearly excluded by the will itself. This subject is so forcibly discussed, and applied even to a power to the executors to sell the estate, by C. J. GIBSON in Renny *v.* Stiltz (5 Wharton, 384), it is needless to dilate upon it. The testatrix in this case died seized of an executed trust according to established principles supported by numerous authorities collected in Dodson *v.* Ball (10 P. F. Smith, 492). She could have revoked the trusts herself, or could have gone into equity, and compelled a reconveyance, and on her death the fee which was never out of her descended to her heirs, unless intercepted by her will.

Her will in this case is operative by the law of the State, and it was unnecessary to resort to the power of appointment, which was clearly intended to meet only a condition of coverture.

We are therefore of the opinion that the will of Elizabeth J. Warder conferred a valid power of sale upon her executors.

Decree affirmed with costs to be paid by the appellant, and the appeal dismissed.

PER CURIAM. WILLIAMS, J., absent.

[See Ashhurst's Appeal, 1 WEEKLY NOTES, 410; Ash's Appeal, 2 WEEKLY NOTES, 360; Phillips's Appeal, Id. 483; Osborne *v.* Soley, Id. 533; Huber's Appeal, Id. 579; Campbell *v.* Ingersoll, Id. 13; Evans's Est., Id. 337; Fry's Est., Id. 662; Enderiss *v.* Harkness, *ante*, 366.]

Jan. '76, 123. Jan. 31, 1877.

Horter et al. v. Silliman.

Principal and agent—Unauthorized act of agent—Ratification by acts of principal—Principal liable therefor, when he accepts the benefits resulting therefrom.

A. was B.'s agent for making sales and collections, but had no authority to indorse for the latter. He, however, in discounting two notes, transcended his powers by indorsing "A., agent B." B. received and appropriated the proceeds of the discount.

Held, that he ratified A.'s unauthorized act by thus receiving the benefits thereof, and was liable for the amount of the notes.

Error to the Common Pleas No. 2, of Philadelphia.

Assumpsit by E. S. Silliman against W. Horter and P. Belsinger, trading as W. Horter & Co., on two promissory notes for $400 and $230.20 respectively, drawn by J. M. Hughes to the order of "Wellington Jones, agent W. Horter & Co.," and indorsed "Wellington Jones, agent W. Horter & Co." In his declaration the plaintiff averred that Jones was an agent of the defendants, duly authorized by them to indorse the notes and deliver them to the plaintiff. The defendants filed the usual short pleas, non-assumpsit, payment with leave, etc., and also a special plea traversing the allegation that Jones was their duly authorized agent to indorse the notes and deliver them to the plaintiff.

The facts of the case were as follows: Jones was a travelling salesman for W. Horter & Co. His business was to solicit and procure orders for merchandise. He also frequently made collections on account of his sales, and remitted the same from time to time. In the course of these transactions, Jones sold goods to J. M. Hughes, receiving in payment the notes in suit. These two notes, together with a note of one Seiberling, were taken by Jones to Silliman, who discounted them upon Jones's indorsement, handing the latter a check for the proceeds drawn to the order of W. Horter & Co. This check was remitted by

Digitized by Google

Jones to W. Horter & Co., who indorsed it, and received the proceeds. Hughes afterwards failed, and his notes were not paid. Silliman thereupon brought this suit.

At the trial the plaintiff offered in evidence the notes in suit. Objected to on the ground that the plaintiff had not shown that Jones was authorized to bind the defendants by indorsement. Objection overruled, and evidence admitted. Exception.

The defendants offered evidence to show that Jones had no authority to bind them by indorsements; that he would sell goods, collect the money, and remit to the defendants sometimes his own checks and sometimes the checks of bank cashiers and others; that defendants never knew that the notes in suit had been indorsed by him as their agent until they received notice of protest. Defendants also put in evidence the letter of Jones to them inclosing Silliman's check, and containing the following statement:—

John M. Hughes, Tamaqua note, 90 days.
August 20, 1872, $400, Tamaqua note, 90 days.
" " " $360 20, Peter Seiberling, Tamaqua.
Note 4 months, $155 75.

	$935 95
Silliman's check sent	909 23
Discount	$26 72

The Court (LYND, J.) charged the jury as follows: "I instruct you to find a verdict for the plaintiff. The defendants received the proceeds of the notes, according to their own admission, and it would be very like a fraud to allow them to hold the money and refuse to acknowledge their liability. You have nothing to do, therefore, but to find for the plaintiff for the full amount of his claim."

The jury accordingly found a verdict for the plaintiff for $704.57, the amount of the notes with interest, and judgment was entered thereupon. The defendants took this writ, assigning for error the admission of the evidence excepted to and the charge of the Court.

G. Bull, for plaintiffs in error.

Jones had no written power of attorney to act for W. Horter & Co., nor authority of any kind to bind them by indorsement. He was employed merely as a travelling salesman and collector. But general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting or indorsing bills so as to bind the principal.

Byles on Bills, 32 and notes.
Brander *v.* Ins. Co., 2 Grant Cas. 470.
Wayne *v.* Johnson, 1 Phila. Rep. 503.
Stevenson *v.* Hoy, 7 Wr. 191.
Strohecker *v.* Bank, 6 W. 96.
Kerns *v.* Piper, 4 Id. 222.

Where, as in this case, agency is to be proved by the subsequent ratification and adoption of the act by the principal, there must be evidence of previous knowledge, on the part of the principal, of all the material facts. But, in this case, the plaintiffs in error knew nothing of Jones's indorsement, until they received notice of the protest of the notes, long after their appropriation of Silliman's check.

2 Greenleaf on Evidence, § 66.

It was therefore error to admit the notes in evidence, as no sufficient evidence had been produced to show Jones's authority to indorse them.

Moore *v.* Patterson, 4 C. 505.

At any rate, the question of the extent of Jones's authority to bind W. Horter & Co., like all questions of agency, was for the jury to decide, and it was grave error for the Court to take it from them.

Jordan *v.* Stewart, 11 Har. 244.
Savings Fund Society *v.* Bank, 12 C. 498.
Seiple *v.* Irwin, 6 Id. 513.
Slonecker *v.* Garrett, 12 Wr. 415.

W. F. Johnson, contra.

The testimony of plaintiff, and of defendants, established clearly the authority of Wellington Jones to make sales, receive payment therefor, to receive notes and have the same discounted for the benefit of his principals, W. Horter & Co.; he did not exceed his authority in this instance; there was no question of improper conduct, of *mala fides*, of appropriation of the money by Jones to his own use. W. Horter & Co. received the money from him immediately, and, having received and used it, they cannot escape from their liability on the endorsement.

Feb. 12. THE COURT. The defendants received the proceeds of the discount of these notes by Silliman, and were so informed by the very letter in which Jones remitted Silliman's check for the proceeds. They, therefore, must have known that Jones negotiated them as their agent. Having received and retained the money, with a knowledge of its source, and on what account paid, they cannot now set up a want of authority on the part of Jones. If they objected to Jones's act, they ought to have notified Silliman, and returned his check to him. They cannot hold the money and escape liability upon the indorsement of their agent used in negotiating the notes.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

Digitized by Google

Common Pleas—Law.

C. P. No. 1. Feb. 3, 1877.

Com'th ex rel. McCauley v. Malony.

Bail—The surety on the bail bond has fourteen days from the service of a summons to surrender his principal—Practice

Rule to show cause why an *exoneratur* should not be entered.

Debt on a bail-bond.

The plaintiff, having obtained judgment against the defendant in the original suit who had been arrested on a *ca. sa.* and for whom the present defendant became bail, issued a *fi. fa.* and *ca. sa.*, and, the latter being returned *non est inventus*, instituted this suit upon the bond.

The summons issued January 26, 1877, returnable to 1st Monday in February. The defendant, having taken out a bail piece, on the 1st of February surrendered his principal to the sheriff, and took this rule.

Jacquett and *Charles E. Morris*, for the rule.

Since the Act of June 13th, 1836, the practice has been to allow the bail fourteen days from the service of a summons upon them in which to surrender the principal.

Carey *et al. v.* Henry, 3 Penn. L. J. Rep. 32.
Tr. & H. Practice, vol. i. 322; vol. ii. 456.
Still *v.* Howard, 2 Miles, 274.

The only defence to an action on the bond is the *exoneratur* on the bail piece.

Harrington *v.* Jacquett, 3 Phila. 325.

The first day of the term is not included in calculating the fourteen days.

Cowles *v.* Brawley, 4 Watts, 358.

When the principal has been arrested on a bail piece, an order of discharge made by the Court is conclusive against the bail, though erroneously made.

Lopeman *v.* Henderson, 4 Barr, 231.
Thos. Kall & Co. *v.* Brown, 9 Watts, 288.

Lucas Hirst, contra. This is an irregular proceeding, since no steps can be taken for exoneration of the bail, without the certificate of the sheriff that the defendant is in his custody. The condition of the bond is broken upon a return of *non est inventus*, and a subsequent surrender of the principal cannot be pleaded.

Tr. & H. Practice, vol. i. 322.

C. A. V.

Feb. 10. The Court. The surrender was made within fourteen days, the time allowed by law; and hence the bail is entitled to an *exoneratur*.

Rule absolute.

C. P. No. 3. Feb. 3, 1877.

Mutual Assurance Co. v. Power.

Mortgage—Release by the mortgagee of a portion of the mortgaged premises affecting a subsequent lien upon the remainder—What will amount to notice to the mortgagee—Actual notice—Act of April 2, 1822.

Rule to open judgment and let the defendant into a defence.

The Mutual Assurance Company for insuring houses from loss by fire were the assignees of a mortgage for $10,000, secured originally upon a vacant lot of ground at the corner of 39th and Locust Streets, 100 feet in width and 120 feet deep on 39th street. This large lot was subdivided into three smaller lots, and the one at the corner 30 feet in front on Locust Street was in 1875 the property of John Powers. In the early part of 1875 he contracted with John A. Palmer for the erection of a house upon this corner lot, the contract price being $14,000. The building was commenced on 20th May, 1875, and was finished 6th May, 1876. On Nov. 15, 1875, when the house was almost completed, the Assurance Company released 70 feet of the large lot from the lien of the mortgage, thus imposing upon the corner lot the whole of the $10,000. The contractor upon the completion of the house having received but $4000, filed his lien for $10,000, issued a *sci. fa.*, obtained judgment, and in July, 1876, sold the house at sheriff's sale and purchased it for $9500. He did not obtain a deed until December. Default having been made in the payment of interest on the $10,000 mortgage, suit was commenced, a judgment obtained, and the property advertised for sale on the 5th February, 1877. In the suit upon the mortgage no service was made upon the terre tenant Palmer, but judgment was obtained upon two returns of *nihil habet*. No actual notice was ever given by the contractor to the mortgagee that he had acquired a lien upon the premises.

Nathan H. Sharpless and *Edwin S. Dixon*, for the rule.

The mortgagee when notified that subsequent creditors had acquired a lien upon the corner lot had no right to impose upon that one lot the whole of the $10,000, and thus deprive the contractor of his security.

Taylor's Executors *v.* Maris, 5 Rawle, 51.

Under the Act of Assembly of 2d April, 1822, § 1 (Purdon's Digest, pp. 479–80) the defendant is entitled to have a jury say how much of the $10,000 shall be imposed upon the corner lot.

The fact that the other two lots were not released from the lien of the mortgage until the house on the corner lot was almost completed, shows conclusively that the plaintiff had actual knowledge that the house was being erected, because the bare lot is not worth $10,000.

Digitized by Google

Peter McCall, contra.

The release was executed by the mortgagees in good faith. There is nothing in the depositions to show that the Assurance Company had any notice that the release would injuriously affect any one. If the lien creditor desired the plaintiffs to "withhold their hands" he should have given them actual notice.

Taylor's Executors *v.* Maris (*supra*).

Why should the plaintiffs, if they had seen the house in course of erection, imagine that the contractor was not being paid or that Mr. Powers was not building the house?

It is reasonable and just to require strict proof of notice. The subsequent lien creditor had full knowledge that the land was subject to the mortgage, and he ought not to subject the mortgagee to the necessity of investigating his contracts and transactions with the mortgagor in order that he may be protected when he can so easily protect himself by giving notice to the mortgagee.

The knowledge of the subsequent lien and that the release will injuriously affect the lien creditor must be clearly brought home to the mortgagee in such a way as to show an intentional disregard by him of the interests of the subsequent lien creditors.

Washburn on Real Property, 2d ed., vol. 1, *523.
Wheelwright *v.* Depeyster, 4 Edwards' Ch. 232.
Stuyvesant *v.* Hone, 1 Sandford Ch. 419.
Blair *v.* Ward, 2 Stockton's Ch. 126.
Cheesebrough *v.* Millard, 1 Johns. Ch. 126.
George *v.* Wood, 9 Allen, 80.

C. A. V.

Feb. 5, 1877. THE COURT. This is a case in which we have a grave doubt; to rule it against the motion, would deprive the contractor of every remedy. No doubt notice is required. Here the lot was in the possession of the contractor, by whom an expensive house was erected, and the question of fact involved in this possession of the lot, and erection of the building, as it bears on the question of notice to the mortgagee, should go to a jury subject to the direction of the Court.

Rule absolute.

Oral opinion by LUDLOW, P. J.

C. P. No. 3. Feb. 8, 1877.

Paul v. The Keystone Lodge.

Action against an unincorporated beneficial association by name—Suit by a member for benefits—Semble that such a proceeding should be by bill in equity—Act of April 28, 1876.

Sur demurrer to declaration.

This was an action in assumpsit for sick benefits, brought against The Keystone Lodge, No. 2, Knights of Pythias (*eo nomine*).

The declaration set forth, *inter alia*, that the defendant lodge was an unincorporated association, of which the plaintiff was a member.

Defendant demurred and assigned for cause that the plaintiff could not maintain this action against his copartners.

E. R. Worrell, for demurrer.

J. L. Tull, contra, argued that, although it had been decided in Pritchett *v.* Schaeffer (2 WEEKLY NOTES, 317), that the members of an unincorporated society were to be considered as partners, yet the Act of 28 April, 1876, sec. 1 (P. L. 53), had expressly changed the law as laid down in that case, and such societies are now to be considered as *quasi* corporations.

C. A. V.

Feb. 10. THE COURT. We concur in the opinion of ALLISON, P. J., in Pritchett *v.* Schaffer (*supra*), and, as it appears on the face of the record in this case that the defendant is an unincorporated society, we hold that the present action cannot be sustained. The Act of 28 April, 1876, declares that members of beneficial societies "shall not be individually liable for the payment of periodical or funeral benefits or other liabilities of the lodge or other organization," and provides that "the same shall be payable out of the treasury of such lodge or organization." In some way, therefore, you may reach the funds in the hands of the treasurer, but it is doubtful whether it would not be better to file a bill in equity and let chancery exercise its control over them.

Demurrer sustained.

Oral opinion by LUDLOW, P. J.

C. P. No. 4. Jan. 13, 1877.

Cole v. Wehn and Bawdon.

Negligence—Liability of employer for accident to employé—Where a certain state of facts is proved from which a certain occurrence might naturally follow, and such occurrence does follow, it is a question for the jury whether the occurrence is a result of the state of facts.

Rule to take off non-suit.

This was an action on the case brought by Mary Cole, widow of George M. Cole, for negligence resulting in the death of her husband, who was in the employ of the defendant Bawdon. There was no evidence as to the defendant Wehn, and the case was abandoned as to him.

At the trial before ELCOCK, J., the following facts appeared. The deceased was employed by Bawdon, who was a master stevedore, at a large building, filling buckets with sand, which were drawn up to the seventh story by means of a single fall pulley and rope attached to a beam run out of the eighth story. The rope terminated in a large open hook from which was suspended the

Digitized by Google

bucket, weighing, when filled, 500 lbs. At the seventh story, immediately below the pulley, was a platform upon which, without detaching the bucket, the sand was emptied into a chute. The bucket was drawn up by horses managed by a boy. Should the horses back when the bucket was up, the bucket would descend on the platform and thereby become liable to be unhooked and fall. There were two buckets; while one was being drawn up the other was being filled. The decedent was employed on the ground filling the buckets with sand, and while so engaged was struck and instantly killed by a falling bucket. It did not appear how the falling of the bucket was occasioned.

THE COURT entered a non-suit, on the ground that it did not appear how the accident had occurred, and that the deceased, by continuing in the work with knowledge of the defects in the tackle, had assumed the risk and waived the right to insist upon his remedies.

G. P. Rich having obtained a rule—

J. Alex. Simpson now showed cause.

An employer is not responsible to an employé for negligence of a co-employé.

Caldwell *v.* Brown, 3 Sm. 453.
Patterson *v.* Railroad, 26 Id. 389.
Johnson *v.* Bruner, 11 Id. 58.

The decedent, knowing the character of the employment, took the risk when he entered it.

G. P. Rich, in reply.

The evidence discloses negligence in the master in employing an incompetent person to drive the horse, and in furnishing unsafe tackle.

In this action, although the burden of proof is upon the plaintiff, as there was no contract of safety, yet sufficient affirmative proof has been adduced to overcome the presumption of law, by showing that the tackle was unsafe, and likely to cause the accident; it is therefore for the jury to say whether the accident did or did not happen from that cause.

Raydure *v.* Knight, 2 WEEKLY NOTES, 713; 3 Id. 109.

When the negligence of the employer has been established, the proof of a result which would naturally happen from that negligence is sufficient to send the question to the jury. The negligence of the master was the proximate cause, and the negligence of the co-employé does not excuse him.

Caza *v.* Taylor, 10 Gray, 274.
3 Macqueen's H. of Lords, ch. 290.

The provision of a dangerous tackle was negligence.

Johnson *v.* Bruner, 11 Sm. 58.
Hey *v.* City of Phila., 2 WEEKLY NOTES, 465.

If no other inference can be drawn, it must be left to jury.

R. R. Co. *v.* Stranahan, 29 Sm. 485; S. C., 2 WEEKLY NOTES, 215.
Briggs *v.* Oliver, 4 Hurl. & C. 403.

There is no evidence, except inferential, that deceased knew of the risk. He had a right to rely upon his employer's judgment. It is for the jury to say whether, under the circumstances, the deceased was negligent himself.

Patterson *v.* Pittsburg and Connellsburg R. R., 26 Sm. 389.
R. R. Co. *v.* Barber, 5 Ohio St. 541.

C. A. V.

Feb. 10. Rule absolute.

[*Cf.* R. R. Co. *v.* Decker, *ante*, 121; Mullan *v.* Steamship Co., 1 WEEKLY NOTES, 214; Clark *v.* R. R. Co., Id. 315, 446; Patterson *v.* R. R. Co., Id. 569; Fox *v.* Dougherty, 2 Id. 417; Haas *v.* Steamship Co., Id. 611; Collins *v.* Harrison, Id. 353; Stewart *v.* Alcorn, Id. 401.]

C. P. No. 4. **Steffey v. Frost.** Feb. 10, 1877.

Mechanic's lien law—Apportioned claim less than fifty dollars—Not within the Act of 16 *June*, 1836.

Rule to strike off lien.

The claim was filed against two contiguous houses, for work done and materials furnished by the plaintiff in repairing the said buildings. The plaintiff claimed to have a lien on each of the houses for the sums apportioned. The aggregate claim was sixty-six dollars and seventy-two cents; thirty-three dollars and thirty-six cents of which was apportioned to each house.

Benjamin R Wrigley, for the rule.

The lien was filed against two houses, but the sum apportioned to each house was less than fifty dollars; it was therefore not within the Act of June 16, 1836. (Purd. Dig. 1028, pl. 21.)

J. R. Adams, contra.

C. A. V.

Feb. 17. THE COURT. This claim is filed against adjoining houses for repairs. The aggregate claim is sixty-six dollars and seventy-two cents; thirty-three dollars and thirty-six cents being apportioned against each house. The defendant and owner moves to strike the claim from the record, and assigns for cause, among other reasons, that the claim apportioned against each house is less than fifty dollars.

The Act of Assembly applicable in the premises denies the right to charge any house or building for repairs or alterations done thereto, where the debt is for a less sum than fifty dollars. The debt claimed here against each house is for a less sum than the statutory allowance, and hence not within the statute. Nor is the defect cured by the aggregate charged against both houses, as each house is answerable only for repairs done to it alone.

It follows from this, without adverting to the other reasons raised by the plaintiff, that the claim must be stricken from the record.

Rule absolute.

Opinion by BRIGGS, J.

Digitized by Google

Orphans' Court.

Gordon's Estate. May 16, 1876

Partnership assets—Distribution—A pledge by a deceased partner in his lifetime of his individual property as security for a firm debt is, to the extent that the securites are used, so much added to the firm capital; and firm creditors must be paid in full before the estate of the creditor partner can receive the value of the securities so used.

Sur exceptions to adjudication upon the audit of the account of the administrator of Nathaniel P. Gordon, who was the surviving partner of the firm of Repplier, Gordon & Co.

In 1872 George S. Repplier and N. P. Gordon were partners, under the name of Repplier, Gordon & Co. Their business was mining, shipping, and selling coal. At the same time George S. Repplier was a partner in another firm engaged in similar business, under the name of George S. Repplier & Co. This latter firm was composed of George S. Repplier and two men who had practical charge of the collieries.

In October and November, 1872, Repplier, Gordon & Co. borrowed from the Philadelphia and Reading Coal and Iron Company $120,000 upon the security of certain mortgages and stock estimated to be worth, in the aggregate, $164,000. The greater part of these securities, that is to say, four mortgages estimated to be worth $110,000, and stock estimated at $8000, was *the property of George S. Repplier*, and was assigned voluntarily by him to secure the loan made to the firm. Of this loan of $120,000, Repplier, Gordon & Co. gave to George S. Repplier & Co. the sum of $79,258.67, which amount was charged and credited accordingly on the books of both firms.

George S. Repplier died in 1873 and N. P. Gordon in 1874. In the course of the administration of the firm assets, Seth Caldwell, Jr., the administrator of Gordon, the surviving partner of the firm, entered into an agreement with the widow and administrator of George S. Repplier, and certain creditors of George S. Repplier, and certain firm creditors; but the creditors of the firm claiming here were not parties to and in no way ratified this contract. Under it, the said Caldwell was authorized to sell at private sale to the Philadelphia and Reading Coal and Iron Co. two collieries, the property of the firm, for $270,000, the balance of which sum, after the payment of certain claims which were liens on the collieries, was to be applied to the liquidation of the indebtedness of Repplier, Gordon & Co. to the Coal and Iron Co., and further, that the said Caldwell, administrator, may receive from the Philadelphia and Reading Coal and Iron Co. all the property, of every character, which was deposited and still remains with the said company to secure the payment of said indebtedness as well that which it is claimed belongs to the separate estate of George S. Repplier, as that which it is admitted belongs to the estate of Repplier, Gordon & Co.; and that he may use and apply the proceeds of the former, so far as may be requisite, for the payment of any balance which shall remain due to the Coal and Iron Company by the firm of Repplier, Gordon & Co., after the appropriation of the proceeds of the collieries to the liquidation thereof, as aforesaid. In this agreement it was expressly provided that "the respective rights of the firm estate and of the separate estates in and to the proceeds of the said collaterals which shall be so used, and the respective rights of each of said estates arising from the said use of those which shall be used, shall not be in any manner affected or prejudiced hereby, but are to remain for future adjustment or determination."

In pursuance of this agreement the collieries were sold, a mortgage belonging to Repplier, Gordon & Co. of $3000, and two mortgages worth about $35,000, which had been the property of George S. Repplier, and assigned *inter alia* by him to the Coal and Iron Co. as security for the loan of $120,000, were transferred to the Coal and Iron Company. The entire debt was thus paid, and the remaining securities belonging to George S. Repplier were returned to his administrator.

The fund in the hands of the administrator of Gordon, the surviving partner of Repplier, Gordon & Co., obtained from the collection of debts due the firm and from the sale of coal owned by the firm was $9190.50. The firm creditors claimed that they were entitled to be paid out of it their claims amounting to about $3000. The administrator of the estate of George S. Repplier claimed the entire sum, and it was awarded to him by O'Brien, J., who audited the account.

To this adjudication the firm creditors, who were not parties to, and had not in any way ratified the agreement, filed exceptions.

S. S. Hollingsworth, *C. Stuart Patterson*, and *James Starr*, for the exceptants.

The Coal and Iron Co. was not a party to the agreement. In pursuance of its right, it elected to take the securities; and the effect of the agreement, *quoad* these securities, was merely to enable the company to take them at a valuation, and so avoid the sacrifice of a public sale. Upon the exercise of this right, the title of the pledgor

Digitized by Google

was absolutely gone. The loan of securities to the amount of $118,000 by George S. Repplier to secure the firm debt of $120,000 was in effect a pledge to the firm with the understanding that the owner of the securities was to have a large part of the money borrowed. Of the $120,000, George S. Repplier & Co. did obtain $79,258.67; and both sets of books show an indebtedness of that firm in that amount to Repplier, Gordon & Co.—such debt far exceeding the value of George S. Repplier's collaterals actually used by the firm. Therefore, upon the facts, no equity is raised in favor of George S. Repplier's estate and against the firm estate. Upon repaying the money borrowed, the firm would of course have the right to take the securities.

McCormick *v.* Irvin, 11 C. 111-117.

George S. Repplier in fact became a creditor partner. An advance to the firm, as against creditors, is to be treated as so much added to the capital, and before any account between the partners of the firm and separate estate can be settled, the firm creditors must be paid in full.

Adams's Equity, *244, and notes.
Bispham's Equity, 515, and notes.
Babb *v.* Reed, 5 R. 151.

Nor can a partner, who pays a firm debt, claim by subrogation.

Ex parte Sillitoe, 1 Glyn & Jameson, 354.
Curtis *v.* Perry, 6 Ves. 739, 748.
Ex parte Kendall, 17 Id. 520.
Neff *v.* Miller, 8 Barr, 347.
Bailey *v.* Brownfield, 8 Har. 41.
Manson *v.* Gordon, L. R. 1 App. Cases, 195.

This Court recognizes only two classes of claimants, creditors of the decedent, and distributees and legatees.

If, therefore, Repplier's administrator bases his claim upon the agreement of Gordon's administrator, his remedy is not against Gordon's estate, but against Mr. Caldwell in his personal capacity, and such action would not be within the jurisdiction of this Court.

R. M. Schick and *G. M. Dallas*, contra.

The effort here is to get payment in full from George S. Repplier's estate, instead of *pro rata* with other creditors. The loan was to Repplier, Gordon & Co., and it is not material to this inquiry that George S. Repplier & Co. at the same time or subsequently received a portion of the money which George S. Repplier's securities were advanced to secure. The securities belonged to Mr. Repplier, whereas the money was received by George S. Repplier & Co. Mr. Repplier's individual property has not ceased to be his because pledged for a firm debt. The administrator cannot hold the collaterals for the debt of George S. Repplier & Co. There is no lien upon them, and set-off would not be a plea in an action of trover; even if there were valid foundation for such a claim, this Court cannot go into partnership accounts to ascertain the claim to collaterals made by reason of a lien or a set-off. Under the agreement, the administrator of the firm estate was bound to apply the firm assets to the payment of the debt to the Coal and Iron Company first before the securities of George S. Repplier were touched; not having done this, the present fund stands where the securities would have stood, had this fund been used in liquidating the debt to which the securities were appropriated, and the entire fund was, therefore, properly awarded to the estate of George S. Repplier.

C. A. V.

May 27, 1876. THE COURT (after stating the facts): The balance in the hands of accountant was realized from the collection and conversion of assets of the firm. This being the case, it is a general rule of law, both in England and in this country, that partnership assets must be first applied to the payment of partnership debts. (Parsons on Partnership, *346; Bispham's Equity, 461; Black's Appeal, 8 Wright, 503; Houseal and Smith's Appeal, 9 Wright, 484.)

And the administrator of a deceased partner, who during the continuance of the partnership pledged his private property to secure a debt due by the firm, stands in the same position as respects the surviving partner or creditors of the firm, as the decedent whom he represents. Here the deposit of the collaterals, although the separate property of the partner, was for the benefit of the firm, and it thereby became a firm transaction, equally as if the partner had with his own moneys or individual obligation paid the debt. Where partners borrow money to be used in the business which they are jointly carrying on, it becomes a partnership fund; and no matter how they stand on the security given to the lender, they are accountable to one another as partners. The relation of principal and surety can have no place between them. The partner paying the debt cannot be substituted to the rights of creditor, as against his copartner; he must first account for the profits of the business in which they were jointly engaged. If there is anything due him, account render is his remedy at law, and to that action, or to a bill in equity for an account, he ought to be remitted. (Baily *v.* Brownfield, 8 Harris, 46.)

An advance to the firm, as against creditors, is to be treated as an addition to the capital, and does not, *ipso facto*, constitute the partner a creditor of the firm. It cannot be determined whether, even after such advance or loan, he is a creditor of the firm, until the settlement of the business of the firm, payment of all its debts, and the adjustment of the accounts of the several partners. A partner to whom the partnership is indebted, can have no satisfaction, but out of

Digitized by Google

what remains after all the joint debts are paid. And there is no individual or separate estate in firm property, except in the residuum, after the payment of the firm debts. (Watson on Partnership, *329; Story on Partnership, § 97.)

The pledge by the deceased partner in his lifetime of his individual property was a loan or advance to the firm of which he was a member, and for his own benefit. To hold him to be a creditor of the firm, and entitled to preference in the distribution of its assets, should his collateral securities be used, either wholly or in part, to pay his own debt, or in case of the insolvency of the firm, entitled to share *pro rata* with the firm creditors, would be contrary to equity. If the firm was unable to pay the debt, it must be presumed that the natural consequence was anticipated and intended by the partner pledging his private property, to wit, that it should be sold by the creditor. For the reasons stated, the conclusion is inevitable, that as the deceased partner, against the joint creditors, did not occupy the position of a creditor, so neither can his administrator claim as such to their prejudice. The exceptants were not parties to the settlement made by accountant with a creditor, who thereby was given a preference, and their rights cannot be affected or diminished by such settlement. Being of opinion that the claims of the creditors are entitled to payment, and that the balance remaining should be retained by accountant to await a settlement of the accounts between the copartners, the exceptions are sustained.

Opinion by HANNA, J.

Barnett's Estate. Feb. 10, 1877.

Petition to mortgage real estate for the payment of debts and maintenance of minors—Should be presented by administratrix alone—Petition joined in by guardian, not in proper form—Requisites of petition—Order to mortgage not granted where there is a previous unexecuted order of sale outstanding—Act of March 20, 1832—Orphans' Court practice.

Sur petition for leave to mortgage real estate of decedent.

The petition of the administratrix, in which the guardian of the minor children of decedent joined, set forth that decedent died seized in fee of certain real estate therein described, subject to two mortgages; that it was comparatively large, unproductive, and the buildings were in need of repairs; that the personal estate amounted to $2021.35, including a mortgage for $1600, which was not due until 1884. That the Court, on the petition of the guardian, in April, 1876, granted an order of sale of the premises, and the same had twice been offered at public sale, but without obtaining any bid, and subsequent efforts had been made to secure a purchaser at private sale, but at present there is no prospect of selling said real estate. That suit has been commenced and judgment obtained upon one of the two mortgages against said premises, and the holder of the second mortgage threatens to proceed upon his mortgage. That a number of debts not of record also remain unpaid, as per list annexed. Wherefore the petitioners, believing it would be for the best interest of said minors, pray for authority to join with the son of decedent, who is *sui juris*, in executing a first mortgage upon said real estate for such amount as would cover all of the debts against said estate.

Waxler, for the petitioners.

Feb. 17. THE COURT. This petition is apparently presented under the Act of March 29, 1832 (Purd. Dig. 428, § 111), but is not in proper form. If it is proposed to mortgage the real estate for the purpose of paying debts of the decedent and also to maintain and educate his minor children, then the petition should be by the administratrix alone. The guardian should not be joined. He is not a proper party, as he has nothing whatever to do with the payment of debts. But if it is also contemplated to improve and repair the real estate, then that is a matter over which the administratrix has no control, and is solely within the guardian's powers. The petition is therefore defective in including improper parties, and combining subjects which the act requires to be kept separate and distinct. The precise sum it is desired to obtain upon mortgage should be stated in, and a copy of the inventory and appraisement of the personal property, filed in the register's office, annexed to the petition. A statement of the gross amount of the personal property, as in this petition, is not a compliance with the Act of Assembly.

A further defect in the application is that an order of sale of the real estate is still outstanding and unexecuted. This should be returned or vacated. Until then it would be irregular to authorize the execution of a mortgage upon the same premises.

For these reasons the petition is refused.

Opinion by HANNA, J.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] THURSDAY, MARCH 15, 1877. [No. 24.

Supreme Court.

Oct. & Nov. '75, 300. Oct. 6, 1876.

Seely v. City of Pittsburgh.

Constitutional law—Act of April 2, 1870—Frontage method of assessing cost of paving and similar municipal improvements—Unconstitutional when applied to property in suburban districts—City of Pittsburgh bonds

The method of assessing the cost of paving and other similar municipal improvements, in proportion to the frontage of property on the street improved, although sustained, as to closely built up portions of a city, by a long line of decisions, is, when applied to property in suburban districts, in derogation of the constitutional rights of the property holders.

The Act of April 2, 1870 (P. L. 796), is unconstitutional in so far as it attempts to apply this method of assessment to property in such suburban districts.

Error to the Court of Common Pleas No. 2 of Allegheny County.

This was a *sci. fa.* sur municipal claim, brought by the City of Pittsburgh against C. B. Seely. A case-stated was submitted to the Court, setting forth the following facts:—

The Act of Assembly of April 2, 1870 (P. L. 796), entitled "An Act to provide for the improvement of Penn Avenue and other avenues and streets in the City of Pittsburgh," and the supplements thereto of Feb. 1, 1871, and March 2, 1872, provided that a majority of the owners of property fronting on Penn Avenue, between St. Mary's Avenue and the eastern boundary of the city, should have the power to elect, in a manner prescribed, commissioners to control and superintend the paving, grading, etc., of that portion of the said avenue; that these commissioners should determine the kind of pavement, contract for the work, sell city bonds to pay the contractors, and, on the completion of the work, ascertain the entire amount of the bonds so sold and the interest thereon; that this amount should be taken to be the cost of the improvement and be assessed equally per foot upon the properties abutting on the said avenue; that on the failure of any property holder to pay such assessment, the city might file a lien therefor, in the nature of a mechanic's lien, and issue a *scire facias* upon such lien; and, finally, that the act should not take effect until approved by the councils of the city.

The approval of the councils was obtained, the commissioners elected, and the paving done, strictly in accordance with the provisions of the Act. Bonds were issued to the amount of $356,500, and after the completion of the entire work, the total cost was assessed equally per foot front on the adjacent properties.

The defendant owned property with a frontage of 108½ feet on the avenue, on which the assessment amounted to $1073.84. A lien was filed for that amount against the property, on which lien this suit was brought. The line of the said improvement ran, in part, through what is called the rural or suburban portion of the city, and the defendant's property was situated in such rural district, as shown by an annexed plan.

It was agreed in the case-stated that if, under the above state of facts, the Court should determine that the said assessment was not in derogation of the defendant's constitutional rights, judgment should be entered for the plaintiff for the amount thereof, with interest and costs; that otherwise judgment should be entered for the defendant for costs; and that either party should have the right to take out a writ of error to the Supreme Court.

The Court entered judgment for the plaintiff on the case-stated. The defendant thereupon took this writ, assigning for error the judgment of the Court.

M. A. Woodward (*J. W. Kirker* with him), for the plaintiff in error.

The Act of April 2, 1870, is unconstitutional, for it directs the cost of the improvements contemplated by it to be assessed on the property-holders in proportion to the frontage of their property on the street to be improved. Now this rule, although equitable and expeditious as to thickly settled portions of a city, is, when applied, as in this Act, to improvements in suburban districts, extremely unequal and unjust. The cost of the improvements will often exceed the whole value of the property, thus sweeping away entirely the safeguards thrown around the right of private property by the bill of rights.

In re Washington Ave., 19 Sm. 361.
Hammett *v.* Philadelphia, 15 Id. 155.
Cooley's Constitutional Limitations, 500.

G. Shiras, Jr. (*T. S. Bigelow* with him), contra.

The frontage rule has been sustained by too many decisions of the Court, for its constitutionality now to be questioned.

Pennock *v.* Hoover, 5 Rawle, 291.
Northern Liberties *v.* St. John's Church, 1 H. 104.
City *v.* Wistar, 11 C. 427.
Com'th *v.* Woods, 8 Wr. 113.
McGonigle *v.* City, Id. 118.
Magee *v.* Com'th, 10 Id. 358.
Stroud *v.* City, 11 Sm. 255.
Schenley *v.* City, 1 C. 130.
City *v.* Tryon, 11 Id. 404.

Digitized by Google

City v. Field, 8 Sm. 320.
Smith v. McCarthy, 6 Id. 259.
Lea v. City, 2 Weekly Notes, 254.

Jan. 2, 1877. The Court. It is fortunate for the rights of the people when a case occurs causing the Courts to pause and to retrace the boundaries of delegated powers. Thus the stealthy steps of invasion may be detected and the power denied, ere it be too late and a precedent become fixed beyond judicial control.

This is such a case. The attempt is to apply, here, the frontage rule of valuation of compact city lots, to a rural population, and make farm property and town lots indiscriminately pay for an expensively paved city highway, under the name of a street, running far out into the country. The assumption is that by the addition of extensive rural districts to a city, the whole surface is brought by the legislative power within the sphere of city taxation for municipal purposes; and cases are cited of local or special taxation for local purposes, as justifying this stretch of power. But seeming analogies must not be allowed to lead our minds astray. Fortunately this subject has been examined in several recent cases, leading to a fuller development of the principles at the foundation of this power. Prominently among them are Hammett v. Philadelphia (15 P. F. Smith, 146), and Washington Avenue (19 P. F. Smith, 352). In the early cases the mode of determining the benefits, to pay the damages and the cost of construction, was by actual view and assessment. (McMaster v. The Commonwealth, 3 Watts, 292; Fenelon's petition, 7 Barr, 173; Extension of Hancock Street, 6 Harris, 26.) These were followed in the later cases of Commonwealth v. Woods (8 Wright, 113); McGee v. Pittsburgh (10 Wright, 358); Wray v. Pittsburgh (10 Wright, 365) Afterwards came the frontage mode of equal valuation per foot front. (Schenly v. City of Allegheny, 1 Casey, 128; Philadelphia v. Tryon, 11 Casey, 401; Schenley v. Allegheny, 12 Casey, 57; McGonigle v. Allegheny, 8 Wright, 118; Stroud v. Philadelphia, 11 P. F. Smith, 255.)

In none of these cases was there a close examination of the per foot front rule, but it seems to have been assumed as a convenient approximation where the property fronting on the street was of a kind, and not differing much in value. But in "Washington Avenue" it is shown that this mode of valuation is but a substitute for actual assessment. It is there said: "So long, therefore, as a law faithfully and reasonably provides for a just assessment according to the benefits conferred, and does not impose unfair and unequal burthens, it cannot be said to exceed the legislative power of taxation when exercised for proper objects. It is on this ground only that assessments according to the frontage of property on a public street to pay for its opening, grading and paving, can be justified. As a practical result in cities and large towns the per foot mode of assessment makes a just and equal apportionment in most cases." Again: "But it is an admitted substitute only because practically it arrives, as nearly as human judgment can ordinarily reach, at a reasonable and just apportionment of the benefits on the abutting properties." "But this rule, as a practical adjustment of proportional benefits, can apply only to the cities and large towns where the density of population along the street and the small size of the lots make it a reasonably certain mode of arriving at a true result. To apply it to the country and to farm lands would lead to such inequality and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursuance of law; so that at first blush every one would pronounce it to be palpably unreasonable and unjust."

It needs no reasoning to prove the soundness of these views. That the benefits a property owner receives from an improvement can be ascertained only by a reasonable mode of assessment, is plain; and that to measure the fronts of all the abutting properties and divide the cost by an equal charge per foot front upon each, is not an assessment of advantages, but simply an arbitrary mode of charging, is equally plain. Therefore to be just and equally fair to each, it is evident all the owners must stand in like, or in reasonably equal, circumstances; otherwise the charge is an exaction, not a fair assessment. The cases of frontage cited, as far as discoverable, were of city lots in close juxtaposition. The frontage rule, when applied to such cases, is not denied. As remarked in Washington Avenue, "Whatever doubt might have been originally entertained of it as a substitute, which it really is, for actual assessment by jurors or assessors under oath, it has been so often sanctioned by decision it would ill become us now to unsettle its foundation by disputing its principle."

These remarks will enable us to test the case before us. The law under which the proceeding took place was peculiar, and, in some respects, extraordinary. It was passed April 2, 1870 (P. L. 796). A marked feature is that it gives power to a majority of the abutting owners on Penn Avenue, between St. Mary's Avenue and the eastern boundary of the city of Pittsburgh, a distance of about three miles, to elect a commission of five citizens, without any previous ordinance or subsequent control of the city. The only assent of the city required was its approval of the Act before its taking effect. Then the commissioners were to determine the kind of pavement, contract for the work, make requisition on the city for bonds, and sell them to raise money

Digitized by Google

to pay the contractors. When the Avenue was completed, it was to come under the city's control. The commissioners were to ascertain, on completion, the entire amount of bonds sold by them and the interest, and this should be taken to be the cost of the improvement and assessed equally per foot front upon the abutting properties. They were to give notice, and within twenty days might correct errors. After that their judgment became final without appeal. Now, though technically it may be said the improvement was made under municipal authority, because of the general approval of the Act by the city, yet, in fact, the improvement is made by a majority of the owners, the minority *nolens volens*. It is, perhaps, not beyond the power of the legislature to authorize the work to be done by such a commission, but it will be seen that practically the voice of the property owner who objects to be thus charged with the expense, is not heard even through his representatives in the city councils. The municipal authority cannot even intervene for his protection. Now, without resting a decision on these harsh features of the law, they constitute strong reasons for a rigid examination into the power of the legislature to authorize the frontage rule to be applied to this case. The east end of Penn Avenue, upon which this improvement is made, extends from St. Mary's Cemetery, near the U. S. Arsenal, eastward for about three miles, as shown by the distance upon the plot made part of the stated case; passing in that distance the grounds of several cemeteries and through lands, partly farms, partly large rural residences, partly smaller, and partly the lots of several hamlets and villages which were taken into the city territory. The avenue is a broad wood-paved highway, after the manner of a city street, and its cost, as evidenced by the bonds issued, was $356,500.

While the cost per foot front, as evidenced by the map and the charge, was within a small fraction of ten dollars, the defendant's lot being $108\frac{48}{100}$ feet front, and his assessment $\$1073\frac{84}{100}$, the bonds which, under the 16th section, were made the cost of the improvement, were made up of the contract price, and the incidental expenses. The contracts were to be let by the commissioners without supervision, the law providing for no settlement of their account, and the expenses were such as might be determined by the commissioners to be incidental, and subject to no review. The commissioners were, no doubt, reputable men, and so far as their personal supervision went, their duties were performed, no doubt, faithfully. Yet such a system, which subjects the property holders to jobbing contracts, and ingenious expedients, such as men bent upon making all they can out of their jobs adopt, and to patent-right claims for wooden streets, which rot out in seven or eight years, without a power of self-protection or the control of even their representatives in councils, is not to be viewed complacently.

How near the actual value of the improvement approximated the estimated bond cost may be inferred when it is seen that the whole cost was $350,000, and the per foot cost ten dollars. This blending of town and country, of city lots and farm lands, of the residences of the living and the graves of the dead, constitutes a group so motley and discordant, a series so wanting in similitude and uniformity, that the frontage or per foot rule cannot be applied to it. It is so plainly, palpably, and rankly unjust, it must be pronounced no proper or lawful mode of special taxation, but an injustice so rank that it is therefore void as against the right of property as protected by the bill of rights. The ground of this has been so distinctly stated in the Washington Avenue case, it need not be restated here. (19 P. F. Smith, 363)

A fixed sum to be paid per foot, without regard to the character, kind, extent, or value of the property, is an exaction, not a just assessment according to benefits. The extent back to which the lien runs (120 feet) merely limits the quantity to be taken, but does not change the kind, character, or value of the property upon which the fixed charge is fastened.

But it is said that Seely's lot is in a village, and therefore the foot rule may apply to him. Possibly this might have been the case had the streets of that village alone been improved. But this is not its character. The act assumes to make a wide and costly avenue, extending long distances through rural lands where it is not needed, and to make the cost of the whole the measure of the cost of each owner. It makes a unit of the entire distance, where the per foot front rule obtains and where it does not obtain, and then divides this integer into fractions of a foot; imposing on the defendant his proportion of the fractions. Such a mode of charging might be continued for any indefinite distance over the State, and the owner of each lot in every village through which the line passed be made to pay his per foot charge of the entire route. The principle of such a system is wrong, and therefore cannot be applied even to the village lot owner. If the rural portions of the route be exempt, as clearly they must be, then must all others be also, for the system itself is founded on a general *error*. If this case be examined closely, what is it but a repetition of the Hammett *v.* Broad Street case in principle, differing only in form. Penn Avenue, like Broad Street, is a grand thoroughfare, designed for the use of the people of the city proper, where they may ride out into the country for pleasure or profit. That it is a great, useful, public improvement, so long as its wooden

Digitized by Google

pavement lasts, no one will deny. But it is this very public character for general use, and not for local benefits through the farms and along the cemeteries, which should protect the owners along the route from special taxation. More literally and directly the case is governed by the case of the Washington Avenue, which it resembles closely in form and fact.

More than once lately we have had occasion to reprehend that legislation which seeks to cast the burdens of the public on the shoulders of individuals, often bringing ruin on men of moderate means. Such legislation is too often the fruit of designing schemers, to promote their selfish ends. We may therefore say that while the frontage rule is conceded to be a legal mode of assessment when properly applied, it is not to be used as an arbitrary mode of casting the public burdens upon the property of individuals.

To prevent any misconception of the facts we may add, before closing, that they come up as a stated case, and not in equity form. If there be any facts to raise an estoppel or other defence in equity, the parties ought to have stated them. No motion has been made to quash the case as defective. The case itself states "That the line of said improvement in part runs through what is called the rural or suburban part of the city, and the defendant's premises are situated in such rural district. The plan hereto attached is the assessment plan for said improvement, and is made part hereof." The plan referred to includes large tracts of land fronting on the avenue whose lines and measurements noted prove that they are not city lots. For example, St. Mary's Cemetery fronts 1000 feet; Philip Winebiddle's property 1261 on one side, and 2427 feet on the other; the Pennsylvania Railroad Company's land, 1829; then we find many tracts fronting 300 to 400 feet; 400 to 500; 500 to 600; 600 to 700; 700 to 800; 800 to 900; and 900 to 1000. The facts of the case, therefore, very distinctly appear, and we ought not of our own motion to quash the case.

The judgment of the Court below is therefore reversed, and judgment is now entered for defendant for costs.

Opinion by AGNEW, C. J. PAXSON, J., dissents. WILLIAMS, J., absent.

Dissenting opinion of PAXSON, J. I do not concur in this judgment. Owing to the meagre presentation of the facts I have found it difficult to come to an intelligent conclusion. It appears from the case-stated that "the line of said improvements, in part, runs through what is called the rural or suburban part of the city, and defendant's premises are situated in such rural district." This bald statement, with a plan that furnishes little practical information, is all we have upon which to base a decision of vast importance both in its principle and the immediate results flowing therefrom. The case, as it appears to my mind, is one in which we ought to have the fullest information.

There is another matter which it is proper to refer to. It is alleged in the counter-statement of the defendant in error, and not denied, "that no property owner along the line of any streets or avenues improved under this system has in any manner formally objected to these improvements while they were in progress; that the improvements were under the direct and exclusive directions of the persons directly interested, to wit, the property owners; and that should this case be reversed it would practically add over five million dollars to the debt of the city of Pittsburgh." If the fact be that this plaintiff was eagerly clamoring for the benefits of this system, and held his peace while the improvements were in progress, it is an answer to so much of his case as is based upon the allegation of its special hardship. It is idle to say that the improvements referred to were of no benefit to him. Having received the benefit, and having stood by while the improvements were made without interposing an objection, knowing that his property was to be assessed for its pro rata share of the expense, he is not in a position to complain. He would be estopped from doing so in an equitable proceeding. He may not be estopped from setting up this defence at law, but it furnished a persuasive reason why this Court should move with caution, and act only with all the light that can be thrown upon the case. For the reasons given I would quash the case-stated.

[See Wistar v. City of Philadelphia, *ante*, 124.]

July, '76, 23. **Hammett's Appeal.** Jan. 13, 1877.

In re Hammett's Estate.

Decedents' estates, settlement of — Exclusive jurisdiction of Orphans' Court—Creditors bound to present their claims or be debarred —Distribution not delayed to await result of suits in common law courts—Notice to creditors—Acts of March 22, 1832, *and April* 13, 1840.

As the Orphans' Court has exclusive jurisdiction of the settlement and distribution of decedents' estates, *creditors*, as well as legatees and distributees, must appear and present their claims in said Court or be debarred from the fund.

The mere pending of an action in a common law Court to establish the claim, does not *ipso facto* entitle a creditor to share in the distribution in the Orphans' Court.

Nor is the pendency of such litigation any reason for suspending the proceedings in distribution to awa.t

Digitized by Google

its result; but the Orphans' Court may direct such temporary delay as may, in their discretion, be necessary to give the notice to creditors provided for in the 20th section of Act of 1832.

The Orphans' Court made a decree, postponing "until the further order of the Court," the distribution of a large sum of money in the hands of executors, to await the determination of suits pending in common law courts to establish claims which had not been presented before the Orphans' Court.

Held, that, while a temporary decree of this nature, to give time for notice to creditors, etc., might be sustained, this indefinite postponement of the exercise of the statutory powers of the Orphans' Court was a trenching upon its own jurisdiction, and was error.

Appeal from the Orphans' Court of Philadelphia County.

This case was heard in the Court below upon exceptions to the report of an auditor appointed to audit the account and award distribution of the balance in the hands of the executors of Barnabas Hammett, dec'd.

The material facts were as follows: Barnabas Hammett died January 22, 1873, leaving a will in which J. H. Campbell, D. M. Fox, and N. B. Browne were appointed executors. In due time the executors filed their first account, which was referred by the Orphans' Court to Thos. Greenbank as auditor. The balance in the executors' hands was found by the auditor to be $84,688.67, one-third of which Robenia Hammett, the widow of the decedent, claimed as her distributive share. No creditor appeared to claim this balance, or any part of it, but the executors called the attention of the auditor to the fact that several suits for very large amounts were pending in the various courts against the estate.

The auditor reported *inter alia*: "This balance, under a reference to the auditor to settle the account and to distribute the balance, would, in an ordinary case, be distributed by the auditor among the widow and legatees, because no creditor who remains unpaid has presented and established a claim to any part of it. But taking into consideration the pendency of the numerous suits at law which are brought to the attention of the auditor, he is of opinion, that, although they are not presented as claims upon this fund, and it could therefore be distributed without regard to them, yet, as a matter of precaution, it would be wise to retain a larger part of this balance in the hands of the executors, after awarding a small proportion of the distributive fund to the widow and legatees, until the adjudication of the next account. The auditor has therefore made distribution of one third of the distributive balance."

To this report Mrs. Hammett filed the following exception: "The auditor has erred in not distributing the whole balance of $84,688.67, in the hands of the accountant."

The executors likewise filed, *inter alia*, the following exceptions: "The accountants except to the distribution of any portion of the fund at this time, because it appears that there are large claims against the estate in course of litigation, the result of which, if adverse to the executors, will more than absorb the entire personal estate."

The Orphans' Court (DWIGHT, J., delivering the opinion) held that the Orphans' Court and the Common Pleas had concurrent jurisdiction of the claims of creditors against a decedent's estate, and they therefore dismissed Mrs. Hammett's exception, sustained that of the executors, set aside the distribution reported by the auditor, and ordered the accountants to retain the balance in their hands until the further order of the Court. (Reported 2 WEEKLY NOTES, 430.)

Mrs. Hammett thereupon took this appeal, assigning for error the above-mentioned action of the Court.

W. A. Porter (with him *W. D. Allen*), for appellant.

It is admitted that the Orphans' Court and the common law courts have concurrent jurisdiction to ascertain the amounts due creditors of a decedent, and to enforce payment out of his real estate or out of such of his personal estate as may not be in the actual custody of the Orphans' Court. But when an executor or administrator has once filed his account, the Orphans' Court has exclusive jurisdiction to settle it, and to make distribution of the balance, and every creditor must appear before the said Court and establish his claim or lose his right to share in the distribution of the particular fund then in hand.

Act of March 29, 1832, Purd. Dig. 1103, pl. 4.
Act of April 13, 1840, Id. 446, pl. 200.
Act of June 16, 1863, Id. 1104, pl. 8.
Kittera's Estate, 5 Har. 416.
Gochenaur's Estate, 11 Id. 460.
Bull's Appeal, 12 Id. 286.
Mitchell's Estate, 2 Watts, 87.
Stover's Appeal, 3 W. & S. 154.
Weber *v.* Samuel, 7 Barr, 499.
Whiteside *v.* Whiteside, 8 Har. 474.
Shollenberger's Appeal, 9 Id. 341.
Horner *v.* Hasbrouck, 5 Wr. 179.
Everman's Appeal, 17 Sm. 336.
Musselman's Appeal, 15 Id. 480.
Dundas' Appeal, 23 Id. 474.
Sergeant's Executors *v.* Ewing, 6 Cas. 75.

G. Bull (with him *H. M. Phillips*), contra.

The jurisdiction of the Orphans' Court as to claims against decedents' estates, is concurrent with that of the common law courts. Moneys in the hands of executors are trust funds on which the widow and heirs have no claim until the rights of creditors have been secured. In administering such a trust, it would be inequitable for the Orphans' Court, having been informed of large claims against the estate, more than sufficient to absorb the fund, in process of litigation in the common law courts, to hand over the trust fund to the widow and heirs.

Digitized by Google

Swain v. Ettling, 8 Cas. 489.
Walthaur's Heirs v. Gossar, Id. 259.
McLean's Executors v. Wade, 3 Sm. 146.
Van Dyke's Appeal, 10 Id. 487.
Woodward's Appeal, 2 Wr. 328.

Feb. 12. THE COURT. The exclusive jurisdiction of the Orphans' Court to ascertain the amount of the estates of decedents, and order their distribution among those entitled, creditors as well as legatees and distributees, is so fully settled that nothing but further legislation can alter the law. The sources of this jurisdiction and its conclusiveness, will be found in a long line of well-considered decisions. (Kittera's Estate, 5 Harris, 416; Whiteside v. Whiteside, 8 Harris, 473; Bull's Appeal, 12 Harris, 286; Ashford v. Ewing, 1 Casey, 213; Black v. Black, 10 Casey, 354; Musselman's Appeal, 15 P. F. Smith, 480; Everman's Appeal, 17 P. F. Smith, 335; Dundas' Estate, 23 P. F. Smith, 474.)

In the first instance, under the 19th section of the Act of March 29, 1832, the application for distribution among the creditors came from the executor or administrator, when the assets were insufficient to pay all the debts. The standing of the creditors in the Orphans' Court, under this Act, was not so clear. But when the Act of 13 April, 1840, § 1, was passed, authorizing any creditor to apply for distribution, their standing became entirely certain. This Act was followed by Kittera's Appeal, and the long line of cases, which now hold that the distribution of a decedent's estate among *creditors*, as well as legatees and distributees, belongs exclusively to the Orphans' Court. So binding is the effect of such a distribution, that even the Commonwealth, not having given notice of her claim, is barred from coming afterwards upon the distributed estate. (Mitchell's Estate, 2 Watts, 87.) This effect of the 19 section of the Act of 1832 has been held to be imperative, if the notice to creditors has been properly given, as required by that section. (Boyer's Estate, 5 Watts, 50; Stoever's Appeal, 3 W. & S. 154.) The creditors being thus bound to appear and claim their respective debts before the auditor appointed to settle and adjust their claims, a legislative protection of their rights will be found in the provisions contained in the 20th section of the Act of 1832 (Purdon, 446), that when any of the heirs, legatees, distributees, or creditors of a decedent, reside out of this State, or out of the United States, or where from other circumstances it may be expedient to give additional or further notice, it should be given according to the discretion of the Orphans' Court.

Outside of decided cases, when we examine the subject in the light of reason and necessity, the distribution of a decedent's estate among all entitled to have it, must belong to the Orphans' Court. It has possession of the fund, for it controls and directs all those who have its custody; and it is only through its decree the fund can be reached. It is true the remedy of the creditor to establish his debt in a common law court is not taken away, for this may be necessary to stop the running of the statute of limitations, to decide disputed and complicated questions, and make the settlements afterwards and before the auditor more easy and convenient. But this does not *ipso facto* bring the pursuing creditor on the fund in the Orphans' Court. On the contrary, the law gives a remedy to prevent a sale under execution, and to carry the creditor into the Orphans' Court, where the condition of the estate requires it to prevent a sacrifice of the general interest. The creditor who desires to share in the fund in the hands of an executor or administrator, must present his claim before the auditor; and when there it is subject to attack, and he must establish it. If he have already established it, in a court of law, it is so much the better; but if not, under the decisions heretofore cited, he must support his right to share in the fund before the auditor, by proving it. Thus it is evident that a proceeding in a common law court, to establish a claim, while it may be a reasonable ground for the exercise of the sound discretion of the Orphans' Court, in suspending proceedings in distribution for a reasonable time, and to a reasonable part of the estate, necessary to satisfy the demands of creditors according to the 39th and 40th sections of the Act of 24 February, 1834 (Purdon, 447-8), confers no jurisdiction on the former Court to withdraw the fund from the power or control of the Orphans' Court. Of necessity, as we have seen, the latter Court must proceed to distribute the fund, and cannot be hindered or delayed by actions pending in other courts, beyond a time which its own exercise of discretion may determine to be necessary. It would be a most ruinous doctrine, that estates could be tied up under a claim of litigation elsewhere, when the Orphans' Court has full power to adjudicate all claims of the creditors. If it were so, not only legatees and distributees, but domestic creditors might have to wait the bidding of distant tribunals, not in sympathy and having no motive to speed a cause. This conclusion does not affect the prerogative of other courts, but only the rights of the creditors. They may, if they choose, persist in a common law suit to the end to reach real estate or some other fund, but if they fail to come in on a fund in due course of distribution in the Orphans' Court, after notice of the proceedings there, they may lose their grasp upon a fund which that Court alone has jurisdiction to distribute among the creditors.

We think, therefore, the Orphans' Court erred

Digitized by Google

in trenching upon its own jurisdiction so far as to permit the fund before it to await indefinitely the action of other courts. The decree in itself might, perhaps, be sustained with a slight modification, which would give it a temporary effect merely, as a discretionary suspension until the notice provided for in the 20th section of the Act of 1832 could be given. But it is manifest this was not the purpose of the decree, and it must therefore be reversed, to enable the Court to make such further order as may be necessary to speed the proceeding in distribution, and make it effective.

Decree reversed. The costs of the appeal to be paid out of the estate, and the record ordered to be remitted with a *procedendo*.

Opinion by AGNEW, C. J. WILLIAMS, J., absent.

[*Cf.* Kimble *v.* Carothers, *ante*, 88; Ingersoll's Estate, 1 WEEKLY NOTES, 417.]

Oct. & Nov. '76, 243. Oct. 27, 1876.

Overholt & Co. v. First National Bank of Mt. Pleasant.

Usury—National banks—Act of Congress of June 3, 1864, § 30—Renewal notes—Usury in original transaction taints all subsequent renewals—In a suit on the last note of the series, all interest paid on the prior notes may be defalked.

Whenever a national bank resorts to a suit to recover a debt on which usurious interest has been paid or stipulated for, the forfeiture of the *entire* interest on such debt follows as a necessary result, under the 30th section of the Act of Congress of June 3, 1864. (Revised Stats. § 5198.)

Where there has been a series of renewal notes given for the same original debt, the taint of usury in the first follows the descent through the entire line; and in a suit on the last note of the series, the defendant may defalk *all* the interest he has paid from the beginning, and not merely the excess above the legal rate.

Usurious interest paid on another and independent note, not in suit, cannot be defalked.

Error to the Common Pleas of Westmoreland County.

Assumpsit by the First National Bank of Mt. Pleasant against B. F. Overholt & Co., on two promissory notes, for $2000 and $2200 respectively, given by defendant and discounted by said bank.

The defendants' affidavit of defence set forth that the bank, plaintiff, had negotiated a series of notes for defendants, the notes in suit being the last of the series, on which defendants had paid interest at the rate of 8 and 9 per cent. per annum, to the amount of $2144.46. On another note of $4000, at 9 per cent., they had paid plaintiffs $1314.09, and defendants claimed to set off against plaintiff's claim twice the amount of these two sums, viz., $6917.10.

A rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence was made absolute, and judgment was entered for plaintiff for $3485.18, being the principal of the two notes in suit, less the excess of interest paid, the Court holding that on the obligations in suit *all* the interest was forfeited, but on the previous renewals only the *excess* over the legal rate could be defalked; that the liability to forfeiture of double the interest could only be enforced after recovery by action; and that the usurious interest on the $4000 note, not in suit, could not be set off in the present suit.

The defendants took this writ, assigning for error, *inter alia*, the entry of judgment, and the refusal of the Court to allow defendants credit on all the interest paid, both on the notes in suit, the previous renewals, and on the $4000 note not in suit.

Edgar Cowen and *M. Culloch* (with whom was *Markle*), for plaintiffs in error.

If, as is decided in Lucas *v.* Gov. Nat. Bank (28 Sm. 228; S. C., 2 WEEKLY NOTES, 135), the interest-bearing power of the notes was destroyed by charging illegal interest, it follows that all the charge for interest, and all interest paid, should be an offset to the claim of the bank.

Citizens' Nat. Bank of Piqua *v.* Leming, 8 Int. Rev. Record, 132.

In Thomas *v.* Shoemaker (6 W. & S. 179), it is expressly decided that excessive interest on one note could be set off against another, not the one on which such interest had been paid.

A. M. Fulton, for defendants in error.

As many of the notes of the series, prior to the last renewals, were the notes of entirely different parties, and as the notes in suit bore only 6 per cent. interest, the defendants below could not defalk, in this suit, the interest paid on such prior notes.

Brown *v.* The Second Nat. Bank of Erie, 22 Sm. 209.

Lucas *v.* Gov. Nat. Bank of Pottsville, *supra*.

The $4000 note is still held by the bank, and not yet sued on. It should certaining be lifted or sued on before a credit for usurious interest paid upon it could be allowed.

Hartman *v.* Danner, 24 Sm. 40.

Nov. 13, 1876. THE COURT. The thirtieth section of the Act of Congress of June 3, 1864, under which the defendants in error were organized and incorporated as a national bank, declares that "the knowingly receiving, reserving, or charging" by a national bank "a rate of in-

Digitized by Google

terest greater than" that lawful in the State in which such bank may be located, "shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence carries with it, or which was agreed to be paid thereon; and in case a greater interest has been paid, the person or persons paying the same, or their legal representatives, may recover back in any action of debt twice the amount of interest thus paid from the association taking or receiving the same: Provided, that such action is commenced within two years from the time the usurious transaction occurred."

It is very clear, we think, that Congress intended that the national banks should be effectually prevented, as far as legislation could prevent it, from either charging or receiving more than the legal rate of interest in the States in which they might be located and carry on their business. Experience had abundantly shown that to do this it would not be sufficient to provide that the excess over the lawful rate only should be illegal. These institutions of large capital would naturally exercise great power over those who should stand in need of their assistance, for it is as true now as it was in the days of Solomon, "The rich ruleth over the poor, and the borrower is servant to the lender." It was considered, no doubt, that it would be too severe a measure to provide that the debt itself should be forfeited, or the security given for it declared void. That, too, had been tried in England and some of the United States, but was found not to arrest the practice, but only to increase the unjust gain of the usurer, who required to be indemnified by the needy borrower for the risk he ran by a much increased rate. It was deemed a sufficiently effectual preventive to enact that whenever the bank violated the law by "knowingly receiving, reserving, or charging" more than the lawful interest, they should recover none, and that where the unlawful interest had been voluntarily paid, the debtor should be entitled to recover, as a penalty, double the whole interest paid, provided suit were brought within two years. Whenever the bank must resort to a suit, then, the forfeiture of the entire interest, when an illegal rate has been stipulated or taken, follows as a necessary result.

It was abundantly shown in Campbell *v.* Sloan (12 P. F. Smith), by numerous English and American authorities cited in the opinion of the Court, that when there has been a series of renewal notes given for the continuation of the same original loan or advance, the taint of usury in the first transaction follows down the descent through the entire line. A renewal note is not payment of the original debt, and a new debt or novation in view of the usury laws, however it may be, if the parties so intend, as to other questions. If it were held otherwise, nothing would be so easy as to evade the statute. What the creditor is entitled to recover is the original loan, with lawful interest, and the borrower is entitled to credit for all that he has paid beyond what by law he is bound to pay. It is clear, then, as to the national banks, that whenever they charge or stipulate for an illegal rate, all payments of interest, and not merely the excess, are illegal. "The illegal act," as is well remarked by Mr. Justice GORDON in Lucas *v.* Government National Bank (28 P. F. Smith, 231), "destroys the interest-bearing powers of the obligation." "The receiving of such excessive interest is treated by the supreme power in the State as a public evil, and as such prohibited; consequently, when taken against the statutory prohibition, it is acquired without right, and no title thereto vests in the taker. In such case he is to be held as one wrongfully in possession of his neighbor's property."

It follows, that when the bank resorts to legal proceedings to recover its debt on the last of the series of renewal notes, the borrower is entitled to credit for all the interest he has paid from the beginning on the loan, and not merely to the excess above the lawful rate.

This question was not before the Court, and was not decided, in Brown *v.* The Second National Bank of Erie (22 P. F. Smith, 209). The only matters which could avail the plaintiff in error there, were the answers to the two first points which he made below. These were that the bank could not recover any part of its claim, and that, if it could, the debtor was entitled to defalk double the amount of interest paid. These the Court below refused, and their judgment was affirmed. His third point was, that he was entitled to credit for the excess of interest he had paid from time to time on the renewal notes; and his fourth was, that he was entitled to an abatement of all the interest on the note in suit, and these the Court below affirmed. What is stated in the syllabus as decided by the Court below—if, indeed, it was meant to say that the debtor could only set off the excess of interest on previous notes—was not involved in the affirmance of the judgment. In Lucas *v.* Government National Bank (28 P. F. Smith, 228) the credit claimed was not for interest paid on former notes, of which the note in suit was the last renewal, but upon entirely independent loans which had been paid in full, and the defendant claimed to defalk double the amount which he had paid. This the Court held he could not do, but that he was entitled to defalk the usurious interest he had paid on previous transactions. The affidavit of defence stated that the defendant had paid not less than $3000 in excess of the legal rate of interest; and this, it was held, he had a right to

Digitized by Google

defalk. Further than this, it was not necessary to go in order to reverse the judgment and award a *procedendo*.

We are of opinion that the defendant below was not entitled to defalk the interest on the $4000 note, which was not in suit. The words of the Act of Congress, "shall be held a forfeiture of the entire interest which the note, bill, or other evidence carries with it," as was said in Brown *v.* The Second National Bank of Erie, have evident reference to the enforcement of the contract by judicial process. No action is given to recover back the interest charged, and if not, there can be no defalcation against an independent claim. *Non constat*, that the principal of the $4000 note will ever be sued for; but when it is, all the interest paid on the note of which it is the last renewal, will be a credit upon it.

Judgment reversed, and writ of *procedendo* awarded.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

Oct. & Nov. '76, 123.

Bryar v. Tradesman's National Bank of Pittsburgh.

Usury—National Banks—Act of Congress of June, 3, 1864, § 30—Renewal notes.

Overholt *v.* First National Bank of Mount Pleasant (reported above) affirmed.

Error to the Common Pleas No. 1 of Allegheny County.

Assumpsit by the Tradesman's National Bank of Pittsburgh on a promissory note for $9000, given by the defendant, and discounted by the bank.

The affidavit of defence averred that the note in suit was the last of a series of renewal notes, on which usurious interest had been paid, and the defendant claimed the right to defalk *all* the interest paid. Judgment for plaintiff having been entered, the defendant took this writ, assigning for error the entry of such judgment.

R. B. Carnahan (with whom was *T. J. Keenan*), for plaintiff in error.

Thos. C. Lazear, for defendant in error.

The entire interest is forfeited only where the contract is executory and is sought to be enforced by judicial process. Where usurious interest has been paid on prior transactions, defendant can only set off the excess, or bring suit under the Act of Congress for the penalty. He cited—

F. & M. Nat. Bank of Buffalo *v.* Dearing, 1 Otto, 29.

Nov. 13. THE COURT. The question raised by the record in this case has been ruled by this Court in Overholt *v.* First National Bank of Mount Pleasant, argued on a writ of error to the Court of Common Pleas of Westmoreland County, the opinion in which case is filed at the same time with this, and in conformity to that opinion the judgment in this case must be reversed.

Judgment reversed and *procedendo* awarded.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

Jan. '76, 93. Feb. 6, 1877.

Hestonville, Mantua, and Fairmount P. R. R. Co. v. Gray.

Negligence — Contributory negligence—Contributory negligence by a boy under ten years of age, induced by act of defendant's servant—When a question for jury—Master and servant—What acts of servant wilful and malicious.

In an action to recover damages for injuries to a child, through the negligence of defendant, the question as to what degree of care and discretion was ordinarily to be expected of a child of the age of plaintiff, is a question for the jury.

A boy, nine or ten years old, got on the front platform of a horse-car, on the driver's invitation. Very soon thereafter, the driver made the boy get off, without stopping the car, though requested by the boy to do so. The boy was injured, and sued the company for damages:

Held, that the questions of the boy's capacity and of his contributory negligence in jumping on the car, under the circumstances, were properly submitted to the jury.

Error to the Common Pleas No. 3, of Philadelphia County.

Case by Albert S. Gray, by his next friend Noyes C. Gray, against the above-named passenger railroad company, for injuries resulting from alleged negligence. Plea, not guilty.

At the trial (before FINLETTER, J.) the plaintiff, a boy nine or ten years of age, testified that on Jan. 26, 1874, when returning from school, he ran by the side of one of the defendant's cars, in Arch Street, when the driver offered him a ride, and he got up on the front platform. The plaintiff further testified that presently the driver told him to get off, which he refused to do unless the car should be stopped; that the driver insisted and put his hand on the plaintiff's shoulder, the car moving at a good rate of speed; the plaintiff jumped and fell, and one of the flanges of the hind wheel injured his leg. One Benedict, a former driver of the company, testified that McLaughlin, the driver at the time of the accident, did not understand his business; on cross-examination, however, it appeared that Benedict had been discharged for drunkenness.

Digitized by Google

On the part of the defendant, McLaughlin testified that he slacked the car to let the plaintiff get off, and did not order him to get off; that the company had ordered him to let no one get on the front platform. It appeared that McLaughlin was considered a good driver by the company, and that he was not discharged after the accident.

The defendant asked the Court to charge, *inter alia:* (3) That it was negligence in law for the plaintiff, who was of admitted intelligence and discretion, rashly and wilfully to jump on the car while the same was in motion. *Refused.* (4) That as the plaintiff, from the evidence, was of sufficient discretion to understand the dangerous character of the act which resulted in the accident, then if by such act he contributed to the accident, he cannot recover. *Refused.* (5) If the jury believe that the driver invited or induced the plaintiff to get on the front platform, and immediately thereafter, rashly and improperly, or carelessly and negligently pushed him off, that was such a wilful and malicious act on his part, that the defendants are not liable for the injury resulting to the plaintiff. *Refused.*

Verdict and judgment for plaintiff for $3200.

Defendants took this writ, assigning for error the refusal of their points above quoted.

Henry Hazlehurst and *Lewis C. Cassidy* (with whom was *Isaac Hazlehurst*), for plaintiff in error.

If the slightest negligence could be shown on the part of the plaintiff, the defendant would not be liable. There is no such thing in law as comparative negligence.

Railroad *v.* Norton, 12 H. 469.
Wilds *v.* Railroad, 24 N. Y. 432.
Stiles *v.* Geesey, 71 Penna. 439.
Railroad *v.* Winn, 19 Ga. 440.
Johnson *v.* Railway, 20 N. Y. 73.

An infant of tender years is held to the exercise of that degree of intelligence which could be expected from his age and capacity.

Railroad *v.* Gladmon, 15 Wall. 408.

The test is the liability to foresee and avoid danger.

Railroad *v.* Hassard, 25 Sm. 377.
See Railroad *v.* Spearen, 11 Wr. 302.

The plaintiff's testimony showed that he was a boy of superior intelligence; and the Judge, in his charge, remarked upon the brightness of his appearance. As a trespasser, the plaintiff could not recover.

The maxim *respondeat superior* does not apply. The plaintiff was invited to get on the car by a person who had no authority to invite him, and who broke the rules of the company in doing so. The company is responsible only for the negligence of its servants in the scope of their duties. Negligence consists of nonfeasance, not malfeasance; and allowing the boy to get on the car and pushing him off, were acts of malfeasance. A master is not liable for his servant's intentional injuries.

Snodgrass *v.* Bradley, 2 Grant, 43.
Witaker *v.* Railroad, 51 N. Y. 295.
Isaac *v.* Railroad, 47 N. Y. 22.

McCabe (with whom was *McCandless*), contra.

It was denied at the trial that the car was in motion when the plaintiff got on. Negligence depends on the circumstances of each case. It is culpable negligence to allow children to ride on the front platform.

Crissey *v.* R. R. Co., 25 Sm. 83.
R. R. Co. *v.* Hassard, Id. 367.
Pittsburg Passenger Railway Co. *v.* Caldwell, 24 Sm. 425.

The proximate cause of the accident in this case was the driver's hurrying the boy off the car by word and manner, without stopping the car as requested. "Where the servant is acting within the scope of his employment, the master is responsible, even for an act the very reverse of that which the servant was directed to do."

Wharton on Negligence, § 171.

Feb. 12. THE COURT. It would have been error in the Court below to have affirmed the third and fourth points of the plaintiffs, of which they complain in their first and second assignments of error. They would have taken from the jury, the material questions of fact, what degree of care and discretion was ordinarily to be expected of a child of the age of the plaintiff below. We see nothing in the evidence like an admission which precluded the jury from the consideration of this question. The fifth point, which forms the subject of the third error assigned, plainly involved a contradiction in its terms, which could not have been rightly affirmed. It asked the Judge to instruct the jury that a rash and improper, careless and negligent act of the servant of the defendants below, was such a wilful and malicious act on his part, that they were not liable for the injury resulting from it to the plaintiff. None of the specifications of error, therefore, can be sustained.

PER CURIAM. Judgment affirmed.

WILLIAMS, J., absent.

Oct. & Nov. '75, 234. Oct. 3, 1876.

Findley's Appeal.

Contracts for municipal works—Powers of city authorities in awarding such contracts—Discretionary, not merely ministerial.

Under the Act of May 23, 1874 (P. L. 230), the city authorities have not merely ministerial but deliberative and discretionary powers in awarding contracts for municipal works.

Digitized by Google

The exercise of such discretionary powers, even though indiscreet, will not be reviewed by the Courts, where no actual fraud is proved.

Commonwealth *v.* Mitchell, *ante*, 393, affirmed.

Appeal from the Common Pleas No. 2, of Allegheny County.

This was a bill in equity by G. Findley against the City of Pittsburgh; J. Blackmore, Mayor; R. M. Snodgrass, Controller; C. L. Magee, Treasurer; and J. M. Brush, trading as J. M. Brush & Co.

This case arose out of the same transactions, and involved the same legal questions as Com'th *v.* Mitchell, reported *ante*, 393. The bill, filed by Findley in the interests of the tax-payers of Pittsburgh, set forth substantially the same facts as the petition in that case, and prayed that for all work and materials required by the City the defendants should be enjoined to receive and accept the bids of the lowest responsible bidders, and to award the work to such; and should be restrained from awarding the contract for the forcing mains to J. M. Brush & Co.

The City and J. M. Brush & Co. filed separate answers, alleging in defence the facts set forth in Com'th *v.* Mitchell.

The case was referred to a master, J. G. McConnell, whose finding on the evidence as to the facts was similar to that of Stowe, P. J., in his opinion in Com'th *v.* Mitchell. To this report the plaintiff filed exceptions.

The Court (Ewing, P. J.) delivered an opinion, reversing the master's finding as to the "mud-drum" contract of N. Snyder & Co., and sustaining the charge of corruption and bribery brought against that firm; dismissing, with these modifications, the exceptions to the master's report, refusing the injunction, and dismissing the bill.

The plaintiff took this appeal, assigning for error the above-mentioned action of the Court.

W. H. & A. N. Sutton, for appellant.

Slagle & Wiley and *T. S. Bigelow*, contra.

Nov. 6. The Court. Whilst we are not prepared to take the same view of the facts in this case as did the learned Judge of the Court below, in that we think the allegations of fraud, charged against N. Snyder & Co. in a former contract with the city, are not sustained, yet we must adopt his final conclusion as the proper one. We have ruled in the case of The Commonwealth *ex rel.* N. Snyder & Co. *v.* Mitchell *et al.* and The City of Pittsburgh, argued at the same time with this case, that the Act of Assembly imposed upon the city authorities duties, in awarding the contract in controversy, which were not merely ministerial, but deliberative and discretionary, and that, as a consequence, the writ of mandamus would not lie to compel them to award the contract to N. Snyder & Co., who were the lowest bidders. That the city authorities having, perhaps indiscreetly, but not corruptly, proceeded to the performance of the duty with which they were charged by the statute, the matter was put beyond our reach. It is obvious, therefore, that it would be utterly incongruous for us to do, in this case, what we refused to do in the former one. For it is to be observed that the prayer in the petition for the mandamus, and that in the bill in this case, are substantially the same. Were we, under such conditions, to reverse the Court below, and issue the process prayed for, we would bring about the same result which we refused to permit by the writ of mandamus. Had there been fraud exhibited in the awarding the contract involved in this controversy, we might have come to a different conclusion, but under the circumstances, as they have been presented to us, we must decline to interfere with the action of the Common Pleas.

The decree is affirmed at the costs of the appellants.

Opinion by Gordon, J. Williams, J., absent.

July, '75, No. 139. Jan. 26, 1877.

Seymour v. Hubert.

Affidavit of defence—Sufficiency of—Executors or administrators not required to file affidavit in actions for debts of decedent.

In a suit against an executor or administrator for a cause of action arising in the lifetime of the decedent, an affidavit of defence cannot be required.

A *scire facias* to revive a judgment, issued after the death of the defendant, was served upon his executors. They filed an affidavit of defence setting forth that they were informed, believed, and expected to prove that there was nothing due on the judgment, the whole amount having been paid by usurious interest to plaintiff. The Court below entered judgment for want of a sufficient affidavit of defence:

***Held*, that the affidavit was sufficient, and that, even were it not, judgment should not have been entered against the executors.**

Leibert *v.* Hocker, 1 Miles, 263, approved.

Error to the Common Pleas No. 1, of Philadelphia Co.

Scire facias to revive judgment, *et quare executionem non*, brought by Alice Hubert against Sarah Lewis and Seymour *et al.*, executors of Sarah Tingle, deceased.

The judgment had been entered Dec. 17, 1873, on a judgment note given by Sarah Tingle and Sarah Lewis to the plaintiff. Sarah Tingle died in 1874. The *sci. fa.* issued Jan. 22, 1875, and was returnable the first Monday of February.

Digitized by Google

On the 6th February the defendant obtained a rule, *nisi*, to set aside *sci. fa.*, open judgment, and let defendants into a defence. On the 10th May the Court granted the defendants five days to file an affidavit of defence, proceedings to stay in the mean time. On May 12, Sarah Lewis filed an affidavit alleging her coverture and minority; and on May 19, an affidavit of Eddy, one of the executors of Sarah Tingle, deceased, was filed, alleging, *inter alia*, that deponent was informed and believed that there was nothing due on the judgment, the whole of the amount claimed having been paid by illegal and usurious interest to the said plaintiff, all of which deponent expected to be able to prove on a trial of the case.

The Court entered judgment for the plaintiff for want of a sufficient affidavit of defence. The executors of Sarah Tingle took this writ, assigning for error the entry of said judgment.

J. A. Burton, for plaintiff in error.

It is not necessary for executors to file affidavits of defence, in actions upon debts of decedents.

Edwards *v.* Ewing, 4 Yeates, 235.
Leibert *v.* Hocker, 1 Miles, 263.

Were it necessary the affidavits set up a good defence, for any defence subsequent to the judgment could be pleaded under the statute of 4th Anne (Robert's Digest, 46).

Savage *v.* Everman, 20 Sm. 319.

A. Thompson and *Bispham*, contra.

The case of Leibert *v.* Hocker, *supra*, was one where the action was brought on a contract made by the decedent, and was decided on the ground that the executor could not be expected to be cognizant of all the matters of defence. Here the amount due was ascertained by the judgment, and the reason of the law in the other case ceases.

The affidavit does not allege payment *after* the entry of judgment, which is the only defence admissible under the Statute of 4th Anne.

Feb. 12. THE COURT. For a variety of reasons this judgment cannot be sustained. On the 6th February, 1875, a rule was granted to set the *scire facias* aside, and open the original judgment. This rule was pending and undetermined when judgment for want of an affidavit of defence was entered. But apart from this irregularity, it is difficult to discover any essential defect in the affidavit made by Joshua P. B. Eddy, one of the defendants. He swore that he had been informed and believed that there was nothing due on the judgment, but that the whole amount of it had been paid by illegal and usurious interest to the plaintiff; and he averred that he expected to be able on the trial to prove the truth of his statement. It was objected on the argument, that the language of the affidavit did not exclude the possible conclusion that the alleged payment was made on the note before the original judgment was entered. Some facts may have been developed in the previous proceedings in the Common Pleas to give foundation for the objection, but no implication of such a conclusion is consistent with the plain terms of the paper itself.

A still more important question is contained in this record. Two of the defendants were sued as executors of Sarah Tingle, deceased. In Leibert *v.* Hocker (1 Miles, 263) it was decided that an executor or administrator was not required to file an affidavit of defence in an action on a decedent's contract. The same rule was applied to a suit against the committee of a lunatic in Alexander *v.* Ticknor (1 Phila. R. 120). Those decisions expressed what is believed to have been the pervading professional impression in this State. In many, perhaps in all the judicial districts where rules of Court, in the absence of statutory provision, have required specific defences to be set out, actions against executors and administrators have been expressly exempted from their operation. Where the practice has been regulated by statute, such actions have uniformly been held not to have been within the legislative intention. Such a construction is indispensable to protect interests that would be otherwise defenceless, and to afford security to creditors, distributees, and heirs. In no ordinary case would it be possible for a personal representative to set out on oath, in specific detail, the nature and incidents of a transaction to which his decedent had been a party, and to which he was a stranger. A dead man's estate would be in utter peril, if a creditor could convert his demand into a judgment upon no proof other than the statement of his claim, filed at the commencement of his suit. And yet a rule that would require an affidavit from an executor or administrator would work just that result. On every ground the rule for judgment ought to have been discharged.

Judgment reversed, and *procedendo* awarded.

Opinion by WOODWARD, J. WILLIAMS, J., absent.

[See Vandusen *v.* Graham, executor, etc., 1 WEEKLY NOTES, 103; Hogg *v.* Braddock, Id. 147; Garrison *v.* Bunting, 2 Id. 14.]

Oct. & Nov. '76, 209. Nov. 10, 1876.

Green v. The Commonwealth.

Criminal law—Murder in the first degree—Elements necessary to constitute—Rashness and impetuous temper no excuse for—What provocation insufficient to excuse.

Where all the ingredients necessary to constitute murder in the first degree have been proved, the mere fact that the murderous act was committed under

Digitized by Google

verbal provocation and threats from the deceased, will not reduce the grade of the offence.

Where the law and the facts have been fully and fairly presented to the jury in the general charge and answers to points, a partial qualification of one of the points, which, standing alone, might perhaps be doubtful, but which, in view of the immediate context and a reference to the general charge, was not calculated to mislead the jury, is no ground for reversal.

Error to the Oyer and Terminer of Allegheny County.

William Green, a colored man, was tried at December Sessions, 1875, in the Oyer and Terminer of Allegheny County under an indictment for the murder of his half-brother, Samuel Marshall, at Mansfield, near Pittsburgh, on Sept. 2d, 1875.

The material facts disclosed on the trial were as follows: Green, the prisoner, and Marshall, the deceased, had lived with their mother, but had quarrelled, and had been involved in litigation, and Green had left the house. Green, on the morning after the settlement of the lawsuit before a Justice, threatened the life of Marshall. On the evening of the killing, Green stopped before the door of the house where the deceased was sitting at supper, and asked the latter "what he was going to do about the potatoes"—referring to some potatoes, claimed by Green, which Marshall had dug and appropriated. This led to an angry altercation, deceased using bad language, and threatening to give the prisoner a good pounding. The prisoner, having started up the road toward home, saying he would bring suit next day, deceased ran back to the fireplace, picked up a poker, and, running out of the house, called to the prisoner to come back, saying, if he came he would not go away alive. The prisoner, then being some yards up the road, said, "I will come," started towards the deceased, and, before reaching him, levelled at him a gun which he (the prisoner) had been carrying in his hand, and which, the evidence showed, he was accustomed to carry constantly with him, to shoot groundhogs and game. The deceased said, "Shoot if you want to." The prisoner was heard to say, "G—d d—n your wicked heart, I have been waiting for that!" At the same time the report and flash of the gun were heard and seen, and the deceased fell near the spot where he stood, before the house. The sound of a heavy blow was then heard, but no one saw the blow struck, and very soon the prisoner started off towards home. The deceased was found, still grasping the poker in his hand, with a bullet wound, necessarily fatal, in his side, and also a large gash in his head. A piece of the gun-barrel, about a foot long, was, shortly afterwards, found near by. The broken gun, carried off by the prisoner, was found at his house the same evening.

At the trial, counsel for the prisoner requested the Court, *inter alia*, to charge: "That to constitute murder in the first degree, there must be a design and intention to kill at the time the homicidal act is committed, and this intention must be a fully formed purpose to kill, with so much time for deliberation and premeditation as to convince the jury that this purpose is not the immediate result of rashness and impetuous temper." The Court (STERRETT, P. J.) declined to affirm this point as a whole, saying: "It is correct with the exception of the qualifying clause with which it closes. To constitute murder of the first degree, there must be a design and intention to kill at the time of the homicidal act, and this intention must be a fully formed purpose to kill with sufficient time for deliberation and premeditation, as already explained in the general charge, but the *purpose to kill*, necessary to constitute murder in the first degree, may, sometimes, be 'the immediate result of rashness and impetuous temper.' A rash and impetuous temper is no excuse, unless it has been aroused by adequate, legal provocation as explained in the general charge, and the intention to kill has been formed in the heat of passion thus generated." The learned Judge charged, *inter alia*, as follows: "All murder, not of the first degree, is necessarily murder of the second degree, and includes all unlawful killing under circumstances indicating depravity of heart, and a disposition of mind, regardless of social duty, where no intention to kill exists or can reasonably be inferred. Therefore in all cases of murder, if no intention to kill can be inferred or collected from the circumstances, the verdict must be murder of the second degree.

"*Manslaughter* may be defined to be the unlawful killing of another without malice, express or implied, which may be voluntarily done in a sudden heat of passion, or involuntarily, in the commission of an unlawful act. Voluntary manslaughter often so nearly approaches murder that it is necessary to distinguish it clearly. The difference is this: manslaughter is never attended by legal malice or depravity of heart, that condition or frame of mind before spoken of, exhibiting wickedness of disposition, recklessness of consequences, or cruelty. But being sometimes a wilful act, as the term voluntary denotes, it is necessary that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty. Therefore to reduce an intentional blow, stroke, or wounding, resulting in death, to voluntary manslaughter, there must be sufficient cause of provocation, and a state of rage or passion, without time to cool, placing the accused beyond the control of his reason and suddenly impelling him to the commission of the deed. If any of these be wanting—if there be provocation

Digitized by Google

without passion, or passion without legal provocation, or if there be time to cool and reason has resumed its sway, the killing will be murder. But it is not every cause of provocation that is regarded as sufficient or legal. Insulting or scandalous words are not sufficient cause of provocation; nor are actual indignities to the person of a slight and trivial nature. Whenever the act evidences a deadly revenge, and not the mere heat of blood, whenever it is the result of a devilish disposition, and not merely the frenzy of rage, it is not manslaughter, but murder. Passion arising from adequate legal provocation is evidence of the absence of malice."

The jury found the prisoner guilty of murder in the first degree, and sentence of death was accordingly pronounced.

The defendant took this writ, assigning for error, *inter alia*, that "the record and evidence failed to show that the ingredients, necessary to constitute murder in the first degree, were proven to exist;" and the refusal of the Court to affirm the latter part of the above point.

J. C. Graham and *J. H. Baldwin*, for plaintiff in error.

The evidence in this case is too contradictory to justify a verdict of murder in the first degree. There is no evidence to controvert the theory of a *conflict*, the true theory of the case.

Under the Act of March 31, 1860, murder, to be of the first degree, must be "wilful, deliberate, and premeditated killing."

Wilful— "of set purpose, voluntary, showing design; done or suffered by design." *Deliberate*—"weighing facts and arguments, with a view to a choice or decision; carefully considering the probable consequences of a step; circumspect; slow in determining; formed with deliberation; well advised or considered; not sudden or rash, nor hasty or sudden; slow." *Premeditated*—"to think on and revolve in the mind beforehand; to contrive and design purposely."

Webster's Dictionary.

If the purpose to kill is the *immediate* offspring of rashness and impetuous temper, there can be no *wilful, deliberate*, and *premeditated* killing. There must be time to frame in the mind, fully and consciously, the intention to kill.

The evidence showing that the prisoner habitually carried his gun, this case is different from one where a man deliberately chooses a gun, and seeks an opportunity to slay his enemy. If, in the suddenness of the occasion and impetuousness of temper, a blow is given, with the intention to do great bodily harm, it would be murder in the second degree.

Commonwealth *v.* Drum, 8 Sm. 9.
2 Wharton's Crim. Law, §§ 932, 935, 944, 978.
Hopkins *v.* Commonwealth, 14 W. 9.

"If the prisoner is lashed into ungovernable passion by recent provocation, so strong as to destroy all self-control, and is not the master of his own understanding, and if, in this condition of mind, he inflicts a blow from which death ensues with an instrument which happens to be near or in his possession, the offence will clearly be but manslaughter."

Kilpatrick *v.* Commonwealth, 7 Casey, 202.

The Court below therefore erred in declining to affirm defendant's point without qualification.

T. M. Bayne (with him *E. A. Montooth*, Dist. Attorney), contra, presented no paper-book, but contended that the question was entirely one of sufficiency of evidence, and that the evidence sustained the verdict of the jury.

Nov. 20, 1876. THE COURT. Upon a careful examination of the evidence in this case, we find that all "the ingredients necessary to constitute murder in the first degree were proved to exist." The prisoner and the deceased had been upon bad terms, and involved in litigation immediately before the homicide. The former, on the next morning after the lawsuit, had threatened the life of the latter. In the evening of the killing he stopped before the door of the house where the deceased was sitting at supper, and asked the latter what he was going to do about the potatoes—a subject of difficulty between them. This led to an angry altercation, the deceased using bad language, and threatening to give the prisoner a good pounding. The prisoner having started up the road towards home, saying he would bring suit next day, the deceased ran back to the fireplace, picked up a poker, and running out of the house, called to the prisoner to come back, saying if he came he would not go away alive. The prisoner then being some yards up the road said, "I will come," and started towards the deceased, and, before reaching him, levelled at him a gun he had been carrying in his hands. The latter said "Shoot if you want to." At the same instant the report and flash of the gun were heard and seen. The deceased fell near the spot where he stood before the house; the sound of a heavy blow was heard, and very soon the prisoner started off towards home. The deceased was found with a large gash in his head, a piece of the gun-barrel, about one foot long, was shortly afterwards found near by, and the broken gun carried off by the prisoner found at his house on the same evening. No one saw the blow struck, yet the sound of it, the broken piece near the spot, the fractured gun, and the cut in the head of the deceased, leave no doubt of the fact. Nor is it very material where and how precisely the blow was struck, as the evidence beyond question proves that the gun was fired before the prisoner reached the deceased, and the bullet wound was the undoubted cause of death. Still the fact of the blow is important in deter-

Digitized by Google

mining the state of the prisoner's mind, and his disposition towards the deceased. Had the conflict and the blow occurred before the shooting, a different case would have been presented, bearing on the prisoner's state of mind and intention. But here one whose mind had before been inflamed toward the deceased, who had threatened him, levelled a loaded gun and fired at him, at some distance and before the latter had committed an assault upon him, or could have reached him with the poker held in his hand, and found still in it when carried into the house. It is evident, therefore, that there was ample time for the prisoner to frame in his mind the deliberate purpose to shoot the deceased, and to carry this intent out, by levelling his gun and discharging it, when told to shoot. It is no doubt true that he was also irritated by the very bad language of the deceased, but this was no sufficient cause of provocation for taking life, while the turning back of the prisoner when called to come back, his expression as he turned—"God damn your wicked heart, I have been waiting for that"—walking back towards the deceased, levelling the gun at him, and shooting at the instant the deceased told him to shoot, all evidence a sufficient time to act deliberately, and not under a sudden gust of passion, tearing up reason by the roots and urging him on to a rash and thoughtless deed. These facts, together with the previous state of the prisoner's feelings toward the deceased (his half brother) clearly presented a case where the ingredients of murder in the first degree were proved to exist, and therefore must be submitted to the jury for their judgment. Nor can we say that there was such a strong and reasonable doubt of their existence, as to require an acquittal.

But one other assignment of error is worthy of notice. The prisoner's first point is that to constitute murder in the first degree there must be a design and intention to kill at the time the homicidal act is committed, and this intention must be a fully formed purpose to kill with as much time for deliberation and premeditation as to convince the jury that this purpose is not the immediate result of rashness and impetuous temper. The answer affirmed the point in its own language nearly, and the Judge added, "but the purpose to kill necessary to constitute murder in the first degree may sometimes be 'the immediate result of rashness and impetuous temper.' A rash and impetuous temper is no excuse unless it has been aroused by adequate legal provocation, as explained in the general charge, and the intention to kill has been formed in the heat of passion thus generated." The first clause of the qualification is perhaps doubtful, yet in view of the whole sentence and of the reference to the explanation given in the general charge, relating to the crime of manslaughter, as an offence committed under provocation and passion, we are led to believe that the qualification contained in the answer was intended to guard the jury against a mistake by which they might reduce the offence from murder to manslaughter in the absence of a *legal* provocation, there being a seeming provocation in the bad language of the deceased. In this view we may reasonably conclude that the jury were not misled by the seeming inaccuracy of the first clause in the qualification of the answer. The general charge correctly set before the jury the distinctions in regard to homicide, and drew their attention to the difference between murder and manslaughter. The point, however, was not intended to bring this distinction into view, but rather the frame of mind necessary to the commission of murder in the first degree, that is, the deliberation and premeditation which the Act of Assembly makes essential to the crime of murder in the first degree. So far as impetuous rage and rashness followed by the immediate act, which takes away life, tend to deprive the prisoner of deliberation and premeditation, and to reduce the homicide from murder in the first to murder in the second degree, the point was pertinent; for it was for the jury, judging upon the evidence, to determine whether the act was a result of a deliberate and premeditated purpose to kill. The time may be short, yet a jury may find that the fully conscious purpose to kill existed. Yet if, on the other hand, by reason of the shortness of the time, and the presence of great rage produced on the instant, and in a moment of impetuous temper a blow is given, a jury may be convinced, that it was not the result of a fully formed purpose to kill, but of a rash and hasty impulse, with scarcely a consciousness of any purpose except to do bodily harm to the object of wrath. Hence, though the absence of a legal provocation may prevent the reduction of the crime from murder to manslaughter, the want of the deliberation and premeditation required by the law, may reduce the grade of the murder from the first to the second degree. If therefore the learned Judge intended the qualification in his answer to the first point to apply to the point itself, it would be inaccurate. But his reference to his general charge conveys the impression that he intended only to guard the jury against a misapprehension, reducing the offence to manslaughter in the absence of a legal provocation. This acquires strength when we remember the facts of the homicide. The prisoner returned at the call of the deceased, and before reaching him, levelled his gun and fired, and this too after the expression, "God damn your wicked heart, I have been waiting for that," excited by the call. No doubt he was angry and provoked by the threats of the deceased; but his anger was the offspring of hate and revenge, and not of that hasty and impetuous

Digitized by Google

rage which for the instant dethrones reason, and impels to the commission of an act of violence with scarcely a consciousness of its own real purpose. To use the language in Drum's Case (8 P. F. Smith, 16), the law regards and the jury must find the actual intent, that is, the fully formed purpose to kill, with so much time for deliberation and premeditation as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind fully and consciously the intention to kill, and to select the weapon or means of death, and to think and know beforehand (though the time be short) the use to be made of it, there is time to deliberate and premeditate.

Upon the whole case we discover no substantial error. The judgment of the Court of Oyer and Terminer is affirmed, and it is ordered that the record be remitted for the purpose of execution.

Opinion by AGNEW, C. J. WILLIAMS, J., absent.

July, '76, 101. Jan. 12, 1877.

Moss's Appeal.
Lazarus's Appeal.
Lazarus's Estate.

Distribution—Income and capital—What is income—Shares of stock—Issue of new stock—Market values.

L., the owner of 100 shares in a joint stock company, died in 1868, having bequeathed the income, profits, and product of his estate to his wife for life, the capital, after her death, to go to residuary legatees. The executors continued to hold the stock as an investment. At this time the capital stock of the company was $1,000,000, divided into shares of $100 each. In 1872, the company, having a surplus of $1,400,000, procured an act of Assembly, authorizing it to double its capital stock by the issue of new shares. The stockholders accepted the act, and passed a resolution giving each stockholder the privilege of subscribing at par for as many shares of new stock as he held of the old. Just before the new issue the stock sold for $240 per share, based on actual assets; but immediately after it declined to $170 per share. L.'s executors sold their right to subscribe for sixty shares at $66.66, realizing $4000, with which they paid for the remaining forty shares for which they were entitled to subscribe:

Held (reversing the decree of the Court below), that the money realized from the sale of the options, and invested in the 40 shares subscribed for, was not income, and therefore did not go to the widow, but belonged to the residuary estate.

Earp's Appeal (4 Casey, 368), and Wiltbank's Appeal (14 Smith, 256), distinguished.

Appeal from the Orphans' Court of Philadelphia County.

This was an appeal by William Moss and others, residuary legatees of the estate of Henry Lazarus, deceased, from a decree of distribution entered upon the account of Lucien Moss, one of the executors and trustees under the will of the said decedent.

The facts in evidence at the audit are stated in the opinion of the Supreme Court as follows:

"Henry Lazarus, by his will, devised 'the income, profits, and products' of his estate to his wife for life, and after her death (after the payment of certain legacies) he devised all of his estate to residuary legatees, among whom are the appellants. At the time of his death, in 1868, he was the owner of one hundred shares of the capital stock of the Pennsylvania Company for Insurance on Lives and Granting Annuities. The stock of the said corporation consisted of ten thousand shares of $100 each, amounting to $1,000,000. The executors did not sell this stock, but retained it in their hands as a part of the residuary estate. An Act of Assembly was passed in 1872, authorizing the said company to increase its capital stock by the issue of new stock, not exceeding $1,000,000. In March, 1873, the company accepted this act, and proceeded to issue ten thousand shares of $100, thus doubling the original capital. To each of the old stockholders was given the privilege of subscribing and paying for as many shares of the new stock as he or she held of the old. The estate of Henry Lazarus thus became entitled to subscribe for one hundred shares of the new stock. At that time the old stock was worth in the market $240 per share, which valuation was based upon actual cash assets in the hands of the company, there being an admitted surplus of $1,400,000 over and above the $1,000,000 originally paid in. In May and June, 1873, the market price of option to subscribe for shares was sixty-six dollars each. The executors of Henry Lazarus having no funds on hand to subscribe for the one hundred new shares to which his estate was entitled, sold the option or right to subscribe for sixty of them for sixty-six and two-thirds dollars each, realizing the sum of $4000 therefrom, and with this money they subscribed and paid for the remainder, to wit, forty shares."

It also appeared that immediately after the new issue the market price of the stock declined from $240 to $170 per share. At the audit the widow of Henry Lazarus claimed the forty shares as part of the income and profits, while the residuary legatees claimed them as belonging to the *corpus* of the estate. The auditing Judge (DWIGHT, J.) made the following adjudication:—

"The trustees purchased forty additional shares of the Pennsylvania Company for Insurance on Lives, etc., with the money raised by selling out

Digitized by Google

the right to subscribe to sixty other shares. At the time, the hundred shares already owned by the trustees were worth . . . $24,000
The one hundred and forty shares were, *at the time of the audit*, selling for $225, 31,500

Being net profits of . . . $7,500

"Under Earp's Appeal (4 Casey) and Wiltbank's Appeal (14 Smith), I think the *cestui que trust*, by virtue of the will, is entitled to this profit. I award to her thirty-three shares of the stock."

This adjudication being confirmed *pro forma* by the Court, the residuary legatees and Mrs. Lazarus each entered an appeal.

John Samuel (with whom was *John G. Johnson*), for the residuary legatees, contended that the forty shares in question were capital, not income. If, before the new issue, the executor had sold the stock, the estate would have received $24,000. The effect of the new issue was to double the number of shares without doubling the assets to be divided, and to make each share worth only $170. The sum of $4000 from the sale of options, which by investment became the forty shares in question, was required to maintain in their integrity the one hundred shares left by Mr. Lazarus. The value of the right to take new shares goes to the remainder-man and not to the life-tenant. (Atkins *v.* Ambree, 12 Allen, 361.) The Court below was clearly wrong in taking the value of the shares at the date of the audit. If this course were sanctioned, the rights of the parties would depend on the promptness or delay of the executors in filing their accounts, or on the press of business in the Court.

But, even if the assets of the company, beyond the original capital stock, were accumulated profits, they cannot be claimed as such by the *cestui que trust*, not having been divided as dividends or income. Until such a distribution is made, the earnings are capital of the shareholders.

Ezekiel Barton's Trust, 5 L. R. Eq. 238.
Straker *v.* Wilson, 6 L. R. Ch. App. 503.

Earp's Appeal and Wiltbank's Appeal, so far from ruling this case, are clearly distinguishable from it. In the former there was a distribution of profits in the shape of new shares, for which the holders paid nothing; in the latter, there was no evidence of loss to the remainder-man. Being in opposition to every similar case, American or English, Wiltbank's Appeal should be restricted to its own state of facts.

Samuel G. Thompson, for the *cestui que trust*.

The testator not only bequeaths the income to his wife, but significantly adds, "*profits and products*." The options sold sprang from the old stock, and the sum realized from their sale is literally their product. This is settled by Wiltbank's Appeal (14 Sm. 256). That case is on all-fours with the present, and clearly settles the principle contended for by us. While Earp's Appeal differs from this last case in the facts, they both establish that where there is a gain, as an incident to stock, it is income.

January 22. THE COURT (after stating the facts *ut supra*). Mary Lazarus, the widow, claims these forty shares as income; the residuary legatees claim them as a portion of the *corpus* of the estate devised to them. The Orphans' Court, under the authority of Earp's Appeal (4 Casey, 368), and Wiltbank's Appeal (14 Smith, 256), awarded thirty-three of said shares to the widow as income or profits. From this decision both parties entered an appeal to this Court; the widow alleging that she was entitled to the whole of the forty shares; the remainder-men alleging that she was not entitled to any of them. Whether she is entitled to the whole or any portion of the forty shares is the sole question presented by this record.

We are in no doubt about the law; that can be ascertained with mathematical precision. The difficulty is in applying the principles of law, however well settled, to the facts of a particular case. Herein we think the learned Judge of the Orphans' Court fell into error. This case differs widely from either Earp's Appeal or Wiltbank's Appeal. In Earp's Appeal, the testator, at the time of his death, in 1848, held 580 shares of the stock of the Lehigh Crane Iron Works of the value of $125 per share. This stock formed a part of the residuary estate of the testator, and was bequeathed to his executors in trust to pay the income thereof to his four children during life, with remainder over. For several years after the death of the testator the company had made large profits. Upon the 1st day of July, 1854, the actual surplus earnings of the company, as ascertained by the report of the Master, amounted to the sum of $714,542.15. On the 10th of July, 1854, under authority of an amendment to its charter, the company proceeded to make distribution of a portion of this accumulated profit by increasing its capital stock from $200,000 to $500,000. This increase was represented by 2000 new shares at $50 each, apportioned among their stockholders, and paid for entirely out of the surplus earnings or profits of the company. The 540 shares held by the estate of Robert Earp received 810 of the additional shares, making altogether 1350 shares. The contention was whether the 810 shares should be regarded as principal, and as such remain in the hands of the executors, or whether they should be regarded as income, and go to the life-tenant. After the increase of stock the shares fell from $125 to $80 per share. The decree of the Court

Digitized by Google

below, affirmed by this Court, awarded a portion of the new shares to the life-tenant as income. But an examination of the decree shows that the Court was careful to award to the executors enough of the new stock to make up the deficiency in value of the original 540 shares caused by the issue of the new stock; thus preserving the integrity of the capital to the remainder-men. This case was exceptional in its character. As a general rule, nothing earned by a corporation can be regarded as profit until it shall have been declared to be so by the corporation itself, acting by its board of managers. The fact that a dollar has been earned gives no stockholder the right to claim it until the corporation decides to distribute it as profit. The wisdom of such distribution must of necessity rest with the corporation itself. From motives of prudence and self-interest it is frequently desirable to add all or a portion of the earnings to the capital. This is sometimes necessary as a basis of credit for more enlarged operations. It is often a wise exercise of discretion for a corporation to strengthen itself in this way, and with such discretion a stockholder cannot interfere. His only remedy is by an appeal to the ballot at the election for directors. But where a corporation, having actually made profits, proceeds to distribute such profits among the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards form and grasps the substance, would award the thing distributed, whether stock or money, to whomsoever was entitled to the profits.

This is all that was done in Earp's Appeal. The profits had accumulated until they reached nearly three-quarters of a million. A considerable portion of this surplus was distributed to the stockholders in the shape of new stock. It was confessedly profits. It was judicially ascertained to be profits after a careful examination and report by the Master. The corporation recognized the transaction as a distribution of profits. The present case differs from Earp's Appeal in this, that the corporation had made no distribution of profits in the shape of stock or otherwise than its regular dividends. In Earp's Appeal, the stockholder paid the company nothing for the new stock. It was paid for wholly out of the profits. Here the stock of the company was merely doubled in amount, the stockholders paying therefor its par value in cash.

Wiltbank's Appeal was a different case, and stands upon its own peculiar facts. Without going into the details of that case, it is sufficient to say that the trustees sold the new stock, and realized an actual profit, which was carried to the trust account. There was also the further significant fact, stated in the opinion of the Court, that there had been no serious diminution of the value of the old stock caused by the new issue. Here then was the case of the capital remaining unimpaired for the remainder-men, and an actual realized profit by the sale of the new shares. Such profit was properly awarded to the life-tenant. No such state of facts exists here. It requires but a cursory examination of this transaction to show that no profit has been made except upon paper. As before observed the corporation had declared no profits and distributed none. It merely allowed the holder of each share of the old stock to subscribe for a corresponding share of the new stock, and to pay to the company the par value thereof. This right or option was worth from sixty to seventy dollars per share. The executors sold the option for sixty shares, and with the proceeds bought and paid for forty shares of the new stock. The latter is said to be profit. It looks like profit and might readily be mistaken for it. That it is not is conclusively shown by the facts as found by the learned Judge of the Court below. He says: "In January, 1873, the stock sold for $240 per share. In July, 1873, it sold for $170 a share. The result on the shares after the option to subscribe was to add to the assets $1,000,000 and ten thousand new shares. The stock was doubled; most of the options were sold in May and June. They then went down to sixty-six dollars for each option to subscribe. The largest number was sold at that price. If a stockholder sold his option to subscribe at seventy dollars each he was just even, and if at less than seventy dollars he lost." It thus appears that for each dollar gained by the sale of the options, a corresponding dollar was taken from the value of the original shares. If the company had gone into liquidation the day before the issue of the new stock, the one hundred shares of original stock would have realized $24,000. If it had gone into liquidation the day after, the one hundred and forty shares would have realized the same sum. Where then was the profit? It was figured out by the Court below in this wise—

The original one hundred shares were worth	$24,000
The one hundred and forty shares, market price, at the time of the audit, $225 were worth . .	$31,500
Being net profit of . . .	$7,500

The fallacy of this theory consists in the fact of estimating the one hundred and forty shares not at their actual value at the time of the transaction, but at the market value three years afterwards. A more uncertain rule could not well be imagined. It would make the right of the parties depend upon the condition of the stock market, which is as variable as the tides, without

Digitized by Google

their regularity. Market values are well enough upon a question of distribution where the parties are about to realize, but upon a question of values between life-tenants and remainder-men, a judicial decree should go down through the shifting sands of the stock market until it reaches the solid rock of actual values. The application of any other rule might work serious injustice. It is well known that within the last year, the stock of more than one large corporation has varied in price over one hundred per cent. Even if the market value were a proper test, why take it three years after the transaction occurred? Why not one year, two years, or any other time? The tenant for life and remainder-men might well differ as to the precise day which should fix the market value, as the bulls or the bears might happen to be in the ascendant. It often happens that stocks that are intrinsically worthless are kept up at high prices by the ways that are peculiar to Third Street and Wall Street. In such a case as this the solemn judgment of a Court upon a question of values, defining the rights of parties in the future, must have a more secure foundation. The date at which the value of this stock must be estimated is the time when the transaction took place. Its actual value then was $170 per share. This valuation is based not upon the caprice of the market, but upon actual assets in the hands of the company. If it was worth $225 per share in 1876, when this account was audited, the increase is the result of the gains of the business of the company during the preceding three years. As such it forms a portion of the capital of the company, and so must remain until such time as said company shall declare it to be profit, and in some manner provide for its distribution. When such event shall occur the one hundred and forty shares will be entitled to their proportion thereof.

We are of the opinion that the forty shares of new stock issued by the company form a portion of the capital of the residuary estate of Henry Lazarus, deceased, and must be held upon the same uses and trusts as are expressed in the will of the testator in regard to the original one hundred shares of the same stock.

The decree is reversed and the record remitted to the Orphans' Court for further proceedings in accordance with the views contained in this opinion. The costs of the appeal to be paid by the appellees.

Opinion by PAXSON, J. WILLIAMS, J., absent.

Appeal of Mary Lazarus.

January 22. THE COURT. The decree of the Court below having been reversed upon the appeal of Wm. Moss *et al*, it becomes unnecessary to discuss the case upon this appeal.

The appeal is dismissed at the costs of the appellant.

Opinion by PAXSON, J. WILLIAMS, J., absent.

Common Pleas—Law.

C. P. No. 1. Feb. 17, 1877.

Building Association v. Schuller.

Building association mortgage—Fines—Penalty for non-payment of interest when due—Measure of damages—Fines for unpaid dues of past months can only be imposed when expressly authorized by charter or by-laws—Act of April 12, 1859.

Rule to set aside assessment of damages.

Scire facias on a building association mortgage in the ordinary form, conditioned for the monthly payment of interest and dues, and of such fines as might be imposed under the constitution and by-laws of the association. Judgment was entered for want of a sufficient affidavit of defence. The prothonotary assessed the damages as follows:—

Cash advanced		$888.00	
⅞ of premium $312 . . .		273.00	$1161.00
48 month's instalments . .			288.00
48 " interest . .			288.00
			$1737.00
By cash paid	$380		
Withdrawal value of 6 shares of stock transferred as collateral for loan and cancelled by this credit $673.74			
Less fines for non-payment . .	$268.10	$405.64	$785.64
			$951.36

In this computation of damages, the monthly penalties or fines were calculated at the rate of 10 per cent. upon each month's dues that were unpaid, and for every succeeding month that they remained unpaid. According to this method of calculation, the monthly penalty being $1.20, the fines on forty-three months' dues in arrear amounted to $268.10.

The following is the clause in the constitution on which this claim was founded:—

"Sec. 5. In case any stockholder shall neglect or refuse to pay his, her, or their monthly dues or interest, such stockholder shall forfeit and pay the additional sum of 10 cents on each dollar due by him, her or them, for every such monthly refusal or neglect, to be

Digitized by Google

charged with the monthly dues; but no fines shall, in any case, be charged on fines."

The affidavit set forth that the item of $268.10, is much in excess of the sum due for fines at the time of entering judgment; and that the mode of computing fines adopted by the association plaintiff is unauthorized by their constitution.

Levi (with whom was *Gimber*), for the rule

J. H. Sloan, contra.

The mode of computing fines used by the association plaintiff, and which is usual with building associations, is necessary to its successful operation. There is nothing in the Act of Assembly, 12 April, 1859, § 6, forbidding it, and it is authorized by sec. 5 of the constitution. This question has been lately decided in Common Pleas No. 3, in—

Building Association *v.* George, 3 WEEKLY NOTES, 239.

THE COURT. The Act of 12 April, 1859, allows this mode of computing fines only when expressly sanctioned by a by-law of the building association. In Building Association *v.* George (*supra*), the by-law was so worded as to justify the decision there given. In the present case the clause of the constitution regarding "fines and penalties," is so worded as to exclude the imposition of fines for the unpaid dues of past months.

Rule absolute.

[*Cf.* Association *v.* Keller, 2 WEEKLY NOTES, 29; Association *v.* Neurath, Id. 95; Selden *v.* Building Association, Id. 481; Lutz *v.* Winkler, Id. 273; Flounders *v.* Hawley, 1 Id. 574; Building Association *v.* George, *ante*, 239.]

C. P. No. 2. March 5, 1877.

O'Donnell v. George E. Bleim, owner, and Isaac E. Bleim, contractor.

Mechanic's claim—Requisites of the claim as to setting out particulars of work or materials —Apportionment.

Rule to strike off mechanic's claim.

This was a *scire facias* upon a mechanic's lien. The lien was an apportioned claim for carpenter work on ten three-story houses on north side of Oxford Street, between Seventeenth Street and Bouvier Street, for $770; apportioned $77 each.

The bill of particulars set up a special contract to roof the houses at $70 per house, without the kitchens, for which the plaintiff claimed seven dollars per house additional.

G. Harry Davis, for the rule.

It being possible to specify the amount of the work done, and the price for the same for each house, separate claims should have been filed against each.

Acts of 1831, 1836, 1850, Purd. Dig. 1033.
Thorn *v.* Shaw, 5 Legal & Ins. Reporter, 19
Wilson *v.* Forder, 6 Cas. 131.

The claim should set forth the nature and character of the work, and specify the items. When it is sought to charge the owner, a lump contract is not sufficient.

Lee *v.* Burke, 16 Sm. 336.
Smaltz *v.* Knott, 3 Gr. 227.
Lynch *v.* Feigle, Leg. Int. 1876, 408.

The special contract recited in the lien should have been fully set forth and made part of the claim.

H. C. Titus, contra.

C. A. V.

March 9. Rule discharged.

[*Cf.* Millett *v.* Allen, *ante*, 374; Kennedy *v.* Bozarth, *ante*, 157, and cases cited in notes.]

C. P. No. 2. **Huddy v. Havens.** March 5, 1877.

Removal of causes from State to Federal Court —What is the first term at which a case could be tried.

Rule to stay proceedings and transfer case to the Circuit Court of the United States.

Case. The summons was returned on the first Monday of May, 1875. The narr. was filed January 15, 1876. Demurrers were filed and withdrawn, pleas were subsequently filed, and on June 15, 1876, a replication was filed and issue joined, and the case ordered on the trial list. On February 26th, 1877, this rule was taken.

Harrington, for the rule.

Sutton, contra. This application is too late. The Act of Congress requires the petition for removal to be filed at or before the term at which the case could first be tried.

Harrington. The case was not reached, and could not have been tried.

THE COURT. The "next term," under the Act of March 3d, 1875, ch. 137, § 3 (U. S. Stat. 471), means the next term at which the case could *legally* be tried, not actually. If, owing to the crowded state of the docket, a case could not be reached till the third term after it was at issue, a petition to remove it then is too late.

Rule discharged.

C. P. No. 2. **Adams v. Smithman.** March 5, 1877.

Lis pendens—To be determined as of the time the second writ issued.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a book account.

The affidavit of defence set forth that a suit had been brought in Court of Common Pleas, No. 3, for the same cause of action and between the same parties, and was still pending.

Duffield, for the rule, submitted the record in

Digitized by Google

the former proceeding, which showed that the suit had been discontinued, but not till after the writ issued in the present case.

Williams and *Stilwell*, contra.

THE COURT. Plaintiff's right to sue must be determined as of the time his writ issued. As the other action was then pending, a plea of *lis pendens* would be good, and this affidavit is equivalent to such a plea.

Rule discharged.

C. P. No. 2. **Griffith v. Salter.** March 5, 1877.

Affidavit of defence law—Recognizance of bail in error is within—Copy need not be filed.

Rule for judgment for want of a sufficient affidavit of defence.

This was a *scire facias* sur recognizance of bail for stay of execution. The defendant filed a suggestion that plaintiff was not entitled to judgment in default of an affidavit of defence, not having filed a copy of the instrument sued upon.

R. Alexander, for the rule, was not called on.

Selden, contra. The Act of March 11, 1836 (P. L. 75), and the Act of March 12, 1849 (P. L. 66), permitting judgments in default of an affidavit, only relieve the plaintiff from the duty of filing a copy of the instrument sued on in actions upon records, mechanics' claims, and mortgages. A recognizance of bail is not part of the record (Erb *v.* Scott, 2 H. 20), and is a *casus omissus* from the act. Therefore there should have been a copy filed.

THE COURT. The long established practice has been, in *scire facias* on a recognizance of bail for stay of execution filed in the same Court, to treat the recognizance as a record within the Acts of Assembly.

Rule absolute.

[See Crine *v.* Wallace, 1 WEEKLY NOTES, 293; *contra*, Allen *v.* Gatley, 2 Id. 98.]

C. P. No. 2. March 7, 1877.

Fluch v. Lehigh Valley Insurance Co.

Insurance, fire—Suppression of material fact — When the question should be left to jury.

Motion for a rule for new trial.

Covenant on a policy of insurance against fire issued by the company defendant on machinery and fixtures in a certain distillery in Frenchtown, New Jersey.

The facts developed upon the trial were that the plaintiff had been aware previous to his application for insurance that a number of buildings in the neighborhood had been set on fire by incendiaries, and that a notice had been found posted on a neighbor's fence that plaintiff's building would go next. Plaintiff had at various times had his building insured, but at the time of this notice the policies had all expired. Shortly afterwards he procured this insurance, but did not state to the defendants the fact of the incendiary fires in the neighborhood or of the threatening communication posted on the fence.

After several unsuccessful incendiary attempts, causing but little damage, of which the company was not notified, the property was destroyed by an incendiary fire, about nine months after the date of the policy. The defendant asked the Judge to charge that "if the plaintiff procured the insurance by reason of threats to burn down his building, and did not disclose such threats to the company, the verdict must be for defendant."

The Judge, MITCHELL, J., refused to charge as requested, but instructed the jury that any material suppression of facts by the insured at the time of his application, especially of facts not readily discoverable by the insurers, would be a breach of good faith, and would make the policy void, and left it to them to say, upon the evidence, whether there was any such suppression of material facts in this case.

Bowman, for the motion.

THE COURT. The question is a very narrow one. The defendant's point asked the Judge to say as a *matter of law* that the failure to communicate the facts was a sufficient suppression to avoid the policy. We think under the evidence it was a question of fact, and therefore properly left to the jury.

Rule refused.

C. P. No. 4. **Taylor v. Nyce.** Feb. 24, 1877.

Affidavit of defence—Judgment for want of, notwithstanding a paper purporting to be an affidavit of defence had been filed—Practice —On motion for judgment for want of an affidavit of defence, the Court will inspect a paper, which had been filed and docketed prior to the motion, purporting to be an affidavit of defence, and if the paper is frivolous, alleges no grounds of defence, and appears to have been filed merely for the purpose of delay, will, without notice to the attorney for the defendant, enter judgment for want of an affidavit of defence.

Motion for judgment for want of an affidavit of defence. Before BRIGGS, J., sitting to grant judgments for want of affidavits of defence.

Assumpsit upon a promissory note.

On the Court docket was entered "Feb. 24, 1877, affidavit of defence filed."

Digitized by Google

Thomas Mitchell, for the motion, exhibited to the Court a paper endorsed "Affidavit of Defence, filed Feb. 24, 1877." This paper was the affidavit of one Edward Slocum, defendant's step-son and a stranger to the suit, alleging that, since the issuing of the writ in this case to the present time, the defendant had been sick and confined to his bed "in such a condition that it was impossible for him to attend to any business or to consider anything that might be a defence to the action. That he is so low now that it would not be advisable to consult with him, that the slightest excitement of mind would be dangerous. Deponent is advised, therefore, that longer time should be given to the defendant for making affidavit to any defence he may have to the above action."

Mitchell stated that he had been negotiating with the defendant during the past three weeks for the settlement of this case; that the attorney for the defendant had recently assured him that no affidavit of defence should be filed; and that he believed that the paper under inspection had been interposed merely for the purpose of delay and in order that time might be obtained for the accomplishment of measures to prevent the collection of the debt.

The affidavit does not even intimate that any one believes in the existence of a possible defence to this action. The paper cannot be called an affidavit of defence. No injury can result if the motion is granted, because the Court may open the judgment or stay execution thereon upon a subsequent suggestion of defence.

[BRIGGS, J. It does not appear that you have given notice of this application to the attorney for the defendant.]

There has been no time; the affidavit was filed this morning, and the defendant's attorney had assured me none would be filed.

BRIGGS, J. The paper cannot be called an affidavit of defence, since none is suggested by it. Under the circumstances we will grant the motion.

Motion granted.

C. P. No. 4. March 5, 1877.

Lennig v. Quaker City Steamboat Co.

Affidavit of defence law—Wharfage is not the subject of book entry within the Act.

Rule for judgment for want of sufficient affidavit of defence.

The copy filed embraced a number of charges of the following kind:—

Aug. 21.	To wharfage . .	$2.00
" 22.	" " .	2.00
etc. etc.		

The affidavit averred that the copy filed was insufficient to entitle the plaintiff to judgment.

C. H. Howell showed cause. The book account for wharfage would not be competent evidence of the plaintiff's claim, and the copy is therefore not within the affidavit of defence law.

Wilmer v. Israel, 1 Browne, 257.
Starkie on Evidence, 494, n. 1.
Notes to Price v. Torrington, 1 Sm. L. C. 390.
Hale v. Ard's Adm'r, 12 Wr. 22.

The use of a wharf gives a claim in the nature of rent, and, in the absence of a written contract to pay, the defendant is entitled to a jury trial.

R. D. Coxe, for the rule.

Wilmer v. Israel was decided before the affidavit of defence law was enacted. The entry of wharfage is the entry of a service rendered within the rule.

THAYER, P. J. We think this case by no means comes within the category of services which are the subject of a book charge. It is rather a license for a consideration.

Rule discharged.

Orphans' Court.

Collins's Estate. Jan. 16, 1877.

Will—Demand for issue—Appeal from register—Testamentary incapacity—Insane delusions—Conflicting evidence—What testimony sufficient to authorize issue.

Sur appeal from the register, and demand for issue.

Joseph Collins died in July, 1875, leaving a will, dated August 5, 1873, wherein, after leaving certain pecuniary bequests to his brothers and sisters, he devised to his wife the interest she would take under the intestate Act, and the balance of his estate to his daughter for life, and after her death to his brothers and sisters. The will was duly admitted to probate by the register, and an appeal was then taken from his decision by the daughter of decedent, on the ground of want of testamentary capacity on the part of the testator. The matter was referred to an examiner to take testimony, and came on to be heard upon the filing of his report. The testimony was voluminous and conflicting. On the

Digitized by Google

part of the contestant two physicians were called, who testified that at the time of his death Mr. Collins had softening of the brain, which had probably been coming on for a number of years. Numerous witnesses, with whom Mr. Collins had had business dealings, were called, who testified to various acts of seeming insanity on his part. It was testified by the widow of testator and by the servants living in the house that he had a great hatred for his wife and daughter, having conceived an idea that they had designs upon his life, and that they were robbing him of his property; that he cut to pieces the chairs, bedding, and other furniture in the house "so that he would recognize it again;" that he imagined his food was poisoned, and that men were constantly in the house to take his life. It was also proved that during his lifetime he had no intercourse with any of his family, some of whom lived in Ireland and others in California. It was also alleged that the will was drawn by testator when laboring under a hatred for his wife and daughter.

On the part of the executors, it was alleged that the will was drawn up by counsel at the request of decedent, and with the advice of Mr. John T. Henderson, one of the executors. Many witnesses were called who belonged to the same Masonic Lodge as decedent, who testified that they considered him perfectly sane, and perfectly competent to make a will, and that he had held positions of responsibility in the Lodge to the time of his death. Few of the witnesses, however, had ever been in Mr. Collins's house, or had met him at other places than at the Lodge. The executors appointed by the will testified that decedent had consulted them at different times in relation to it, and seemed to contemplate making the same disposition of his property that he afterwards did. It was also proved that the property of decedent, which consisted almost entirely of real estate, valued at upwards of $60,000, had fallen into a condition of very bad repair during the last few years of his life, and that a great deal of it at the present time was unproductive.

Geo. M. Dallas (with whom was *R. Hopkins Patterson*), for appellant.

The single question is, was Joseph Collins of sound and disposing mind and memory at the time of the making of the paper now claimed to be his last will?

An issue must be awarded if the evidence now laid before the Court would sustain a verdict against the validity of the will upon a rule to set aside such verdict as against the weight of the evidence.

Restine's Estate, 3 WEEKLY NOTES, 27.

The inquiry is not what the Court would find, but what a jury *might* find.

Banks *v.* Goodfellow, L. R. 5 Q. B. 549.
Grabill *v.* Barr, 5 Barr, 441, 443.
Daniel *v.* Daniel, 3 Wr. 191, 196.
Tawney *v.* Long, 26 Sm. 106, 114.
Rees *v.* Stillé, 2 Wr. 138, 143.

The exact nature and degree of lunacy, insanity, madness, hallucination, or delusion, which is inconsistent with testamentary capacity, has been generally considered to be incapable of precise definition. Each case rests upon its own circumstances; but there must be capacity to exercise memory, understanding, judgment, discretion, and reason.

Peake's Ev., 375–6.
2 Stark. Ev., 1278–9.
Boyd *v.* Eby, 8 W. 68.
Rambler *v.* Tryon, 7 S. & R. 95.
Case of Marquis of Winchester, 6 Rep. 23.
Banks *v.* Goodfellow, L. R. 5 Q. B. 549.
Boughton v. Knight, L. R., 3 P. & D. 65.
Daniel *v.* Daniel, 3 Wr. 191, 195.
Thompson *v.* Kyner, 15 P. F. Sm. 368.

In this case, the facts proved establish the existence of one or both of two certain morbid conditions of mind, with reference to which the evidence is to be considered, and the existence of *either* of which, if established to the satisfaction of a jury, would invalidate the will, viz:—

(1) *General lunacy*, to the extent of testamentary incapacity, or the absence of that which the law holds to be necessary, in all cases, to a sound and disposing mind and memory, viz., an "understanding to dispose of his estate with judgment and discretion, which is to be collected from his words and actions and behavior, at (or about) the time."

Boyd *v.* Eby, 8 W. 66, 70.
Banks *v.* Goodfellow, L. R. 5 Q. B. 549.
Grabill *v.* Barr, 5 Barr, 441, 442.
McTaggart *v.* Thompson, 2 H. 149, 154.
Leech *v.* Leech, 9 H. 67, 69.
Daniel *v.* Daniel, 3 Wr. 191, 196.
Thompson *v.* Kyner, 15 P. F. Sm. 368.

(2) *Partial insanity*, consisting of a morbid delusion prejudicial to his wife and only daughter (the latter of whom is the appellant) which exercised, or was calculated to exercise, an influence over his will in disposing of his property.

Peake's Evidence, 375–6.
1 Jarman Wills, 58 n., and page 59 *et seq.*, title "Partial Insanity," notes and cases cited.
Greenwood *v.* Greenwood, 3 Curties' Appx. 1.
Dew *v.* Clark, 1 Addams, 279.
S. C., 2 Id. 102.
S. C., 3 Id. 79.
Atty. Genl. *v.* Parnther, 3 Bro. C. C. 441.
Ex parte Holyand, 11 Ves., Jr. 10.
White *v.* Wilson, 13 Ves., Jr. 87.
Banks *v.* Goodfellow, per Cockburn, C. J., L. R. 5 Q. B. 549.
Boyd *v.* Eby, 8 W. 67, 70.
Leech *v.* Leech, 9 H. 67 (p. 68—3d point affirmed).
Pidcock *v.* Potter, 18 P. F. Sm. 342, 350.
Tawney *v.* Long, 26 P. F. Sm. 106, 107, 110, 111 112, 114.
Lancaster Bank *v.* Moore, 28 Sm. 407, 414.

Digitized by Google

Οἰκειομανία is "a morbid state of the domestic affections, as an unreasonable dislike of wife or child, without cause or provocation, turning love into hatred, a will disinheriting the object of hatred would be set aside."

Ekin *v.* McCracken (C. P. of Butler Co.), 32 Leg. Int. 1875, 405. Per AGNEW, P. J.
See also Wharton & Stillé, Med. Jur., §§ 382, 383, 384, 630, 631, 632, 633, 634.
Ray, §§ 193, 202, 211, 212, 185.
W. & S. Med. Jur. 96.
Boyd *v.* Eby, 8 W. 67, 70.
Ray Med. Jur. of Insanity, 1871, §§ 302, 303.
Tawney *v.* Long, 26 P. F. Sm. 106, 107, 110, 111, 112, 114.

The incapacitating cause must have existed at the time the will was made, but evidence "looking before and after" is relevant, where it *tends* to establish its existence at the precise time.

Irish *v.* Smith, 8 S. & R. 573.
White *v.* Wilson, 13 Ves., Jr. 87.
Boyd v. Eby, 8 W. 67.
Grabill *v.* Barr, 5 Barr, 441, 443, 446–7.
McTaggart *v.* Thompson, 2 H. 149, 154.
Thompson *v.* Kyner, 15 P. F. Sm. 368.
Pidcock *v.* Potter, 18 P. F. Sm. 342, 351.
Ekin *v.* McCracken (*supra*), per AGNEW, P. J.

Insanity or delusion, once existing, is presumed to have continued until proved to have ceased. The burthen of clearly proving a lucid interval at the time of making the will, and of sufficient soundness to enable the party to *judge* the act, is on him who avers it, and "where delusions are of such a nature as is calculated to influence the testator in making the particular disposition, a *jury* would not, in general, be *justified* in coming to the conclusion that the delusion, still existing, was latent at the time."

Boyd *v.* Eby, 8 W. 66.
Banks *v.* Goodfellow, L. R. 5 Q. B. 549.
Jackson *v.* Van Dusen, 5 Johns. 144.
Grabill *v.* Barr, 5 Barr, 441, 443, 446–7.
Leech *v.* Leech, 9 H. 67 (p. 68, point 4 affirmed).

Where the will is inofficious, it is in itself some evidence of unsoundness of mind, and it is persuasively so when the evidence shows no rational cause for disregarding the instincts of natural affection and the moral obligations recognized by the general sense of the community.

Banks *v.* Goodfellow, L. R. 5 Q. B. 549.
Boughton *v.* Knight, L. R. 3 P. & D. 65.
Boyd *v.* Eby, 8 W. 67, 70.
Pidcock *v.* Potter, 18 Sm. 342, 351–2.
Intestate Law of Pennsylvania, Purd. Dig. 806–7.

In Boughton *v.* Knight (L. R. 3 P. & D. 65) the jury found against the will, although the allegation to defeat it was the existence of delusions in the mind of the alleged testator in reference to the contesting sons to whom he had left very considerable legacies, but not so much as they would have been entitled to receive under the law.

Even a rational will cannot stand if made by an insane person, or by one under an insane delusion which had, or is calculated to have had, an influence in making it.

3 Bac. Ab. Tit. "Idiots and Lunatics, F."
Banks *v.* Goodfellow, *supra*.
Boughton *v.* Knight, *supra*.

And proof of insanity, or of such delusion, or the *absence* of "complete and absolute proof that the party who so framed it, did it without any assistance," rebuts any inference of sanity which might otherwise have been drawn from the sensible provisions of a will.

2 Stark. Ev. 1285.
Cartwright *v.* Cartwright, cited in Banks *v.* Goodfellow, *supra*, page 558.

The *factum* is simply "to be considered" as some evidence on the question.

Boyd *v.* Eby, 8 W. 66, 70.

Witnesses who are not experts, nor subscribing witnesses, may testify to their opinion on the question of sanity, where the facts appear on which the opinion is based, and its value is to be determined by reference to those facts.

Rambler *v.* Tryon, 7 S. & R. 92.
Hardy *v.* Merrill, 1 L. & E. Reporter, 20; S. C., Id. 596.
Grabill *v.* Barr, 5 Barr, 442.
McTaggart *v.* Thompson, 2 H. 155.
Daniel *v.* Daniel, 3 Wr. 196.
Pidcock *v.* Potter, 18 Sm. 351.

Weil (with whom was *J. G. Johnson*), contra, commented upon the testimony of the witnesses, and cited—

Cauffman *v.* Long, 2 WEEKLY NOTES, 695.

This will was drawn up with care, and was evidently the work of counsel; there is no evidence to show that decedent was insane at the time of making it.

Thompson *v.* Kyner, 15 Sm. 380.
Stevenson *v.* Stevenson, 9 C. 471.
McMasters *v.* Blair, 5 C. 298.
Redfield on Wills, *83–*85.

As to the law in reference to insane delusions, see—

Clapp *v.* Fullerton, 34 New York, 190.
Fulleck *v.* Allinson, 3 Hagg. Ecc. 527.
Chambers *et al.* *v.* Queen's Proctor, 2 Curteis Ecc. 415.

There was no evidence that the testator was laboring under an insane delusion *at the time of making this will.*

Feb. 10. THE COURT. The testimony in this case is very conflicting, but the case seems to be within the statute which we consider mandatory. We therefore award the issue.

[No opinion.]

Digitized by Google

Weekly Notes of Cases.

Vol. III.] *THURSDAY, MARCH* 22, 1877. [No. 25.

Supreme Court.

May, '76, 65. May 11, 1876.

Ege et al. v. Medlar et al.

Husband and wife—Curtesy in estate settled to separate use of wife—Limitation of actions—Entry on and cultivation of portion of tract under color of title—Act of 22 April, 1856—When limitation runs against a wife and her heirs—Evidence—Evidence of forgery of deed—When too slight to be submitted to jury—Abstract of title filed under rule of Court—When admissible in evidence—Opinion of Supreme Court—Not allowed to be read to jury—Ejectment—Admission of landlord to defend—Limitation of defence to portion of tract.

A husband is entitled as tenant by the curtesy to lands settled to the separate use of his wife and her heirs, unless a contrary intention clearly appears in the deed of trust, and the fact that a power of sale is given to the trustee will not take away the husband's estate.

Whether the execution of such power of sale would bar his curtesy, *Quære.*

An entry upon and cultivation of a portion of a tract by a disseisor will not give him constructive possession of the whole tract, unless he has made his entry under color of title claiming by the specific boundary lines of the whole tract.

The thirty years' limitation imposed by the Act of 22 April, 1856, only applies where a right of entry accrues to a person under a disability. Hence, when a husband has curtesy in his deceased wife's lands, as her heirs have no right of entry until his death, the act does not apply, and their right of action is not barred until twenty-one years after the husband's death.

Where the evidence given to impeach the genuineness of a deed is very slight, and not sufficient to overthrow the direct and positive proof previously given of its execution, such evidence should not be submitted to the jury.

An abstract of title filed by a party under a rule of court may be given in evidence by the other party to the suit.

In an action of ejectment after a general plea of not guilty has been filed, it is within the power of the Court to admit a landlord of the defendants to become a party, and to limit his defence to a portion of the land claimed.

On the trial of a cause counsel cannot be allowed to read to the jury the opinion of the Supreme Court delivered in another case involving the same questions.

Error to the Common Pleas of Cumberland County.

Ejectment by Caroline Ege, *et al.*, heirs-at-law of Elizabeth Ege, deceased, against Frank B. Medlar, Frederick Roberts, and Henry Ward, to recover a tract of land known as the "Moses Foulke tract," containing 283 acres and 40 perches.

On the trial the Mount Holly Paper Co. made application to be admitted to defend as landlord of the original defendants, and to restrict its defence to the land covered by its leases to them, and the balance of the tract claimed by the company, in all 40 acres and 42 perches—being a portion only of the land in dispute. Plaintiffs opposed this application on the ground that the defendants having pleaded "not guilty," the Mount Holly Paper Co. if admitted must join in the issue already formed, and could not defend for part of the land only. Objection overruled, and the Mount Holly Paper Co. admitted to defend for the land included in its leases. Exception. Plaintiffs then proved title in Michael Ege to the land in dispute. They then gave in evidence a certified copy (the original being lost) of a deed from Michael Ege to John Miller in trust for Elizabeth Ege, wife of George Ege, for seven tracts of land, one of which was the land in dispute. This deed was dated June 2, 1815, acknowledged same day, proved by a subscribing witness May 23, 1848, and recorded June 7, 1848. It set forth that it was made "for the purpose of promoting the interest of said Elizabeth separate and apart from that of her said husband," and it conveyed the land to the trustee,

"In trust for the said Elizabeth Ege, wife of George Ege, her heirs and assigns forever, and for her and their sole and separate use and benefit, with full power in said trustee, together with said Elizabeth Ege or her heirs consenting and joining with said trustee, to sell and convey in fee simple the whole or any part of said property to any person or persons, the proceeds thereof to be paid to the said Elizabeth Ege, for her sole and separate use, to be used and disposed of as she may think proper either by will, deed, or otherwise. . . . Provided the said John Miller, trustee as aforesaid, should die before the trusts hereinbefore given and granted to him shall have been completed and ended, then and in that case the said Elizabeth Ege shall be vested with full and ample power and authority to make choice of and appoint such person or persons as she may have confidence in to be her trustee or trustees, who when so appointed by her shall have full power and authority to execute and perform all the trusts and powers given and granted to the said John Miller as trustee of the said Elizabeth Ege in as full and ample a manner as the said John Miller as trustee of the said Elizabeth Ege might or could have done in his lifetime."

Plaintiffs then proved that Elizabeth Ege died December 6, 1848, that her husband George Ege died February 11, 1858, and that plaintiffs were the children and heirs-at-law of said Elizabeth. Plaintiffs also proved that on June 3, 1815, the

Digitized by Google

day after the execution of the deed of trust, Michael Ege had executed and acknowledged to his sons George, Peter, and Michael, Jr., deeds in severalty for his remaining lands not included in the deed of trust. That George and Peter refused to accept their deeds; that in September, 1816, after the death of Michael Ege, Sr., partition was made of his real estate, in which partition the land described in the deed of trust was not included, and that George Ege accepted said partition, and received as his share thereunder a number of tracts of land surrounding the land in dispute and known as the Mount Holly Furnace Estate. Plaintiffs also offered in evidence the abstract of title furnished by defendants under rule of Court; this for the purpose of showing that defendants admitted title in Michael Ege, but claimed under his son George Ege. Objected to. Objection sustained. Exception.

Defendants, in order to impeach the genuineness of the deed of trust, gave evidence tending to show that the surveys of two of the tracts described in it, viz., the Stephen Foulke tract and the Moses Foulke tract, overlapped or interfered with each other; that another of the tracts described by it and called therein the "George Ege" tract was identical with a tract called the James Love tract, which was included in the inquest of partition, and in the undelivered deed of Michael Ege to George Ege, of June 3, 1815; that the courses and distances of this George Ege tract as described in the deed of trust of June 2, 1815, were identical with those of the survey returned to the land office, which survey was not made until 1844, and that these courses and distances could not have been made up from the lines of the adjoining surveys. (The Court afterwards in the charge called the attention of the jury to the fact that the survey of the land in dispute was not made until about the same time as the George Ege tract, yet that, with the exception of a single line, it was identical with the description contained in a deed dated in 1795, the validity of which was not questioned.)

Defendants to prove title in themselves gave in evidence a judgment, *fi. fa.* and levy by the Farmers and Mechanics' Bank of Philadelphia against George Ege; an amicable condemnation thereunder, given by George Ege, of the Mount Holly furnace estate described by its outside boundaries which included the Moses Foulke tract now in dispute; a sale of said estate by the sheriff; a sheriff's deed therefor to the Farmers and Mechanics' Bank, dated August 20, 1838, and successive conveyances by which the title passed from the Farmers and Mechanics' Bank to one Given. In all of these conveyances the land was described as the Mount Holly estate without specifying the number of acres. Defendants then gave in evidence a deed from Given to Kempton of a number of tracts of land, part of the Mount Holly estate, each described by metes and bounds, including a tract of 40 acres and 42 perches which was a portion of the Moses Foulke tract now in dispute. Also a deed from Kempton to the Mount Holly Paper Co., defendants, for the same land. Defendants then proved that they and those under whom they claimed had continuously since 1838 kept inclosed and cultivated a field of about 15 acres called the "old furnace field," which formed a small portion of the "Moses Foulke tract;" that they had dug ore and cut timber from the other portions of said tract at intervals during the same period and had also used a spring of water on said tract a short distance from the furnace field. It appeared, however, from the testimony that they had taken possession of and improved the "old furnace field" and dug the ore from the other portions of the tract under their general claim to all the lands lying within the exterior boundaries of the Mt. Holly estate without regard to the divisions between the different tracts included therein.

In his address to the jury, plaintiffs' counsel proposed to read as part of his argument the opinion of the Supreme Court in the case of Kille *v.* Ege, 1 WEEKLY NOTES, 500, so far as applicable to the facts of this case. Objected to. Objection sustained. Exception.

Plaintiffs presented, *inter alia*, the following points:—

(4) Taking all the evidence given by the defendants and admitted by the Court, touching the execution of the deed of June 2, 1815, there is nothing which would warrant the jury in inferring fraud in the execution and delivery of said deed. *Answer.* We have submitted this evidence to you, and it is for you to determine from all the evidence in the cause the genuineness of the trust deed. But we say to you that the law presumes from the recorded deed as it appears, both execution and delivery, and to overthrow the deed the evidence must satisfy your minds that it is a fraud, or that it was never delivered.

(7) There is nothing in the deed of trust of June 2, 1815, to exclude the surviving husband of Elizabeth Ege from his rights as tenant by the curtesy, and as George Ege did not die until 1858, and this suit was brought in 1874, the possession shown by defendants for a portion of the land in dispute amounts to nothing, and plaintiffs are entitled to recover the whole of the land described in the writ. *Answer.* The purpose of the trust deed is declared to be that "of promoting the interests of the said Elizabeth separate and apart from that of her said husband," and the language of the trust is (here the learned Judge quoted the words of the deed as already set forth). The trust, it will be per-

Digitized by Google

ceived, is not only for the sole and separate use of the wife, but also for the sole and separate use of her heirs, and confers upon the trustee power to sell and convey—the said Elizabeth Ege or her heirs consenting and joining—and with power in her to appoint another trustee or trustees on the death of the trustee named in the deed. The intention of the grantor is apparent to our mind, that the husband was to be excluded from all interest as tenant by the curtesy. We therefore refuse to affirm this point, and say to you that under the terms of the deed George Ege had no curtesy.

(10) The defendants claiming title by adverse possession must show actual, adverse, hostile, and continued possession for twenty-one years. This possession must be of land limited and defined by marks on the ground, showing the extent of defendants' claim, and the burden of proof is on the defendants to show clearly the line to which their claim extends, by some designation of boundary, and as the defendants have not shown either adverse or continuous possession of any land outside of the old furnace field or any designation of boundary outside of said field, the plaintiffs are entitled to a verdict, in any event, for all the land not actually included within the said old furnace field. *Answer.* Refused We have adverted to this fully in our general charge.

The portion of the general charge relating to the question raised by this point was as follows: "The possession of an occupant by a colorable title is coextensive with his title, and when such a one enters into possession by inclosure or cultivation of a portion of the lands included within the lines of a survey, the law makes his possession co-extensive with the bounds of the survey. But he may contract his possession by laying out for himself new boundaries within the old lines of the survey, and when he does this his possession is no longer coextensive with the bounds of the original survey, but extends only to the new boundaries thus laid out. Then applying these principles to the facts in this case, we say to you that the possession by inclosure and cultivation of that part of the Moses Foulke survey known as the furnace field was coextensive with the bounds of the survey, but the very moment new boundaries were defined by the conveyance of Given to Kempton of the 40 acres and the 42 perches now defended for by the Mount Holly Paper Co., and which includes the furnace field, that very moment the possession was drawn in from the outer lines to the lines of the new boundary, and thenceforth all that part of the Moses Foulke survey outside the boundaries of the land claimed by the Mt. Holly Paper Co. passed from the defendants' possession."

Defendants presented, *inter alia*, the following points:—

(1) If the jury believe that the defendants and those under whom they claim have been in open, notorious, and hostile possession of any part of the tract of land claimed in this suit by inclosure, cultivation, or residence, claiming the whole tract as their own, under a color of title, for a period of twenty-one years and upwards, then the plaintiffs are not entitled to recover said tract or any part thereof. *Answer.* The evidence, we think, clearly establishes the fact that the defendants and those under whom they claim, have had the actual, adverse, visible, notorious, hostile, and continued possession, by inclosure and cultivation, of the 40 acres and 42 perches, defended for by the Mt. Holly Paper Company, for the period of twenty-one years next preceding the 14th of August, 1874, the time of bringing this action, and if the evidence so satisfies you that the defendants and those under whom they claim have held such adverse possession, for the period of twenty-one years next preceding the time of bringing this suit, of the 40 acres and 42 perches, then they should recover for that much. There can be no recovery, generally, for the defendants unless you find as a fact that the deed of trust to Elizabeth Ege was in truth never executed and delivered.

(2) Actual possession of part of a tract of land claimed under color of title by courses and distances, is possession of all the land embraced in such courses and distances, and if the jury believe that part of the Moses Foulke tract has been actually possessed and cultivated by the defendants, or those under whom they claim, continuously under color of title for thirty years prior to the bringing of this suit, then their verdict must be for the defendants for the amount of land so held by courses and distances under color of title. *Answer.* This point is answered in the affirmative, with this qualification, however: that the defendants can recover no more than the 40 acres and 42 perches described and embraced within the boundary of the Mount Holly Paper Company, unless you find that the trust deed to Elizabeth Ege was in truth never executed and delivered.

Verdict for plaintiffs against Medlar, Roberts, and Ward for the land described in the præcipe, except the 40 acres and 42 perches claimed by the Mount Holly Paper Co. Judgment thereon. Plaintiffs took this writ, assigning for error the admission of the Mount Holly Paper Co. to defend for part of the lands, the rejection of the abstract of title when offered in evidence, the refusal to allow the opinion of the Supreme Court in Kille *v.* Ege to be read to the jury, and the answers to the points given above.

S. Hepburn and *S. Hepburn, Jr.*, for plaintiffs in error.

(1) The Mount Holly Paper Co. having joined as defendants after a general plea of not

Digitized by Google

guilty had been filed, and having defended on the ground of the forgery of the deed of June 2, 1815, which covered the whole tract, ought not to have been allowed to limit their defence to the 40 acres and 42 perches.

Jones *v.* Hartley, 3 Wh. 191.

(2) As to evidence of fraud or forgery of the deed of June 2, 1815. In Howard Express Company *v.* Wile (14 Sm. 201), this Court says, where there is any evidence which alone would justify an inference of the disputed fact, it must go to the jury. But where a Court should say that there is not evidence sufficient to authorize the inference, they should not admit it. When the evidence offered to set aside a deed is not such as would justify a Chancellor in decreeing its cancellation, the Court should withhold it from the jury.

Merchants' Bank *v.* State Bank, 10 Wall. 662.
Dean *v.* Fuller, 4 Wr. 474.

In the present case the object of the testimony was to prove the forgery of the trust deed, and we submit there is not a single fact that justifies such an inference.

(3) As to the curtesy of George Ege. Since Morgan *v.* Morgan (5 Madd. Ch. 408), the English authorities have been uniform in holding that curtesy is incident to equitable as well as legal estates, and the decisions of our own Supreme Court, as well as our Acts of Legislature, have carefully preserved to the husband this right. That a husband has curtesy in an estate settled to the separate use of his wife, was expressly decided in Dubs *v.* Dubs (7 Casey, 149), and this was in accordance with the principles laid down in—

Faries' Appeal, 11 Harris, 30.
Van Rensselaer *v.* Dunkin, 12 Harris, 252.
Talbot *v.* Calvert, 12 Harris, 329.

If Mrs. Ege had an equitable fee simple in the lands in suit, her husband had curtesy, notwithstanding a contrary intent manifested by the deed of trust, since the incidents of an estate are engrafted on it by law, and are upheld even in disregard of the settlor's intention.

Thornton's Ex'rs *v.* Krepps, 1 Wr. 393.

(4) As to the Statute of Limitations. There could not be an entry by color of title on a portion of an *unknown* tract, so as to cover the whole of it. If defendants did not know that there was such a tract as the "Moses Foulke" tract, how could their pedal possession of a corner of it, believing that such corner belonged to the Mt. Holly estate, extend their title to the limits of the survey? The adverse possession, to have availed defendants, must have been an actual possession within defined lines, marked upon the ground, up to which the adverse possessor claimed.

Ament *v.* Wolf, 9 Casey, 331.

(5) As to the right to read to the jury the opinion in Kille *v.* Ege. In Good *v.* Mylin (1 Harris, 538), the opinion sought to be used had been delivered in a *reversed* case. But in a case where the judgment of the Court below has been *affirmed*, the same reasoning does not apply, and counsel should, therefore, have been allowed to read the opinion to the jury.

John Hays and *Lemuel Todd* (*A. B. Sharpe* with them), contra.

(1) The plaintiffs were not taken by surprise, nor in any respect injured, by the admission of the Mt. Holly Paper Co. as defendants. The latter had the right to limit its defence to a portion of the tract, and the Court had the power to mould the verdict accordingly.

(2) The verdict of the jury established the genuineness of the trust deed, and if there were any errors in the Court's rulings on that branch of the case, they were harmless errors, and did the plaintiffs no injury.

(3) It is conceded on all hands, in Morgan *v.* Morgan, *supra*, and in Bennett *v.* Davis (2 Pr. Will. 316), that where, upon a devise to the separate use of the wife, there is a clear intention that the husband is to have no interest, but the same is to be for the wife and her heirs, a Court of Chancery will bar the husband of his curtesy.

Cochran *v.* O'Hern, 4 W. & S. 99.
Stokes *v.* McKebbin, 1 Harris, 268.
Rigler *v.* Cloud, 2 Harris, 363.

In the present case, the power of sale given to the trustee with the consent of the wife shows that it was the clear intention to exclude all interest of the husband, and this distinguishes the case from Dubs *v.* Dubs (7 C. 154), in which all power of sale was expressly taken away.

(4) The tract of land in dispute formed a part of the Mt. Holly estate. The Farmers and Mechanics' Bank purchased, at sheriff's sale, this Mt. Holly estate, in ignorance of the previous conveyance of this portion of it. Their entry was by color of title.

McCall *v.* Neely, 3 Watts, 72.
Green *v.* Kellum, 11 Harris, 254.
Wilson *v.* Howser, 2 Jones, 109.

And being under color of title, they were legally and constructively in possession of the whole Mt. Holly estate, of which the lands in dispute formed a part.

Kite *v.* Brown, 5 Barr, 291.
Baker *v.* Findlay, 8 Harris, 163.
Burke *v.* Hammond, 26 Sm. 172.
Susquehanna R. R. Co. *v.* Quick, 18 Sm. 197.

By the Act of 22 April, 1856 (Purd. Dig. 930, pl. 13), adverse possession for the period of thirty years is an absolute bar to all claims, even as to persons who were under disabilities during the running of the period. Defendants having maintained adverse possession for thirty-six years, their title cannot now be disturbed.

Pratt *v.* Eby, 17 Sm. 396.
Hunt *v.* Wall, 25 Sm. 416.

Digitized by Google

Under the 4th section of the Act of 26 March, 1785 (Purd. Dig. 928, pl. 5), a claimant who is under a disability at the time his right accrued, has ten years after the removal of the disability in which to bring suit. In the present case, therefore, the plaintiffs could only bring suit within ten years after the death of George Ege.

Henry *v.* Carson, 9 Sm. 297.

Oct. 9, 1876. THE COURT. On the second day of June, 1815, Michael Ege, the elder, being the owner of some eighty-seven tracts of land, situated along the South Mountain, in the counties of Cumberland and Adams, executed a deed, in trust, embracing, *inter alia*, the land in dispute, to John Miller, for the use of Elizabeth, wife of George Ege, one of the sons of the grantor. On the next day (June 3) he executed for his three sons, George, Michael, and Peter, severally, deeds embracing all the land remaining of the said eighty-seven tracts, not included in the trust deed above mentioned. The deed, prepared for George, was intended to convey all those tracts "comprising the Holly Iron Works' Estate." George and Peter refused to accept of the deeds thus executed to them; hence, on the death of Michael Ege, Sr. (August 31, 1815), the lands recited in those deeds remained undisposed of. In September, of the following year, partition was made in due form of the fifty-nine tracts remaining to the estate of Michael Ege, and those included in and designated as the "Mount Holly Estate" were accepted by, and confirmed to, George Ege, under whom the defendants claim title. This estate, so accepted by George, was clearly defined in the proceedings of partition; and as those proceedings were conducted by parties of intelligence, of full age, and under the direction of eminent counsel, the probabilities of mistake are excluded. (*Vide* Kille *v.* Ege, 1 WEEKLY NOTES, 500.)

The Moses Foulke tract, now in controversy, was not one of those included in the partition, and could not, therefore, have been one of those assigned to George Ege. It follows that the sale by the sheriff, in 1838, of the Mount Holly Estate, as the property of George Ege, to the Farmers and Mechanics' Bank, did not, and could not pass title to the land in controversy, even though the parties to such sale so intended.

But, it is argued, and the Court so held, that by the amicable condemnation, executed by George Ege, on the 23d of December, 1836, this tract, by the designation of outside boundaries, was included in the Mount Holly property; that the sheriff's deed, purporting to convey all the land within such boundaries, gave the Farmers and Mechanics' Bank, and its vendees, color of title to the Moses Foulke tract, and, hence, their entry upon part thereof gave them constructive possession of the whole, the continuance of which, for twenty-one years, made them a perfect title by the statute of limitations. This would be correct if (1) the description in the condemnation and deed necessarily included the land in suit, and the party purchasing honestly believed that the sheriff's sale did pass the title to such land. If (2) the bank, or its vendees, did enter upon and claim this Moses Foulke tract *eo nomine*. But, in the first place, it was assuming too much to take for granted the first part of this proposition. It is true that this land lay within the outer lines of the Mount Holly Estate, as described in the amicable condemnation, but so also did the Michael Ege and William Cox tracts, and, perhaps, several others of the trust estate. It is, however, going a great way to suppose, in the face of the fact that an accurate description of the Mount Holly property was of record, that the intention of George Ege was to include all this territory in the levy, or that the agents of the bank supposed that, by the sheriff's sale, they got title thereto. If, however, it was known, or ought to have been known, that that sale did not, in fact, embrace the Moses Foulke tract, then the purchaser acquired no color of title; for, as is said by GIBSON, C. J., in McCall *v.* Neely (3 Watts, 72), "An entry is by color of title when it is made under a *bona fide* and not pretended claim of title existing in another." Whether the circumstances warranted the defendants' vendors in supposing they had acquired title by the sheriff's sale, was a question not for the Court but for the jury. But suppose they had color of title, then was it definite or indefinite? Was it to the Moses Foulke tract *eo nomine*, or was it general, embracing, without particular definition, all the lands within the Mount Holly property? If it were the former, then might the possession of the defendants be extended, constructively, to the whole tract; if the latter, that possession must be confined to the actual work on the ground. It is not to be forgotten that mere color of title is valuable only so far as it indicates the extent of the disseisor's claims; if it fails in this it fails altogether. (Barnhat *v.* Pettit, 10 Harr. 135)

The question then recurs: Did those from whom the defendants derive title enter upon this land claiming, by virtue of their title, to the lines of the Moses Foulke tract? If they did so claim the evidence fails to show it. On the other hand, it is said by Frederick C. Kropff, who, at one time, with Paul D. Geisse, owned the Holly Estate, that they knew nothing of the Moses Foulke survey, but dug ore and cut timber where it suited them over the whole estate. From this testimony, it is manifest that the claim was general to all the lands lying within the external lines of the Mount Holly property, without re-

Digitized by Google

gard to internal tracts or divisions, and that it was under this general claim the bank and its vendees entered into the possession of and held the furnace fields. We need hardly say that it is not possible for an indefinite claim, such as this, to carry the right of the disseisor beyond his mere *pedis possessio*. Thus, under the evidence, as we now have it before us, the controversy is narrowed down to that part of the premises which the defendants and their vendors have had in actual possession. Whether they can hold even this, depends upon the time when the statute of limitations began to run against the plaintiffs' right of entry. The plaintiffs claim as heirs-at-law of Elizabeth Ege, the wife of George, by virtue of the deed of trust executed to John Miller, for her use, by Michael Ege, Sr., whilst the defendants claim under George Ege. Now it is obvious that if, as the plaintiffs contend, George had an estate in curtesy in the lands thus conveyed to his wife, the right of entry did not accrue to them until his death, and hence the statute could not begin to run before that period. (Gernet *v.* Lynn, 7 Cas. 94; Shallenberger *v.* Ashworth, 1 Cas. 152; Crow *v.* Knightlinger, Ibid. 343.) It is alleged that the Act of 1856 has introduced a different rule. Such, however, is not the case. That Act does but affect the former rule as to persons of unsound mind, married women, and minors, who, previously thereto, had ten years after the removal of their several disabilities within which to bring suit against such as might have intruded upon their right of entry; now, however, by the statute above mentioned, the lapse of thirty years from the time when such right of entry has accrued bars their right of action, though the disabilities therein referred to be not removed. (Hunt *v.* Wall, 25 P. F. S. 413.) It will be observed, however, that the right of action in such persons is presupposed, for the time runs from the period when the right of entry begins, but where this right does not exist no action lies, and hence the statute can have no effect. So, in the case in hand, to say that the statute shall run from a date when the heirs of Elizabeth Ege had no right of entry, and consequently no right of action, is to say that they might be barred of such right by no default of their own, and without the possibility of remedy. If, then, George Ege was tenant by the curtesy, the defendants, holding under him, could not be disturbed in the occupancy of the premises until his death. From that period the right of entry vested in the plaintiffs, and from that period only did the statute begin to run against them.

That George Ege had curtesy in this property is not doubtful. The estate conveyed to Elizabeth was a fee; whether legal or equitable matters not, as at law, in either case, curtesy attaches as an incident. Unless, therefore, there is something in the grant which clearly exhibits an intent to exclude the husband's right, equity will not interfere to annul the legal intendment. (Cochran *v.* O'Hern, 4 W. & S. 95; Stokes *v.* McKibbin, 1 Har. 267.) We discover no such intent in the deed before us. The expressions therein contained, such as, "For the purpose of promoting the interest of said Elizabeth, separate and apart from that of her said husband," and "To and for her and their sole and separate use and benefit," are but the ordinary terms used in such instruments, and import no intention to strip the husband of his curtesy. That no such intent existed in the mind of Michael Ege is further obvious, from the fact that he makes no provision to prevent the management or proceeds of the estate from passing into the hands of George. The duties of the trustee are purely passive, except he might be directed to sell by the wife; but, even in that event, he could not control the disposition of the proceeds, for they were to pass to her absolutely and unshackled by any condition or restriction whatever. Almost of necessity, the management of this estate passed into the hands of the husband, and had it been sold, there was nothing to prevent her making a gift to him of the whole proceeds. So, in case of her death, he would be entitled to a share thereof under our intestate laws. There being nothing, then, in the deed of trust, impairing the husband's rights, or altering the statutory order of descent, an estate by the curtesy must be taken to have vested in George Ege. (Dubs *v.* Dubs, 7 Ca. 149.) It is supposed that the power of sale, found in the trust deed, operates against this conclusion; but as that, of itself, does not work a conversion, or alter the character of the estate granted, we cannot understand how it could be made to destroy one of the incidents thereof. The execution of the power might have had such an effect, but not the power unexecuted.

We think the plaintiffs' fourth point should have been affirmed. The evidence of the execution of the deed of trust is direct and positive. The lands which it purports to convey, were not included in the proceedings in partition; it appears to have been duly acknowledged before competent authority, and probate was made of it by George D. Foulke, the subscribing witness, only a few days before it was recorded. Without an attempt to impeach directly this testimony, we cannot see how the fact that the identity of the George Ege tract as described in the deed of trust, with the James Love tract as described in the partition, can have the effect, even remotely, to prove the forgery of the deed of trust. At best it exhibits a mistake made, not, indeed, by Michael Ege, for this deed conveyed the land without regard to whether it was known as

Digitized by Google

George Ege or James Love, but by Peter Ege and those who conducted the partition; and it is rather singular that such a mistake should be used to impeach the deed of the ancestor made in the preceding year. The proposition has the effect, not only to cure a party's own mistake, but to make it evidence in his own favor. So the force of the fact of the identity of the courses and distances, set forth in the deed of 1815, with those in the return of survey made by Davidson in 1845, is completely nullified by the other fact, stated in the charge of the Court, that the same description, with the exception of a single line, is to be found in the deed of Stephen Foulke to Kittera, Jugo & Boyd in 1795. In view of all the circumstances of this case, we think that the evidence of the fraudulent making of this deed, after the survey of 1845, is so slight that it ought not to have been submitted to the jury.

Ordinarily an abstract of title, filed by either party, under a rule of Court, would be evidence; for its principal design is to relieve the case of the proof of such papers and evidences of title as may therein be admitted. Not only are the parties thus relieved of the preparation of unnecessary testimony, but the public business is expedited. Perhaps, as the plaintiffs had in evidence all that by the abstract was admitted, the ruling was harmless; nevertheless it would have been proper to have sustained their offer.

Under the ninth section of the Act of March 21, 1772, the Mount Holly Paper Company, as landlord of the defendants, was properly admitted of record to defend for the land covered by its leases.

It was right to refuse to permit the opinion of the Supreme Court to be read to the jury. (Good *v.* Mylin, 1 Har. 538)

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by GORDON, J. WILLIAMS and PAXSON, JJ., absent. SHARSWOOD, J., did not sit.

[As to tenancy by curtesy, in an estate settled to the separate use of a married woman, see Moore *v.* Webster, Law Rep., 3 Eq. 267; Appleton *v.* Rowley, Law Rep, 8 Eq. 139.]

May. '76, 101. May 12, 1876.

Kille and Wharton v. Ege et al.

Action for mesne profits—Conclusiveness of prior action and judgment in ejectment—Measure of damages—Evidence—Valuable improvements—Amendment—Addition to suit of parties not connected with original parties—Not authorized by statutes—Rights of parties so added—When action commences as to them—What constitutes the record of a suit.

Where, after one verdict in ejectment, the successful party brings suit for mesne profits of the land for a period prior to the commencement of the action of ejectment, the defendant is not estopped, either by the judgment in said action of ejectment or by any of the proceedings therein, from setting up, as to such prior time, the same title which was unsuccessfully relied on by him in said ejectment suit.

In such an action testimony of an expert, as to the value of the land before and after certain improvements had been placed upon it by defendant, is competent evidence to show the value of such improvements.

In an action for mesne profits plaintiff proved that defendant while in possession had leased a portion of the land for fifteen years, reserving an annual rent of $2000, and a royalty on ore mined; that no ore had been mined by the lessees, but they had paid to defendant the first year's rent when plaintiff recovered possession of the land under a judgment in ejectment:

Held (reversing the judgment of the Court below), that as defendant, by his eviction and consequent failure to fulfil his covenants in the lease, had been rendered liable to an action by the lessees, the plaintiff was not entitled to recover from him the whole sum of $2000, as compensation for his occupation of the land.

If, subsequent to the commencement of a suit, additional plaintiffs, strangers in title to the original parties, are added, the action commences as to them only from the time when their names were put on the record.

Semble, that the statutes of Pennsylvania relating to amendments do not authorize the addition of parties to a suit, who are not connected, either in person or title, with the original parties thereto.

Error to the Common Pleas of Cumberland County.

Trespass by Caroline Ege *et al.*, heirs of Elizabeth Ege, deceased, against Charles Wharton and John T. Kille, to recover mesne profits of a tract of land, known as the "Cox tract," recovered by plaintiffs from defendants in an action of ejectment.

On the trial (before HERMAN, P. J.), plaintiffs offered in evidence the "record and proceedings" of said ejectment suit, by which it appeared that the action was commenced June 7, 1872, by the heirs of William Cox, who were subsequently nonsuited; that afterwards on April 24, 1874, the heirs of Elizabeth Ege were added to the record as plaintiffs, who on October 16, 1874, recovered a verdict for the land; that the judgment entered on this verdict was affirmed by the Supreme Court in Kille *v.* Ege (reported 1 WEEKLY NOTES, 500), and that under said judgment plaintiffs were put in possession of the land October 26, 1874.

Plaintiffs further gave evidence that defendant Kille had leased a portion of said land to Ginterman *et al.*, and another portion to Lanigan; that he and his lessees had taken from the land between November, 1869, and September 30, 1874, 27,531 tons of iron ore; that he had received from sales of ore $3950.58, and from royalties from said tenants $12,950.64; that he had leased

Digitized by Google

seventy-five acres of land to Seyfert, McManus & Co. for fifteen years from January 30, 1873, at an annual rent of $2000, and a royalty on ore mined; that under this lease no ore had been mined, but that said Kille had received one year's rent ($2000).

Defendants, in order to show title in themselves prior and up to the bringing of the action of ejectment, offered in evidence proofs of the same title which they had relied on in the ejectment suit (see 1 WEEKLY NOTES, 500). Plaintiffs objected on the ground that the record of the ejectment suit showed that the validity of this title had been passed upon in that suit, and decided against the defendants. Objection sustained and offer overruled. Exception.

Defendants then offered to prove that the leases to Ginterman *et al.* and to Lanigan included land not recovered in the ejectment, on which were situated slush ponds and a railway, to be followed by evidence showing that the use of this land increased the value of the ore taken from plaintiffs' land; this, for the purpose of decreasing the amount of profits claimed by plaintiffs. Objected to by plaintiffs, because the value of the ore taken from their land could not be diminished by showing that defendants used a portion of their own property to wash or carry the ore away. Objection sustained. Exception.

Defendants then gave evidence to show that the land leased to Seyfert, McManus & Co. was not part of the land recovered in the ejectment suit, but was on the Lewis Foulke tract (see draft, 1 WEEKLY NOTES, 501), and that the line, known as the "red marked line" or "Pinegrove line," which plaintiffs claimed to be the boundary between their tract and the Lewis Foulke tract, was not the true boundary. Two of defendants' witnesses (John Evans and David Peelor) testified that even if the "red marked line" was the true boundary there would only be twenty or twenty-five acres of the Seyfert, McManus & Co. tract on plaintiffs' land. Other conflicting testimony was given during the course of the trial in regard to the number of acres of the Seyfert, McManus & Co. tract included in plaintiffs' land.

Defendants then gave evidence of buildings, machinery, and appliances for mining ore erected by the lessees, Ginterman *et al.* and by Lanigan, on the land, and valued at $17,000. They then called one Haskill, who testified that he had known the country where the ore banks leased by Ginterman *et al.*, and by Lanigan, were located, since 1838, and that he had been in the iron and ore business since 1856. Defendants proposed to prove by him the value of the land upon which these banks were located, with the knowledge that there was ore in it, but undeveloped, and what the value of it was at the time of suit with the improvements for mining ore erected on it. This, for the purpose of showing that the property had been increased in value by the expenditure of defendants in developing the ore. Objected to. Objection sustained. Exception.

Defendants presented certain points, which with the answers of the Court thereto were as follows:—

(1) The writ in ejectment to No. 230, August Term, 1872, having originally been served in the names of the heirs of William Cox, deceased, who were non-suited at the trial of the case, and a verdict and judgment in the case having been entered in favor of the heirs of Elizabeth Ege, deceased, who did not come upon the record as plaintiffs until April 24, 1874; the action did not exist as to them until that date. *Answer.* In a general sense this proposition is correct, but it must be understood that the moment the heirs of Elizabeth Ege came upon the record as plaintiffs, they became engrafted upon the action as such, and all the legal consequences of the action attached to them the same as if they had been of the original plaintiffs.

(2) To entitle the plaintiffs to recover in this action the mesne profits for the time anterior to the existence of the action of ejectment, they must show their title and the possession of the defendants. *Answer.* This point is answered in the affirmative, and we think the plaintiffs have done this. They have shown the possession of the defendants and their lessees, from the fall of 1869, and have also shown their own title by the record and proceedings in ejectment. The verdict and judgment in their favor show the recovery of the title by the plaintiffs, and the charge of the Court below, the assignments of error in the Supreme Court in affirming the judgment, show unmistakably the character and extent of the title set up by the defendants, in that trial, to defeat the plaintiffs' recovery.

(3) The verdict and judgment in the ejectment are conclusive against the defendants only from the date of the action to the time when the plaintiffs were put in possession of the property, and the evidence or notes of trial, as kept by the Court in that case, cannot be resorted to for the purpose of seeing what title the plaintiffs recovered on or to show title in them before the action was in existence as to them. *Answer.* This point is affirmed generally. But where, as in this case, the record and proceedings in the ejectment show unmistakably the same continuous title in the plaintiffs down to the verdict and judgment, from a time anterior to that for which mesne profits are claimed, although claimed anterior to the service of the writ of ejectment, the defendants will not be permitted on the trial of the action for mesne profits to set up in defence the same title as that defeated in ejectment. On the

Digitized by Google

trial of a subsequent action of ejectment, it would be different. By the record and proceedings in ejectment we take in not only the verdict and judgment, but also the charge of the Court below, the assignments of error passed upon by the Supreme Court and the opinion of the Supreme Court, all of which we think should be taken notice of in the action.

(4) The lease to Seyfert, McManus & Co., providing for a rental of $2000 per annum, with the privilege of taking out ore therefrom in years succeeding that in which the rent may be paid, and it being admitted that none has been taken, and if the lease to them is on the Cox land, the recovery by the plaintiffs in the ejectment evicted Seyfert, McManus & Co., and made Mr. Kille liable to refund the $2000 they paid to him, and the plaintiffs cannot therefore hold him in this action responsible for the amount he received from Seyfert, McManus & Co. *Answer.* We cannot answer this point as requested. It is true that the recovery by the plaintiffs in the ejectment operated as an eviction of the tenants as between him and Kille, but, whether or not Kille is liable or may ever be called upon to respond in damages to Seyfert, McManus & Co. does not affect the plaintiffs' rights to the rental received by Kille from that part of the plaintiffs' lands covered by the lease to Seyfert, McManus & Co.

The Court, in answer to certain other points presented by defendants, charged the jury that whatever improvements of a permanent and valuable character the defendants or their lessees had put upon the premises prior to the commencement of the ejectment suit, were proper subjects of compensation to defendants, and their value could be set off in this action; but that defendants were not entitled to credit for loose property and temporary structures put and left on the land, and that it was for the jury to say whether the improvements were or were not permanently beneficial to the land; that improvements made after the bringing of the action of ejectment were not subjects of set-off, but that in so far as they were used in carrying on the mining operations, the cost of making and putting them on the ground might be taken into account in ascertaining the value in place of the ore mined.

The Court in the general charge said: "If you determine that the 'red marked line' is the true eastern boundary of the Louis Foulke, then the Cox must come up to it, and this would put 52 acres of the Seyfert, McManus & Co. lease on the Cox. But if you determine that the true eastern boundary of the Louis Foulke is the line as located by Evans 80 perches eastward from the 'red marked line,' then but 2½ acres of the Seyfert, McManus & Co. lease would be upon the Cox. Thus upon your determination of the true eastern boundary of the Louis Foulke, will depend the proportion of the rents and profits of the Seyfert, McManus & Co. lease which the plaintiffs will be entitled to recover for."

Verdict and judgment for the plaintiffs for $12,933.40. Defendants took this writ, assigning for error the overruling of their offers of evidence, the answers to their points, and that portion of the charge given above.

Lemuel Todd and *John Hays*, for plaintiffs in error.

The rule is that one who makes improvements in the face of an adverse claim does so at his peril as to that claimant. But if the adverse claim is defeated, of course the reason of the rule falls. In the present case the action of ejectment was brought by the Cox heirs, and was decided against them. The action did not exist as a claim of the Ege heirs until they were brought upon the record in 1874, and, of course, defendants had no notice of their claim prior to that date, and are not debarred from claiming for their prior improvements.

In an action for mesne profits the record of the judgment in ejectment is conclusive only as to the title from the commencement of the action of ejectment.

Bailey *v.* Fairplay, 6 Binn. 450.
Osbourn *v.* Osbourn, 11 S. & R. 58
Huston *v.* Wickersham, 2 W. & S. 313.
Postens *v.* Postens, 3 W. & S. 183.
Drexel *v.* Man, 2 Barr, 271.
Sopp *v.* Winpenny, 18 Sm. 80.

In another action between the same parties, a judgment is conclusive only as to points directly in issue, and not as to collateral questions.

Duchess of Kingston's Case, 11 Harg. State Trials, 261; 2 Sm. L. Cas. 424.
Lewis & Nelson's Appeal, 17 Sm. 165.

The record of an action in a Court, founded on the common law, consists only of the writ, declaration, pleas, and judgment.

Erb *v.* Scott, 2 Harris, 20.

And in the present case these show simply the writ describing the property, the pleading, the impanelling of a jury, and their verdict. The bills of exception only become part of the record for the purposes of review, and the assignments of error are no part of the record.

If the lease to Seyfert, McManus & Co. was upon the Cox tract, the verdict in the ejectment evicted the lessees.

Schuylkill Imp. Co. *v.* Schmoele, 7 Sm. 271.

Mr. Kille will therefore have to refund them the $2000 paid, and therefore he should not be compelled to pay it to plaintiffs.

The Court below gave to the jury binding instructions as to the quantity of land of the Cox tract embraced in Seyfert, McManus & Co.'s lease; but there having been conflicting testimony

Digitized by Google

on this point, it should have been left to the jury.

What are permanent improvements is a question of law and not of fact, and should, therefore, have been decided by the Court, and not left to the jury.

The object of the action being compensation for damages done (Sedgwick on Damages, *126), the evidence of Haskill as to the value of the land before and after the erection of the improvements, was direct as to the injury suffered, and should have been admitted.

S. Hepburn, Jr., and *S. Hepburn*, for defendants in error.

The amendment of the record in the ejectment suit by adding the names of the Ege heirs (made after and in consequence of the receipt of defendants abstract of title), was proper under our Statutes.

Alden *v.* Grove, 6 H. 385.

Kaul *v.* Lawrence, 23 Sm. 416.

The additional plaintiffs were added with the full knowledge of defendants and without objection from them. They cannot now, in a collateral action, take advantage of the error, if any existed.

Plaintiffs offered in evidence the "record and proceedings" of the ejectment suit without objection from defendants. The "proceedings" show the title on which plaintiffs recovered. That this might be shown by parol, is established by—

Kilheffer *v.* Herr, 17 S. & R. 326.

Defendants' title, having been once adjudicated by a competent tribunal, is as to a collateral proceeding forever put at rest.

Marsh *v.* Pier, 4 Rawle, 288.

The payment of the $2000 received by Kille from Seyfert, McManus & Co., should not be delayed to abide the result of another trial between other parties.

Breading *v.* Blocher, 5 C. 349.

The testimony of Evans and Peelor as to the quantity of land of Seyfert, McManus & Co. on the Cox tract, was a mere guess. They were immediately asked to make a calculation, and did so before the close of the trial, but it was not put in evidence by defendants. Plaintiffs, therefore, had a calculation made, and put in evidence, showing 52 acres to be on the Cox tract, and this was the only real evidence on the subject.

The evidence of Haskill was not as to a fact, but as to an opinion. The value of an undeveloped ore bank that no human eye ever saw, cannot be proved as a fact from which a jury would be permitted to fix actual damages.

Oct. 9, 1876. THE COURT. While due effect should be given to the statutes authorizing amendments, yet care must be taken that they be not so used as to pervert their true spirit. None of the defendants in error were originally parties to the action of ejectment, the record of which they gave in evidence. They were substituted some two years after the writ issued. The original plaintiffs had no title, and were non-suited. The defendants in error did not derive title from them, but recovered on their own title solely. It was in no wise connected with the original plaintiffs. The so-called amendment was not the addition of names omitted through mistake; nor of parties holding any joint interest with the original plaintiffs. There was no privity of title or interest between them. They were strangers to each other's claim. The substitution was not authorized by the statute. That question, however, is not now before us on bill of exception. The substitution having been made, and the record being given in evidence in a subsequent suit, we may declare its effect.

Amendments depriving the opposite party of any valuable right shall not be allowed. Hence when the name of a person was added as plaintiff in ejectment, after suit brought, it was held that if at the time of the amendment the title of the new party was barred by the statute of limitations, he could not recover. (Trego *et al. v.* Lewis, 8 P. F. Smith, 463; Kaul *et al. v.* Lawrence *et al.*, 23 P. F. Smith, 410.) It follows, therefore, that although the defendants in error were substituted without objection, yet they thereby acquired no rights relating back of their substitution. As to them, the action commenced when their names were put on the record. The first assignment is sustained. The 2d, 3d, 4th, 10th, and 11th assignments will be considered together. The action of ejectment was a legal averment of the right of the plaintiffs therein to the possession of the land. By their recovery that right was established. In this subsequent action for mesne profits the verdict and judgment are conclusive of their right to receive damages from the time their action commenced down to the execution of the *habere facias possessionem.* (Drexel *v.* Man, 2 Barr, 271.) But when they sought to recover for damages or profits, prior to their action, the verdict and judgment were not conclusive as to such prior time. They were then required to prove their title, for the record only showed that they recovered the term mentioned, from their substitution. (Hare *v.* Fury, 3 Yeates, 14; Bailey *et al. v.* Fairplay, 6 Binn. 450; Osbourn *v.* Osbourn, 11 S. & R. 58; Huston *v.* Wickersham, 2 W. & S. 308; Postens *v.* Postens, 3 Id. 183; Drexel *v.* Man, *supra;* Sopp *v.* Winpenny, 18 P. F. Smith, 80.)

The evidence in the action of ejectment, by which the right of possession was sustained, must not be confounded with the right itself. The direct issue in the case was their right to possession at the time they came on the record. That

Digitized by Google

issue, having been found in favor of the plaintiffs therein, cannot be questioned in the present case. But it is well settled that the estoppel of a judgment extends only to the question directly involved in the issue, and not to any incidental or collateral matter, though it may have arisen or been passed upon. (The Duchess of Kingston's Case, 11 Harg. State Trials, 261; Moulton *v.* Libbey, 15 N. H. 480; Campbell *v.* Consalus, 25 N. Y. 613; Hibshman *v* Dulleban, 4 Watts, 183; Lentz *v* Wallace, 5 Harris, 412; Martin *v.* Gerndant, 7 Id. 124; Lewis & Nelson's Appeal, 17 P. F. Smith, 153.) It is urged that the charge of the Court below, in the action of ejectment, affirmed here, is a part of the record, and that it, and the other proceedings in that case, show the same title now set up by the plaintiff in error, was there judged to be invalid. It is true the charge of the Court and the evidence may be made a part of the record for the purpose of reviewing the correctness of the rulings in the particular case (Northumberland Bank *v.* Eyer, 8 P. F. Smith, 97), but at common law they are no part of the record (Erb *v.* Scott, 2 Harris, 20; Hageman *et al.* *v* Salisbury, 24 P. F. Smith, 280.) They are preliminary or incidental to the main issue concluded by the verdict and judgment. For the purpose of enforcing the particular judgment they may be deemed a part of the record. (Hageman *v.* Salisbury, *supra.*) Their conclusive effect in a collateral suit is another question. It was held in Packet Company *v.* Sickles (5 Wallace, 592), and in Coleman's Appeal (12 P. F. Smith, 252), that the plea of judgment recovered may be sustained by a mixed matter of record and of fact. But when extrinsic evidence is given for that purpose it must be consistent with the record, and unless it be shown that the verdict and judgment necessarily involved its consideration, it will not be conclusive. Thus far we have considered the effect to be given to a judgment in those cases where one judgment is conclusive. The verdict and judgment in this ejectment did not necessarily involve the title nor the possession prior to the commencement of the action. They were conclusive for the recovery of mesne profits only, and for that purpose only from the time of the commencement of the suit. In a second action of ejectment between the same parties, the verdict and judgment would not be conclusive. Every fact and conclusion found in the first suit might be controverted in the second. Hence when, in this action, the defendants in error claimed for mesne profits prior to bringing their suit in ejectment, they opened the question of their title, and of the possession of the opposite party, for such prior time, as fully as it would have been by a second action of ejectment. Neither the prior judgment in ejectment, nor any of the proceedings therein, estopped the plaintiffs in error from having their rights again passed upon, nor from having the same evidence considered by another jury. The assignments are therefore substantially sustained.

The fifth assignment relates to the plaintiffs in error being charged in this action with the money which they had received from Seyfert, McManus & Co. In an action for mesne profits the plaintiff may recover for the fair rent or yearly value of the premises, and for injury done thereto. (Huston *v.* Wickersham, *supra.*) Compensation is the proper measure of damages (Morrison *v.* Robinson, 7 Casey, 456.) The action is equitable in its character. (Zimmerman *v.* Eshbach, 3 Harris, 417.) Hence a *bona fide* occupant under claim of title, who has made permanent and valuable improvements, may show them to be a full compensation for the use of the premises. (Morrison *v* Robinson, *supra.*) The fact that the plaintiffs in error had let the premises for a term of fifteen years, at an annual rental of $2000, besides the payment of royalty on each ton of iron mined, and received the rent for one year, did not necessarily give the defendant in error the right to recover that sum. It appears that no ore was mined by the lessees during the time for which the plaintiffs in error are liable for mesne profits. By their eviction they became unable to fulfil their covenants in the lease. Their lessees acquired a right of action against them for damages, which may equal or exceed the whole sum they have received. Then, if the premises were in no wise injured by the lessees, and they took no ore therefrom, we cannot see that the $2000 received by the plaintiff in error establishes a correct basis for fixing the just rental value of the premises. The receipt thereof, under the circumstances, establishes no just compensation for the rights withheld, nor for injuries sustained. The point covered by this assignment should have been affirmed.

We are not furnished with the draft showing the "red marked line," referred to in the eighth assignment. We understand it is also called the "Pinegrove line." John Evans testified: "Taking it for granted that the line marked with red marks is the western boundary of the Cox tract, there would only be about twenty acres of the Seyfert & McManus lease on the Cox tract."

David Peelor testifies: "Taking it for granted that the Pinegrove line is the western boundary of the Cox tract, there would only be about twenty or twenty-five acres of the Seyfert & McManus lease on the Cox lands." Both of these witnesses were surveyors and had surveyed the lands in controversy. The number of acres was for the jury to find, and the learned Judge erred in inadvertently assuming fifty-two acres to be the correct quantity.

Digitized by Google

The evidence covered by the thirteenth assignment was offered for the purpose of showing substantially the increased value given to the premises by the improvements and expenditures made by the plaintiffs in error in developing the mines. The witness knew the premises both before and after those improvements were made. He had had large experience in the ore and iron business. He knew the character of those improvements. He knew the ore banks in question, and was familiar with mining operations in that vicinity. He therefore had sufficient knowledge to form an intelligent opinion of the value of the premises both before and after their development. Those two valuations, being ascertained, certainly threw some light on the value of the improvements. Other testimony had shown some of the improvements to be of such a permanent and valuable character as to make them the proper subject of consideration by the jury. (Morrison *v.* Robinson *et al.*, *supra.*) We do not think the mode of proof was so objectionable as to justify the exclusion of the testimony.

In so far as the other assignments are not covered by what we have already said, they are not sustained.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by MERCUR, J. WILLIAMS and PAXSON, JJ., absent. SHARSWOOD, J., did not sit during the argument.

July, '76, 13. Jan. 23, 1877.

Lippincott v. Seidenbach.

Evidence—Meaning of words—Trade terms—Custom.

Though evidence may be given to prove a usage of trade or custom, it is not admissible to prove the meaning of plain English words.

Plaintiff bid for and bought at auction a lot of goods. In the catalogue of sale the following conditions were printed: "Descriptions copied from invoices but not warranted," and "Without allowance." Immediately over the description of the goods purchased by plaintiff were the words "No allowance except for short measure." In a suit against the auctioneers for non-delivery of the goods, defendant called one of their firm and offered to prove by him the meaning of the above expressions:

Held, that, there being no offer to prove any usage of trade or custom to control or qualify the meaning of the expressions, the offer was properly overruled.

Error to the Common Pleas No. 2, of Philadelphia County.

Case by Seidenbach *et al.* against Lippincott *et al.* for damages caused to the plaintiff by the non-delivery of certain goods. Upon the trial the following facts appeared: The defendants, dry goods auctioneers, on April 8, 1874, put up for sale a large consignment of goods. Printed catalogues were issued which contained on the first page, among the conditions of sale, *inter alia*, the following: "Descriptions copied from invoices, but not warranted;" also "Without allowance." In the body of the catalogue, immediately over lot 696, was the following: "No allowance except for short measure." The plaintiff, having a catalogue in his hand, bought in "lot 696," containing according to the catalogue 225 pieces or 4010 yards of goods, which he purchased at 5½ cents per yard. The defendants delivered but ten pieces of the goods, alleging that they had received only that number, and that the sale was a mistake.

The defendants, having called Barclay Lippincott, one of the members of their firm, asked the following questions:—

Q. What is the meaning of the expressions in the terms of sale, printed on the first page of the catalogue, "Descriptions copied from invoices but not warranted?" Objected to. Objection sustained. Exception.

Q. What is the meaning of the expression in your catalogue, "without allowance?" Objected to. Objection sustained. Exception.

Q. What is the meaning of the expression in the catalogue in connection with this lot of goods (No. 696), "No allowance except for short measure?" the object of the question being to show that the auctioneer, by such clause in the catalogue referring solely to this lot of goods, was relieved from any liability for the non-delivery to the purchaser of the full amount of goods advertised Objected to. Objection sustained. Exception.

Verdict for plaintiff for $738, and judgment thereon. Defendants took this writ, assigning for error the rejection of their evidence.

W. H. Browne, for plaintiff in error.

If in a particular trade certain words or phrases have acquired by usage a peculiar meaning, evidence is admissible to show the peculiar meaning of such words used in a contract. The evidence of usage will not be excluded because the words are, in their ordinary meaning, unambiguous. In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it only ascertains it by expounding the language.

Leake on Contracts, 116.
Bateman on Commercial Law, 155.
Best on Evidence, vol. i. 430; lb. 650.

Samuel Dickson, contra, was not called on; his paper-book contained the following argument:—

Without laying the ground by offering to show that the terms employed were peculiar to the trade or in any proper sense technical, the defendants below undertook to prove that words, perfectly

Digitized by Google

intelligible and in common use, were intended to mean something different from their ordinary signification. If this was not intended by the offers there was no use in making them, and if it were meant, this was a sufficient reason for rejecting them.

1 Greenleaf on Evidence, sections 280, 281.

Wiggleworth *v.* Dallison, 1 Smith's L. C. 598, 628.

If a particular word had acquired a peculiar meaning, it can of course be explained; but here was a catalogue intended for the general public, and without offering to show that notices expressed in common English had acquired a technical or peculiar trade meaning, it was proposed to prove that a notice that the auctioneer would make "no allowance except for short measure," meant that he "was relieved from any liability for the non-delivery to the purchaser of the full amount of goods advertised."

January 29, 1877. THE COURT. There was no offer to prove any usage of trade or custom to control, limit, or qualify the words used in the catalogue. The offers were merely to prove the meaning of plain and simple English words. This could not be done without circumstances to show fraud or plain mistake.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

July 19, '75. **Louchheim v. Becker.** Feb. 2, 1877.

Affidavit of defence law—Sufficiency of copy filed—Set-off—Distinctness of averment.

A copy filed styled "copy of book account," if in form it appears to be a copy of a book of original entries, is sufficient.

Averments of set-off should distinctly set out the facts causing the alleged damage.

Error to the Common Pleas No. 3, for the county of Philadelphia.

Assumpsit by Becker against Louchheim *et al.*

The following copy was filed:—

The following is a copy of book account upon which the above suit is brought.

Louchheim Brothers to Arnold Becker.

1875. March 9. Making 46 pantaloons No. 522 at 25 cents	$11.50
Feb. 24. Making 48 vests No. 509 at 25 cents	12 00
etc. etc.	
Amounting in all to	$116.36

The following affidavit of defence was filed:—

Henry S. Louchheim, one of the above defendants, being duly sworn, says that the defendants have the following defence in this case:—

(1) That the copy filed is called a copy of "book account," and is nowhere stated to be a copy of any book of original entries in which the entries as set out are entered.

(2) The defendants are clothiers, and sell ready made clothing. The plaintiff was employed to work for them, and to make up clothing which he received into garments. That under the terms of his contract he was to have the clothing finished and returned at a certain time, or was not to be paid for it. That many of the articles charged for in the account filed were not so returned in time, and the defendants suffered great loss and damage thereby. That some articles after being taken out and kept some time were returned unmade, and the defendants suffered much loss and damage by that, which they claim to defalk and set off against the claim of the plaintiff in this suit. That the loss and damage which the defendants sustained in this way, amounts to at least the sum of thirty-six dollars, which they will be able to prove, and claim to deduct from the claim of the plaintiff.

The Court below entered judgment for want of a sufficient affidavit of defence. The defendants took this writ, assigning for error the entry of this judgment.

Sharpless (with whom was *Diehl*), for the plaintiff in error.

The averment of set-off was sufficient to have taken the case to a jury, or. at least, to have reduced the judgment.

C. Davis, contra, was not called on.

Feb. 12. THE COURT. The allegation in the affidavit of defence, that the copy of a "book account" is insufficient, has no weight, and was not relied on. The amount of damage by a failure to return the clothes made up at the time fixed for their return, is wholly vague. It states not the items, the time fixed when the return was made, or any other particular to render the claim for damages tenable.

Judgment affirmed.

PER CURIAM. WILLIAMS, J., absent.

Jan. '76, 80. **Dawson v. Robinson.** Feb 6. 1877.

Error—When insufficient for reversal—Omission of the Court to charge on a point not made by counsel—Practice.

The Supreme Court will not reverse for an omission to charge upon a point not made by counsel.

PER CURIAM. It would not have been too late to have asked the Judge to submit the question at the conclusion of his charge, if it had been inadvertently omitted.

Error to the Common Pleas No. 4, of Philadelphia County.

Judgment was entered in favor of Robinson against Dawson, on a single bill, under seal, for

Digitized by Google

$3000. The defendant obtained a rule to open judgment, which was made absolute. He then pleaded payment with leave and set-off.

At the trial (before THAYER, P. J.) the defendant showed that he had given the judgment-note in suit for payment for the plaintiff's share in a partnership concern which they had previously carried on together, and offered evidence to prove that he had given the note under a misapprehension of the state of affairs, if not deceived by the fraudulent concealment of facts by the plaintiff.

The learned Judge instructed the jury, *inter alia*, as follows: "If the defendant has not satisfactorily proved a fraud on the part of the plaintiff, then you are to find a verdict for the plaintiff for the whole amount of the note." . . . "If this instrument was obtained by fraud, or by means of a fraudulent concealment of facts by the plaintiff, then it is avoided altogether, and you are to find a verdict for the defendant, otherwise for the plaintiff; the settlement, or the defendant's purchase of the plaintiff's interest is to stand, unless the plaintiff is shown to have been guilty of some fraudulent conduct, which was concealed from defendant."

Verdict and judgment for plaintiff for $3349.50. Defendant took this writ, assigning for error the portion of the charge quoted.

John Dolman, for plaintiff in error.

The jury were confined within too narrow a compass in being told that the only issue before them was one of fraud or no fraud. If the defendant gave the note under a mistake of material facts, it would be sufficient to relieve him from full payment, though the plaintiff were guiltless of intentional deceit.

W. McCandless, contra, reviewed the evidence.

February 12. THE COURT. The only error assigned, is that the learned Judge below, in his charge, confined the jury to the question of fraud, without leaving to them to say whether there was not an innocent mutual mistake of facts. There may have been evidence to raise such a question, but it is very plain that no such point was made to the Court, certainly none in writing; and we cannot convict of error for an omission to charge upon a point not made

It would not have been too late to have asked the Judge to submit the question at the conclusion of the charge, if it had been inadvertently omitted.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

[See Alexander *v.* Weidner, *ante*. 245; Penn Mut. Ins. Co. *v.* Snyder, *ante*, 269.]

Jan. '76, No. 91. Jan. 26, 1877.

McNamee v. Cresson.

Landlord and tenant—Construction of lease—Distress—Abandonment of—Effect of, on rights of surety.

Where a distress is made for rent, and afterwards abandoned, a surety upon the lease is discharged only to the extent of the value of the goods distrained.

A. let a house to B. for one year from June 14, 1872, upon condition that if the tenant remained on the premises after the expiration of the year, the contract was to continue in force for another year, and so on from year to year until legal notice should be given for a removal. During the first year, a legal notice to quit was served upon B.; he, however, remained in possession until April, 1874. In an action against B.'s surety upon the lease, for condition broken:

Held, that the tenancy was not terminated by the notice to quit, the tenant holding over the second year under the terms of the contract.

Error to the Common Pleas No. 3, of Philadelphia County.

Debt on a surety-bond by Cresson, trustee, against James McNamee.

At the trial (before FINLETTER, J.), the plaintiff put in evidence an agreement of June 13, 1872, under which he rented a house to D. McNamee, for the term of one year, from June 14, 1872. The agreement provided that if the tenant remained on the premises after the termination of the year, the contract was to continue in force another year, and so on from year to year until legal notice should be given for a removal. He then put in evidence the defendant's bond, also dated June 13, 1872, in which the defendant agreed to be responsible to the plaintiff for the true and faithful performance of the above-named contract on the part of D. McNamee. He then proved a default on the part of the tenant, and that the tenant occupied the house till April, 1874, when he allowed him to move away.

The defendant proved that the tenant had had three months' notice to quit the premises in March, 1873, and another notice to quit in April, 1874; that shortly after the last notice, the plaintiff levied on the tenant's property for rent in arrear, but that he subsequently agreed to let him move away with his goods, on condition that the tenant should pay as much of the debt as he was able to pay, monthly.

The defendant asked the Court to charge, *inter alia:* "(1) That if the jury believe that the plaintiff notified the tenant to quit the premises three months prior to the expiration of the year ending June 14, 1873, then their verdict should be for the defendant." *Answer:* "If the jury find that there was a notice by the landlord to the tenant to determine the tenancy for the year ending June 14, 1873, or any legal notice to ter-

Digitized by Google

minate the tenancy, then I affirm this point—otherwise it is refused." "(2) That if the jury believe that the plaintiff entered into any agreement with the tenant for a renewal or reletting of the premises for any year or term subsequent to the year ending June 14, 1873, and that he received any consideration therefor, without the express consent of the defendant, then the verdict should be in his favor." *Affirmed.* "(3) That if the jury believe that the plaintiff, after distraining on the goods, allowed the tenant to remove with his goods from the premises during any term for which the defendant was surety, and without the defendant's consent, and agreed with the tenant to receive the rent in arrear by instalments, to be paid subsequently, then the verdict should be for the defendant." *Answer:* "The landlord having distrained, the value of the goods must be deducted from the amount of the rent due at the time."

Verdict and judgment for plaintiff for $306.46.

Defendant took this writ, assigning for error the refusal of the first and third points above set forth.

E. K. Nichols, for plaintiff in error.

When the jury were told to find whether a legal notice to terminate the tenancy had been given, they were put to the discussion of what was a proper notice. Three months notice, in the ordinary acceptation of the phrase, had been proved, and the above direction was misleading. The relinquishment of distress released the surety absolutely and not *pro tanto*. The value of the goods may have been greater than the whole amount of the debt; and even if it was not, the landlord and tenant having made a new arrangement under which the distress was relinquished, then relations with the surety ceased.

Richards *v.* The Commonwealth, 4 Wr. 146.

T. J. Diehl, contra, furnished no paper-book, but argued that the words *legal notice*, in the agreement, did not apply to the first year; in that year no notice was required to terminate the lease, as it was for a determinate period; the tenant held over under the agreement, and his surety continued responsible. The jury were properly told to deduct the value of the goods distrained from the amount of the claim.

Feb 5. THE COURT. The notice of 1873 did not terminate the lease, the tenant holding over in 1874 by its terms.

The point as to the distress was allowed to the proper extent, viz., the value of the goods. The remainder of the point is not good, no consideration for the extension of time being set forth; while in the preceding point, where a consideration was set forth, the point was affirmed

PER CURIAM. Judgment affirmed.

WILLIAMS, J, absent.

Oct. & Nov. '76, 17. Oct 18, 1876.

McCray v. Clark et al.

Ejectment—Lien of judgments—Revival of by scire facias—Notice to terre-tenant—Service of writ upon the vendee of land as terre-tenant—Failure of vendee to record his deed or take possession—Act of 16 April, 1849—Not applicable where plaintiff has actual notice of vendee's title—Evidence.

Where a plaintiff in a judgment has actual notice of a sale of the land bound by it, a scire facias to revive the judgment must be served upon the vendee as terre-tenant, even though the vendee's deed is not on record and he has not taken possession of the land.

The Act of April 16, 1849, providing that the period of five years shall only commence to run in favor of the terre-tenant from the time his deed is put on record and he has gone into possession, does not apply where the plaintiff has actual notice of the vendee's title.

C. obtained a judgment against R., and within five years issued a scire facias to revive it, service of which was accepted by R., judgment taken for want of an appearance, and certain land taken in execution and sold at sheriff's sale to C. Before the scire facias was issued, the same land had been sold and conveyed by R. to M., who neither put his deed upon record nor took possession of the property. C.'s scire facias was not served upon M. nor did he have notice of the proceeding thereon. In an action of ejectment for the land by M against C., M. offered evidence to show that the sale from R to him was well known by C. This the Court refused to admit

Held (reversing the judgment of the Court below), that the Act of April 16, 1849, deals only with constructive notice, and leaves the question of actual notice untouched, and that the evidence therefore should have been admitted.

Error to the Common Pleas of Clarion County.

Ejectment by James McCray against John Clark and R. H. Patton for a tract of land in Highland township. Plea, not guilty. The facts were as follows: Both parties traced their titles from one Columbus Reed. The plaintiff purchased the land in dispute for $600, from the then owner, Reed, in December, 1864, by articles of agreement in which the receipt of the purchase money was acknowledged. These articles were never recorded, nor did the plaintiff take possession of the property by himself or tenants. In May, 1861, the defendant Clark had obtained a judgment against Reed, and in March, 1866, in order to revive the same he issued a writ of scire facias against Reed, but named no one as terre-tenant, nor was the plaintiff served with the writ. Reed accepted service of the writ, judgment was taken for want of an appearance in May, 1866, and, by virtue of executions issued upon this judgment, the land in question was levied on, condemned, and sold to Clark, to whom in December,

Digitized by Google

1868, a deed was executed, acknowledged, and delivered by the sheriff.

On the trial, the plaintiff offered to prove that Clark at the time he issued the scire facias, and at the time Reed accepted service of the writ, had admitted that he had notice of McCray's title and that he was content to revive the judgment against Reed's other land only. To this offer the defendants objected as irrelevant under the act of April 16, 1849 (Purd. Dig. 821, P. L. 664), viz.: "Providing that in all cases when a judgment has been or shall be regularly revived between the original parties, the period of five years, during which the lien of the judgment continues, should only commence to run in favor of the terre tenant from the time that he or she has placed their deed on record."

The Court (JENKS, P. J.) sustained the objection and excluded the evidence. Exception. Verdict and judgment for the defendants. The plaintiff took this writ, assigning for error the rejection of his offer.

James Campbell (*Knox* and *Maffit* with him), for the plaintiff in error.

It is not alleged that McCray had any notice of the judgment against Reed, the scire facias to revive it, or the subsequent proceedings thereon. The Act of April 4, 1798, and March 26, 1827 (Purd. Dig. 819–820), provide that no judgment shall continue a lien for a term exceeding five years unless revived by a scire facias sued out within that period and served on the terre-tenants; and this (it has been held) even when the deed to the terre-tenant is unrecorded and he has never taken possession. The lien of the judgment therefore was not revived against the land purchased by McCray, but expired in May, 1866.

Armstrong's Appeal, 5 W. & S. 352.

The Act of April 16, 1849 (P. L. 665), under which the Court ruled out evidence of actual notice to the plaintiff in the judgment, of the sale to McCray, only provided that constructive notice to him would bring the terre-tenant within the protection of the former statutes, and left the effect of actual notice untouched.

Fames' Appeal, 2 Cas. 184.
Speer *v.* Evans, 11 Wr. 141.

Corbett (*Patrick* with him), contra.

The Act of April 16, 1849, provides for a continuance of the lien for judgment by a revival between the original parties, in *all* cases, except when a vendee has taken actual possession or placed his deed on record. The plaintiff in error did not comply with these requisites, and neither the spirit nor the letter of the act of 1849 requires the plaintiff in the judgment to heed any notice other than possession or recorded deed.

Jan. 2, 1877. THE COURT. This was an action of ejectment. Both parties claimed under Columbus Reed. On the 4th of May, 1861, the defendant in error, Clark, obtained a judgment against Reed. A *sci fa.* was issued thereon March 2, 1866, and service accepted by Reed. At the May term following, judgment was duly taken for want of an appearance. By virtue of executions issued thereon, the land in question was levied on, condemned, and sold to Clark, to whom in December, 1868, a deed was executed, acknowledged, and delivered by the sheriff.

McCray purchased the land of Reed by articles of agreement on the 29th of December, 1864, and paid the purchase-money in full, which is acknowledged in the agreement. He was not served with the *sci. fa.* He had not placed the articles of agreement on record, nor had he taken actual possession of the premises by himself or tenant. The defendants in error now claim that inasmuch as McCray had failed to bring himself within the requirements of the eighth section of the Act of 16th April, 1849 (P. L. 664), the lien of the judgment was continued against his land by the revival against Reed alone. The Act declares "in all cases where a judgment has been or shall be regularly revived between the original parties, the period of five years during which the lien of the judgment continues shall only commence to run in favor of the terre-tenant from the time that he or she has placed their deed on record: Provided that this Act shall not apply when the terre-tenant is in actual possession of the land bound by such judgment by himself or tenant."

It is urged that this statute has prescribed the only ways by which the land of a terre-tenant can be discharged from the lien of a judgment duly revived against the original defendant. The correctness of this view may be tested by considering the object and spirit of the Act. Its object was to protect the plaintiff in a judgment against the title of a third person of which he had no notice. Its spirit was to require one, who desired to continue beyond five years the lien of his judgment on all the lands originally bound thereby, to revive it against all persons who he knew had purchased any of them after recovery of the judgment. This section, however, deals with constructive notice only. The terre-tenant who relies on constructive notice to the plaintiff in a judgment to protect his land from a continued lien by a revival against the defendant therein, must show that he has either put his title on record, or that he was in the actual possession of the land by himself or tenant. It leaves untouched the question of actual notice.

Notice may be either actual and positive, or it may be implied and constructive. Actual notice is knowledge brought directly home to the party. Constructive notice is in its nature no more than evidence of notice, the presumption of which is

Digitized by Google

so violent that the Court will not allow of its being controverted. (1 Story's Eq., § 399; Lessee of Billington *v.* Welsh, 5 Binn. 134.) The rule is well established that a purchaser of land having notice of a prior unrecorded deed from his vendor will not be permitted to set up his title against that prior conveyance. Such purchaser with notice is not considered a *bona fide* purchaser; but as one acting in bad faith, a *particeps criminis*, taking the place of his vendor; and to permit him to hold against the first purchaser would be to convert the statute into an instrument of fraud. (1 Story's Eq. 397; Brightly's Eq. 113; Jaques *v.* Weeks, 7 Watts, 270; Garrard *v.* Pittsburgh & Connellsville R. R. Co., 5 Casey, 154.) So in the York Bank's Appeal (12 Casey, 458), it was held that if a subsequent encumbrancer had actual notice of a judgment defectively entered, before his rights attached, it is equivalent to the constructive notice given by the statute to a proper entry on the judgment docket. That actual notice is as effectual as constructive notice is affirmed in Smith's Appeal (11 Wright, 128); Speer *v.* Evans (Id. 141); Meehan *v.* Williams (12 Id. 238). A purchaser at sheriff's sale is protected by the recording Acts against an outstanding title of which he has neither actual nor constructive notice. (Morrison *v.* Funk, 11 Harris, 422.) But if he is acquainted with an adverse claim of title, it is not necessary that the claimant should give notice of his claim at the time of sale to protect his rights. (Owen *v.* Meyers, 8 Harris, 134.)

Where land on which a judgment is a lien has been aliened by the defendant, an amicable revival by the terre-tenant, to which the original defendant is not a party, will continue the lien of such judgment on the land. (Sames' Appeal, 2 Casey, 184.) But the revival by an agreement to which the terre-tenant is not a party will not continue the lien as to him, although his deed was not recorded. (Armstrong's Appeal, 5 W. & S. 352.) The terre-tenant was there in possession by his tenants on whom service could have been made. In the present case the offer was to prove not only that Clark had notice of McCray's title at the time the *sci. fa.* issued and service accepted by Reed; but, if we correctly understand the offer, that he expressed a willingness to revive the judgment against Reed's other lands alone. We think actual notice may be as effectual as constructive notice to affect Clark, who was both plaintiff in the judgment and purchaser; the learned Judge erred therefore in rejecting the evidence.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by MERCUR, J. WILLIAMS, J., absent.

Common Pleas—Equity.

C. P. No. 4. Jan. 28, 1877.

Reed et ux. (late Foster) v. Roberts et al., Adm'rs of Thomson.

Voluntary gift inter vivos—Meritorious consideration—Affection by one standing in loco parentis—Transfer of stock, as a gift, to an adopted daughter, a niece by marriage, without knowledge of donee, and without actual delivery of certificates — Endorsement of donee's name on envelope containing certificates—Delivery, sufficiency of—Resulting trust—When rebutted by evidence of an intention to make a voluntary settlement.

A., being childless, and the owner of certain shares of stock, had them transferred on the books of the company to B., who was an orphan niece of his wife, and who lived in his family, and was treated in all respects as his daughter. New certificates of the stock were taken out in the name of B. These certificates, after A.'s death, were found in his writing-desk, inclosed in an envelope, which was inscribed with his own name and with the name of B. In two codicils to his will, made a few weeks afterwards, A. declared that he cherished towards B. the feelings of a father, and that he desired her to be so treated and regarded in the law as if she was really his child:

Held, that B. had a perfect legal title to the shares.

Held further, that the circumstances of the case, and the solemn declaration made by A., rebutted the presumption of a resulting trust in favor of A.

Held further, that this was a perfect and executed gift of the shares to B.

Hearing on bill and answers. Before THAYER, P. J., and BRIGGS, J.

The bill, as amended, filed by Henry Reed and Charlotte F. his wife, late Charlotte F. Foster, against George B. Roberts *et al.*, administrators *c. t. a.* and trustees of the estate of J. Edgar Thomson, deceased, set forth:—

(1) That the complainant, Charlotte F., was an orphan, and the niece, by marriage, of the decedent, with whom she had resided, at his request, since the death of her parents, a period of more than sixteen years, during which time she had been treated by the decedent in all respects as his daughter. The decedent had no children, his family consisting only of his wife and the said complainant.

(2) That shortly after the death of Mr. Thomson, on May 27, 1874, there was found in his secretary writing desk, in his private sitting-room, an envelope containing four certificates of the stock of the "Pennsylvania Company," for 500 shares each, of the par value of $50 each, dated April 1, 1874, said certificates standing in

Digitized by Google

the name of the complainant, Charlotte F. Foster, and the envelope being superscribed in the decedent's handwriting, with his own name and address, and also, in the upper corner, with the name "Miss C. F. Foster." That the complainant had no previous knowledge of the transaction, but averred that it occurred under the following circumstances: Some time in 1874, on a settlement of accounts between the decedent and one Thaw, the latter offered and the decedent accepted, in such settlement, 2000 shares of the stock of the Penna. Company, which shares, at the request of the decedent, were transferred by said Thaw, on the books of the company, to the name of the complainant, Charlotte F. Foster; whereupon the above-mentioned four certificates were made out in her name, and given to Mr. Thomson, who placed them where they were found after his death, as aforesaid. At that time Mr. Thomson possessed a fortune of over a million of dollars. No dividends were paid upon the said stock between the date of its transfer, as above mentioned, and the death of Mr. Thomson in the following month.

(3) The decedent, by his will, dated Dec. 20, 1871, devised and bequeathed all his estate to certain of the defendants, in trust for charitable uses, subject, *inter alia*, to the following payments, viz. :—

"First. To so much of the proceeds of said property as my dearly beloved wife, Lavinia F. Thomson, may deem necessary for the maintenance of herself and my dear niece, Charlotte F. Foster, they living in such style as my said wife may think best to promote their happiness and comfort during her lifetime.

"If my niece, Charlotte F. Foster, should survive my wife, then I direct that there shall be paid to her, as long as she may live, the sum of two thousand dollars per annum. To my wife, Lavinia F. Thomson, I give absolutely all of my household furniture, books, and ornaments."

By a codicil, dated May 24, 1874, the testator directed as follows :—

"I desire my dear niece, Lottie Foster, but to whom I cherish the feelings of a father, to be so treated and regarded in the law as if she were really my child, receiving during her lifetime such income from my estate as if she were really my child; and I postpone the operation of the trusts of my will, so as fully to effect this result, until her decease, upon which event they are further to take full effect as expressed in the will."

By a second codicil, dated May 26, 1874, the testator provided as follows :—

"The codicil which I added to my will the other night, May 24, means that I wish my niece, Charlotte F. Foster, to be considered as my daughter, and to take out of the income of my estate, all that she requires to render her more than comfortable in her housekeeping during her lifetime.

"I do not desire to postpone by it the operation of the trusts of my will, except so far as may be necessary to secure the above object."

The testator's personal estate was appraised, in the inventory, at over a million of dollars, besides which he left real estate valued at not less than $300,000.

By the consent of all parties, the administrators exchanged the said stock for an equivalent nominal amount, at par, in the 7 per cent. mortgage bonds of the Pittsburg, Cincinnati, and St. Louis R. R. Company.

The bill averred that the said transfer of the 2000 shares of stock, by Mr. Thomson to the said complainant, was a present, immediate, and executed gift to her, as an expression of the parental feelings cherished by him for her, and that the said bonds, into which the said stock was converted, were her individual property, and not part of the estate of the decedent.

The bill prayed that the defendants, administrators, etc., be required to deliver the said bonds to the complainant, and to account for dividends, etc., received by them on said stock and bonds.

The defendants, in their answers, admitted substantially the facts set forth in the bill, and submitted themselves to the decree of the Court in the premises. They averred, however, that they were advised that, inasmuch as the complainant had not been informed of the said transfer, and as the decedent retained possession and control of the certificates, his alleged gift was not perfected by delivery; by reason whereof the beneficial interest in said stock, if not the legal title, remained his property and that of his estate. The defendants also averred that claims were pending and undetermined, against the decedent's estate, to the amount of more than a million of dollars, some of which seemed to have no foundation, but the result of others could not be predicted.

A. Sydney Biddle and *George W. Biddle*, for complainants, contended that this was a case of an executed gift, founded on good consideration, perfected by a valid delivery, and enforceable in equity, as against the decedent's personal representatives, as a voluntary settlement.

The assumed relation *in loco parentis* is equivalent to actual blood relationship, as a consideration for a voluntary settlement, and rebuts any presumption of a resulting trust.

Currant *v.* Jago, 1 Coll. 261-266.
Powys *v.* Mansfield, 3 Myl. & Cr. 359.
Ex parte Pye, 18 Ves. 140, per Lord Eldon. 19 Ves. 412, per Sir William Grant.
Mouck *v.* Lord Mouck, 1 Ball & Beat. 298.
Trimmer *v.* Bayne, 7 Ves. 508.
Booker *v.* Allen, 2 Russ. & Mylne, 275.
Ray *v.* Simmons, 15 Am. L. Reg., N. S., 701, Mr. Dale's note.

The purchase of stock, by a father who directs the certificates to be made out in his child's name, and places them in a separate envelope, endorsed with the child's name, raises a *presumption of law* of a valid delivery to perfect the gift. This

Digitized by Google

presumption can be rebutted only by affirmative evidence of a contrary intention by the donor. That the donor never parted with possession of the certificates, or that the donee had no knowledge of the gift, is wholly insufficient to rebut the presumption.

Sidmouth *v.* Sidmouth, 2 Beav. 447.
Langdon *v.* Allen, 1 WEEKLY NOTES, 396.
Lorimer *v.* Lorimer, 10 Ves. 367. n. (l).
2 Story, Eq. Jur. §§ 1202-3-4.
Ellison *v.* Ellison, 6 Ves. 656, 661.
Glaister *v.* Hewer, 8 Ves. 195, 198.
Rider *v.* Kidder, 10 Ves. 367.
Dennison *v.* Goehring, 7 Barr. 175, 177, 180.
Diehl *v.* Emig, 15 Sm. 320-7.
Kiddell *v.* Farnell, 5 Weekly Reporter, 424.
Rycroft *v.* Christy, 3 Beav 238.
Evans *v.* Jennings, 6 Weekly Reporter. 616.
Middleton *v.* Follock, L. R. 2 Ch. Div. 104.
Bond *v.* Bunting, 1 WEEKLY NOTES, 441.

Wm. A. Porter, for defendants.

In the cases cited there was either actual delivery, or an actual blood relationship to sustain the gift. Even in the latter case a voluntary gift is ineffectual without actual transfer of title and delivery of possession, or surrender of dominion over the property. Until then it is *in fieri*, and revocable. The mere endorsement of the intended donee's name on an envelope is inoperative as a testamentary gift of the contents.

Plumstead's App., 4 S. & R. 544.
Trough's Estate, 25 Sm. 115.
Noble *v.* Smith, 2 Johns. 52.
Pearson *v.* Pearson, 7 Johns. 26.
Lee *v.* Luther, 3 Woodbury & Minot, 519.
In re Campbell's Estate, 7 Barr, 100, per Gibson, C. J.
Withers *v.* Weaver, 10 Barr, 391.
Pringle *v.* Pringle, 9 Sm. 281.
Zimmerman *v.* Streeper, 25 Sm. 147.
Fink *v.* Cox, 18 Johns. 145.
Kennedy *v.* Ware, 1 Barr, 445.

If the legal title passed, a resulting trust ensued

Jackman *v.* Ringland, 4 W. & S. 149.
Lynch *v.* Cox, 11 Har. 265.

C. A. V.

March 10, 1877. THE COURT (after stating the facts). These are the facts of the case as they appear in the bill and answers. And the question to be decided is, whether the mortgage bonds of the Railway Company, into which the shares of the Pennsylvania Company were converted, belong to the plaintiff or to the estate of Mr. Thomson? Of course the ownership of the bonds follows the ownership of the shares. If the shares were the property of the plaintiff, the bonds unquestionably belong to her, and she is entitled to the relief prayed for.

It is to be observed at the outset that here was a complete, perfect, and absolute transfer of the legal title to Miss Foster. The shares were transferred to her on the books of the company, by direction of the owner, and new certificates were taken out in her name. The plaintiff stands in no need of legal or equitable remedies to complete her legal title. The only relief which she needs and prays for is that her title be relieved from the claims of the administrators and trustees of Mr. Thomson's estate, and that the bonds into which the shares were converted by her own agency, be surrendered to her. It is not the case, therefore, of an incomplete voluntary gift, or of a merely equitable title to a chose in action acquired by an assignment which remains in the possession of the assignor. A gift of a chattel is not consummated and perfected until the delivery of the thing promised, and until then the party may revoke his promise. So, also, an assignment of a chose in action (*e. g.*, a bond, Zimmerman *v.* Streeper, 25 Smith, 147, or a policy of insurance, Trough's Estate, 25 Smith, 115, or a single bill, Pringle *v.* Pringle, 9 Smith, 281, or a certificate of deposit, Withers *v.* Weaver, 10 Barr, 391), where the assignor retains possession of the chose or of the assignment, passes no title to the assignee or donee; and the reason is that the retention of the chose or of the assignment is unmistakable evidence that the assignor, whatever his future intentions might be, has not parted with his property in the thing over which he retains entire control.

If Mr. Thomson had suffered these shares to stand in his own name and had executed to Miss Foster an assignment of them, and had retained that assignment in his own possession until his death, never having delivered it to her, there would seem to be no doubt under the decisions that no property in the shares would have passed to her. And the result would have been the same if he had given her a parol assignment of them without valuable consideration, still retaining the shares in his own name, unless, indeed, circumstances could be shown amounting to a declaration of trust on his part to hold them for her use. But here the gift is complete by the delivery of the thing itself, for transferring the shares to her upon the books of the company is putting her in complete possession of the thing assigned, and clothing her with the complete legal title. It stands in the place of a delivery. Such an act performs precisely the office which an actual delivery would perform if it were a chattel. It is as complete a delivery as the nature of the thing will admit of. There can be no clearer evidence of a design to part with the right of property in favor of another than an absolute transfer of the legal title to her for her own use. Retaining in his possession the certificates which are in her name and which he could not use without her consent, cannot undo or qualify the decisive ownership with which he had invested her by the actual transfer to her on the books of the company. The best evidence of her ownership is the transfer on the books of the company. The certificates were but

Digitized by Google

secondary evidence of her ownership and only useful for purposes of transfer. They were nothing more than the official declaration by the company of what already appeared on their books. There was here no *locus penitentiæ*. He could not have used the certificates, nor could any one have used them except Miss Foster.

We are of opinion, therefore, that the cases relied upon by the defendants' counsel upon the subject of incomplete gifts of chattels, and of undelivered assignments of choses in action, have no application to the circumstances of the present case, for here was a complete divestiture of his own title and a complete investiture of title in her. So complete that he had no further control over the legal title, and no power without her consent to undo or disturb it.

This brings us to what appears to us to be the real question in this case, and that is whether there is here sufficient evidence to rebut the presumption of a resulting trust, which always arises where a conveyance has been made, without consideration, to one, of an estate or other property which has been purchased with the money of another. The presumption of such a resulting trust is always rebutted where, to use the language of the books, the purchase may fairly be deemed to be made for another from motives of natural love and affection. Thus a purchase in the name of a child or of a wife is uniformly held, by the unaided force of the relationship alone, to rebut the presumption, unless there be clear evidence to show that the donee was intended to be a mere trustee. It would be a useless waste of time to go over the cases establishing this doctrine. They have been industriously collected in the paper-book of the plaintiff's counsel, and are familiar to the profession. The doctrine is too well established to admit of the least doubt. It is not controverted by the defendants' counsel, but it is contended that the presumption of a resulting trust cannot be rebutted in the present case because the donee is not related by blood to the donor. Yet the ordinary case of a gift to a wife shows conclusively that blood is not a necessary ingredient to give effect to the presumption rebutting such a trust The presumption in favor of a wife or child which rebuts the resulting trust is doubtless founded on the moral obligation which rests on the donor to provide for them, and the inference which arises therefrom that it was the intention of the donor thus to provide for them, and that they should not hold as trustees. But why may not the presumption also arise where these relationships do not exist, if there is clear evidence to show that such was the manifest intention of the donor? It is quite clear that other circumstances and other relations in life besides the relationship of parent and child, or husband and wife, may sufficiently rebut the presumption of a resulting trust. Thus a gift to a sister (Kiddill *v* Farnell, 5 Weekly Rep 324), a grandmother to grandchildren (Gardner *v.* Merritt, 32 Md. 78, 10 Am. L. Reg N. S. 127), a step-father to a step-child (Ray *v.* Simmons, 15 Ib 702), a relation by marriage (Currant *v.* Jago, 1 Collyer, 261). Now whether there is or is not a resulting trust, must, as was said by Lord HARDWICKE in Hill *v.* The Bishop of London (1 Atk. 618), always depend upon the intention of the grantor. As the presumption which arises in favor of a wife or child is founded exclusively upon the intention of the grantor inferred from the relationship, it would be extremely illogical to hold that a like presumption could not be derived from other circumstances clearly showing the same intention, and especially from proof of the express and deliberately declared wishes of the grantor. There is no magic virtue in blood in such cases, except in so far as it gives rise to a strong, and unless rebutted, a conclusive presumption of the grantor's intention. What then was Mr. Thomson's intention in the present case? If he had declared in so many words that this was not to be a resulting trust in his own favor, and that Miss Foster was not to be a trustee but a beneficiary, would any one doubt that the presumption of a resulting trust would be rebutted, notwithstanding the fact that she was only connected with him by marriage and by the ties of an affection which he himself declared to be as strong as the ties of parental affection? We are to look for the intention of the grantor in his acts and expressions. By his own act he invested her with the complete legal title to these shares. With what intention? That she should be a trustee for him? For what purpose? What possible motive can be attributed to him for having these shares transferred to her upon the books of the company, and thus putting them entirely beyond his own control, if he did not intend her to take as a beneficiary? Was she a stranger to him? Let him answer for himself. Three days before his death he wrote in the codicil to his will, "I desire my dear niece, Lottie Foster, but to whom I cherish the feelings of a father, to be so treated and regarded in the law, as if she were really my own child." And on the day before he died he repeated it, "I wish my niece, Charlotte F. Foster, to be considered as my daughter." Let it be remembered also that these declarations were made less than two months after he had transferred the shares to her.

It seems to us that to decide now that she cannot take as a beneficiary, but must be held to be a trustee *propter defectum sanguinis*, would be to fly in the face of the plainly expressed intentions of Mr. Thomson, and to override what cannot but be regarded as his most urgent dying request. There is no doubt a great deal in blood as indicating the intention with which such an

Digitized by Google

act as this is done. But there is also a great deal in the fact that a childless man takes to his home and heart an orphan child—a near relation of his wife, and dependent upon him for support—and plants her there in the place of a daughter, treats her in all respects as a daughter, and in one of the most solemn acts of his life declares that in measuring her legal rights he desires her to be considered in all respects as if she were really his daughter. It would be a mockery of reason, and an unjust perversion of a wholesome principle, to apply the persumption of a resulting trust because she is not a child, when the author of the gift so solemnly and so emphatically declares that he desires her "*to be treated and regarded as if she were really his child.*" The principle which raises a resulting trust where there is a conveyance to a stranger, or where there is not evidence of a manifest intent that the grantee should take as a beneficiary, is a principle founded in wise and just considerations, but it is not to be applied indiscriminately, or where there are facts and circumstances which fairly rebut it.

Looking at all the circumstances of the case, and giving effect to the declared wishes of Mr. Thomson in reference to the legal status and rights of Miss Foster, we are of opinion that the presumption of a resulting trust is in this case fully and fairly rebutted, that she has a perfect legal and equitable title, and is entitled to the relief prayed for. Accordingly let there be a decree for the plaintiff.

Opinion by THAYER, P. J.

[As to the presumption of law that a deed was legally delivered on the date of its acknowledgment, even though it remained in the hands of the grantor, and there was no evidence to show that it had ever been actually delivered to the grantee, or to any one for him, see—

Doe d. Garnons *v.* Knight, 8 Dowl. & Ryl. 348; S. C, 5 B. & C. 671.
Souverbye *v.* Arden, 1 Johns. Ch. Rep. 240.
Bun *v.* Winthrop, Id. 329.
Jones *v.* Jones, 6 Conn. Rep. 111.
Hope *v.* Harman, 11 Jur. 1097, Q. B.
McLure *v.* Colclough, 17 Ala. 89.
Williams on Real Prop. *124.
Mr. Rawle's note to Smith on Contracts, p. 30.
Arrison *v.* Harmstead, 2 Barr, 193.
Hall *v.* Benner, 1 Penna. Rep. 405.
2 Greenl. Ev. 297-8.
Cowen & Hill's notes to Phillips on Ev., note 888, p. 1281; note 298, p. 295.

As to the presumption in favor of the acceptance of a deed, especially by a voluntary grantee, see—

Marston *v.* Butler, 3 Wend. 149.
Bryan *v.* Wash, 2 Gillman (Ill.) 568.]

Common Pleas—Law.

C. P. No. 3. Feb. 8, 1877.

Bagley et al. v. Atlantic, Miss., and Ohio R. R. Co., defendant, and the Penna. R. R. Co., garnishee.

Foreign attachment—Receiver of company defendant appointed by a United States Court in another State where plaintiff resides—Notification to garnishee—Comity between courts of different States.

Foreign attachment. Rule for judgment against garnishee, on answers to interrogatories filed.

The interrogatories were in the usual form. By the answers it appeared that the defendant company was a corporation under the laws of Virginia, operating a railroad within the boundaries of that State; that the garnishee was indebted to said company on an unsettled ticket account; that the writ in this case had been served upon the garnishee on June 12, 1876, but that on June 6, 1876, receivers had been appointed by the U. S. Circuit Court for the Eastern District of Virginia, to take possession of the property of the defendant company, and said receivers had notified the garnishee to account to them for all traffic balances. The answers also set forth that the plaintiffs were citizens of Virginia and not of Pennsylvania.

F. E. Brewster and *F. C. Brewster* for the rule.

Receivers have no extra-territorial jurisdiction or power of official action, and courts are not bound to recognize a receiver appointed in a foreign State.

High on Receivers, p. 35, § 47; p. 156, § 239.
Booth *v.* Clark, 17 How. 322.
Warren *v.* Union Nat. Bank, 7 Phila. Rep. 156.

Thos. Hart, Jr., contra.

The Courts of the various States will recognize the right to sue of a receiver appointed in another State, when he is authorized so to do by the Courts of his own State, and where no detriment will thereby result to citizens of the State where suit is brought. The receivers here are authorized to sue by the Court appointing them.

Any kind of title—legal or equitable—in the assignee, good against the defendant, is also good against the attaching creditor.

Walker *v.* Coover, 15 Sm. 430.
Patton *v.* Wilson, 10 Casey, 299.
U. S. *v.* Vaughan, 3 Binney, 394.
High on Receivers, §§ 241 and 242.
Runk *v.* St. John, 29 Barb. 585.
Iron Co. *v.* Boston L. Works, 51 Maine, 590.
Bentley *v.* Whittemore, 4 C. E. Greene, 462.
Speed *v.* May, 5 Harris, 91.
Caskie *v.* Webster, 2 Wallace, Jr. 131.
Hunt *v.* Jackson, 5 Blatch. 349.

Digitized by Google

Here the plaintiffs are not citizens of Pennsylvania, and therefore no reason exists why this Court should refuse to recognize the title of receivers appointed in Virginia, especially against creditors who are citizens of that State.

Mulliken *v.* Aughinbaugh *et al.*, 1 Penna. 117.
Thurston *v.* Rosenfield, 42 Mo. 474.

The decision in Booth *v.* Clarke (*supra*) wa made before the passage of the Bankrupt Law. See comments upon this by BLODGETT, J., in

Ill. *Ex parte v.* Norwood, 3 Bissell, 512.

C. A. V.

Feb. 10. THE COURT. As it is discretionary with us to give judgment in a case like this, we refuse to exercise our discretion in favor of the plaintiffs here, they being residents of Virginia, and coming, therefore, into this Court to reach a fund which their own Court has locked up.

Rule discharged.

Oral opinion by LUDLOW, P. J.

Orphans' Court.

Wainwright's Estate. Dec. 22, 1876.

Will—Demand for an issue—Practice—Undue influence—Act of March 15, 1832.

Sur appeal from the Register of Wills, and demand for an issue.

The testator died in January, 1876. Between 11 and 12 o'clock P. M. of the day previous to his death the alleged will was signed by him in the presence of two subscribing witnesses. It was made with the advice and assistance of James Trimble, who was the senior partner of Trimble, Britton & Wainwright, of which firm the decedent was a member. Mr. Trimble was appointed executor. The principal bequests were $5000 to a son of the executor, $5000 to a son of his partner, Britton, $5000 to Meva, "daughter of my friend, Amanda Ueberroth," and the residue, comprising the principal part of his estate, real and personal, to Amanda Ueberroth.

A caveat was filed, and the will was presented for probate within a week after Mr. Wainwright's death, whereupon the heirs-at-law presented a petition to the Register, setting forth "that the said paper writing had been procured by means of undue influence by said Amanda Ueberroth, with whom testator had for some time previous been living in unlawful relations, and by James Trimble, the executor named in the said writing," and praying for an issue *devisavit vel non*, to be certified to the Court of Common Pleas for trial.

While testimony was being taken before the Register, on May 4, 1876, the applicants for an issue demanded that the matter should be certified to the Orphans' Court for its decision; but on the same day the Register announced that he had decided to admit the will to probate. From this decision the present appeal was taken. It was referred to an examiner to take testimony, which was duly returned, and was very conflicting. Witnesses were called who visited the decedent the day before his death, who testified that at that time symptoms of approaching death were apparent. Dr. Stretch testified that the night before, between the hours of eight and nine o'clock, when he visited him, the decedent was of sound mind. After the doctor had left, Amanda Ueberroth and Mr. Trimble were in and out of the room until the will was signed; and they declared that the decedent "wanted to marry Amanda, and give her all his property." The brothers of the decedent objecting to this, Trimble told Amanda that she was "well enough off," and had better persuade the decedent "to drop the marriage." Mr. Lane, one of the subscribing witnesses, testified to the instructions that were given him by the decedent. There was conflicting testimony as to whether Charles B. Wainwright, the other subscribing witness, said the testator was "flighty" at the time of the execution of the will, or whether he said that he was "flighty" at a later hour in the night. A number of witnesses were called, also, who testified that Amanda Ueberroth was a woman of immoral character, and that for some years she had lived with one McCorgar, whom she claimed as her husband. It was also proved that she had lived in several houses of ill-fame which had been kept by her, and that she had been living with decedent in unlawful relations for a year previous to and at the time of his decease.

For the appellees testimony was taken to show that the said will was prepared in strict accordance with the testator's orders, and that before reading it to him counsel requested him to repeat his directions, which he did with clearness. Several witnesses were called, who all testified that the decedent had expressed himself at various times as resolved to dispose of his property in the manner he afterwards directed. It was also testified that testator and the residuary legatee had lived together for nearly a year as husband and wife, though no marriage ceremony had ever been performed between them.

George W. Biddle and *Arthur M. Burton*, for the appellants.

If there is testimony that would tend to prove the testator to be of unsound mind, or the subject of any undue influence, the effect of testimony brought to prove the contrary should be disregarded in determining whether an issue be granted. Counter evidence would therefore only serve to show more clearly the nature and materiality of the facts which are in dispute. The Court is not to pass upon the testimony as a

Digitized by Google

whole, or determine the case upon the mere weight of the testimony, but simply to ascertain whether there is a dispute of fact upon a material point, and, if so, to grant the issue.

F. C. Brewster and *John Q Lane*, contra.

These parties have not placed themselves properly upon the record, and consequently are not entitled to an issue.

The docket entries of the Register, certified with the records of the Orphans' Court, show that on January 15, 1876, the alleged will was presented for probate, and the subscribing witnesses sworn. January 17, petition for an issue. May 4, will admitted to probate. May 6, appeal filed. The docket entry only noticed the petition filed January 17, which petition is irregular, because, at the time of filing it, the will was either proved or not proved, and if it was proved before the petition was presented, it was too late. If it was in time, it cannot now be regarded, as it should be accompanied by a caveat, the only paper known to the law before probate.

[DWIGHT, J. If no caveat had been filed, the Register could not entertain the question of granting an issue; and, if he did entertain it, is it not the presumption that a caveat was filed?]

The Court will not presume a caveat when the record does not show it, and no witness swears it was filed.

[DWIGHT, J. There was a case in this court where a decree of Judge THOMPSON was founded on a petition which the Orphans' Court docket did not show to have been filed, but the Court presumed that everything before the decree was regularly done.]

The contestants failed to satisfy the Register that they were entitled to an issue; although there was no testimony for us, he granted the probate. After he admits a will to probate he cannot grant a feigned issue.

[DWIGHT, J. In my judgment the Register's decision was incorrect. (South's Estate, 2 WEEKLY NOTES, 212; Hansell's Estate, Ibid. 128.) After an issue has been demanded, if he refuses it, he should not admit the will to probate, but should give an opportunity to the parties to appeal from his refusal to grant an issue; but if he does go on and probate the will, the parties' only course is to appeal to this Court, and we will grant or refuse an issue, if asked; or if none is asked, we will decide the case on the evidence before us.]

Jan. 20, 1877. In announcing the conclusions to which the Court had come, DWIGHT, J., said: The Court are equally divided in opinion respecting the right of the appellants to an issue. I would say, also, that I am in favor of granting the issue for these reasons: The Act of March 15, 1832, § 4 (Purd. Dig. 1256, pl. 322), provides that whenever a dispute upon a matter of fact arises before any Register's Court, the said Court "shall, at the request of either party, direct a precept for an issue to the Court of Common Pleas of the county for the trial thereof." It has been held in several cases of late, more particularly in Cozzen's Will (11 Sm. 196), and in Graham's Appeal (11 Sm. 43), that the demand for an issue under this section is a demand of right, when a material fact is in dispute.

As was said in Dormer *v.* Brown (22 P. F. Smith, 404), a case arising under a like provision in reference to the distribution of money raised by sales under execution or Orphans' Court sales, the issue is statutory, and not one springing out of the assimilation of the powers of the Orphans' Court to those of the Court of Chancery In the latter case, a judge sitting as a chancellor exercises discretion, the sole object for granting an issue being to "inform the conscience of the Court." But in the former the right to an issue is given by the Legislature to a party. I think, therefore, that the Court should interpret the legislative intent as far as possible in favor of the demandant; that is to say, in furtherance of his right, and that a repressive effect should not be sought for in the testimony. It is the office of the Court not to interpose between the demandant and a jury, but simply to ascertain whether there is a material fact in dispute. Under the Act relating to the distribution of the proceeds of sheriffs' sales, the mode of ascertaining this is by an inspection of the written request of the party, and a consideration of the affidavits accompanying. A similar practice has been followed frequently by Registers of Wills, when requests for issues had been made to them; but in the Register's Court, and in the Orphans' Court, as successor to its powers and jurisdiction, the mode of ascertaining has not been fixed. It is true that after issues have been refused, the Supreme Court, upon consideration of the merits of the case, have refused to reverse for error, when satisfied that a verdict for the demandants ought not to have been sustained. It seems to me, however, that it is our duty, placed at the beginning of the line, not to act upon a principle which may be eminently just and wise as the guide of a tribunal having the final disposition of the whole case. I think that where the appellants present evidence to sustain the issue prayed for, which is of such a character that, if believed by the jury, their verdict for the appellants would be sustained, the demand for an issue should be granted; and more especially is this the case, when their testimony is met by counter testimony for the appellees, for there is then clearly a dispute upon material matters of fact which the jury may settle, one way or the other, as they credit the witnesses. The evidence in this cause is to the effect that the testator made his will about sixteen

Digitized by Google

hours before his death; that he was living with the principal legatee in unlawful relations; that while his brothers, if I read the testimony rightly, were excluded, she was present in his sick room up to the time when a gentleman of the bar, who had been sent for to draw the will of the testator, entered it to receive his instructions; that while this gentleman was drafting a will, this legatee was alone with the testator for half an hour; that at the end of that time the executor, whose son was also a legatee, having been informed by the legatee in question that testator desired to marry her, went into the testator's sick room, had an interview with him, and on coming out again told the appellants that he had fixed the matter, and told the legatee that the contemplated marriage need not, or ought not, to go any further, because she was already well provided for by the will. I think that these facts, taken in connection with the illicit position of this legatee, and her manifestly increased influence over the testator during the last few months of his life, should be laid before a jury, in order that they might determine how far the principal legatee prompted, or how far she and the executor united in controlling the testator's mind in its testamentary dispositions. As the request for the issue must be refused, and as Judge HANNA is clearly of the opinion that the decree of the Register should not be reversed, I would only add that upon the appeal the decree of the Register is affirmed.

The following opinion was delivered by HANNA, J.

It is the duty as well the province of the Orphans' Court to hear and determine the whole case upon its merits. The appellants demand an issue to try whether the testator was of sound and disposing mind at the time of the execution of his alleged will, and whether or not his alleged will was obtained through undue influence exerted by Amanda Ueberroth the principal legatee, and James Trimble the executor.

We agree there is no evidence of testamentary incapacity, but differ as to granting the issue upon the second proposition submitted by the appellants. For myself I am of opinion that the evidence is not of such a character as to warrant submitting the question to a jury. I do not discover any evidence that undue, illegal, or improper influence was exerted upon the mind of testator in the very act of making the testament, nor at any other time. While it is true that he and the principal legatee were living together as husband and wife, without the marriage ceremony having been solemnized, yet this is no evidence of, nor does it raise any presumption of itself that she exercised any improper influence or control over the mind of the testator. Proof of an unlawful relation must be accompanied by evidence of some act of persuasion, solicitation, or controlling power over the mind, will, and judgment, whereby the testator was forced or induced to dispose of his estate in a manner different from that which he would have selected if he had been a free agent.

There is no proof of any act, tending in this direction, of the principal legatee.

Nor is there any evidence that the executor, who was the senior partner of the testator, used any improper means or influence to induce testator to dispose of his estate otherwise than he, of his own volition and pleasure, intended. It was not illegal or improper for Mr. Trimble to suggest to and advise with the testator as to the disposition of his property or the object of his bounty, and if this can be gathered from the testimony, it shows that his efforts all tended to reconcile testator to the wishes and objections of his brothers, the appellants, to his proposed marriage with the principal legatee.

I also understand the rule to be that if the question of fact be unsupported by sufficient evidence, the Court should refuse the issue. A mere scintilla of proof is not sufficient to entitle a party to his issue.

But the evidence must be such, that if an issue be granted, and a jury should find a verdict against the will, we, if sitting in a Court of law, would be satisfied that the finding was in accordance with the evidence, or the weight of the evidence, and would refuse to disturb the verdict.

As was said by PAXSON, J., in Cauffman *v.* Long (2 WEEKLY NOTES, p. 697), "a man's will, the most solemn instrument he can execute, shall not be set aside without any sufficient evidence to impeach it." See also De Haven's Appeal (25 P. F. Smith, 337), De Puy's Estate (1 WEEKLY NOTES, 212), Will of Ellen De B. Shaw (Idem, 332).

To my mind the evidence clearly shows that the will of William Wainwright was the free, uncontrolled and voluntary expression of his wishes for the future disposition of his estate. It was prepared by his counsel in accordance with instructions received in the solitude and silence of the death chamber. No one was present to solicit or suggest a benefaction, and the testator, alone with his counsel, calmly remembers and seeks to befriend those who he believed would appreciate his gifts, and had won his heartfelt esteem.

Being of opinion therefore that the evidence if submitted to a jury would not justify a verdict against the will, I think that the demand for an issue should be refused, and the appeal dismissed.

O'BRIEN, J., did not sit during the argument of the cause, and, the Court being equally divided, the appeal was dismissed.

[See Collins's Estate, *ante*, 434.]

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, MARCH* 29, 1877. [No. 26.

Supreme Court.

Jan. '77, 73. **Hoff's Appeal** March 1, 1877.

Subrogation—When not allowed between lien creditors—Right to, as against purchaser for value without actual notice of lien.

The rule, that where one creditor has a lien upon two properties of the debtor, and another creditor has a lien only upon one, the first creditor may, in equity, be compelled to levy his debt out of the property to which the other cannot resort, will not be enforced when that property has passed to a *bona fide* purchaser for value without actual knowledge of the lien, and whose equity is therefore superior to that of the creditor asking subrogation.

In 1874 A. was the owner of a property encumbered by a judgment and a subsequent mortgage. He afterwards purchased a second property. In March, 1875, the judgment, by revival, became a lien upon both properties. In July, 1875, A. sold the second property to B., who purchased for value, without actual knowledge of the judgment. Upon a sheriff's sale of the first property for only enough to pay the judgment, the mortgage creditor, without notice to B., obtained from the Court a decree subrogating him to the rights of the judgment creditor. He then levied on the second property. B. then applied to the Court to vacate the order of subrogation, so far as it affected his property:

Held (affirming the judgment of the Court below), that the equity of B. was superior to that of the judgment creditor, and therefore the latter could not be allowed to collect the judgment from B.'s property.

Appeal from the Common Pleas of Berks County.

This was a petition of George E. Reiff, setting forth substantially the following facts: On January 1, 1874, James M. Phillips was the owner of a lot of ground in the city of Reading, encumbered by the following liens:—

Mortgage of G. A. Nicholls, entered March 1, 1870, for $2500.

Mortgage of G. A. Nicholls, entered April 9, 1870, for $2000.

Judgment of Henrietta C. Addams, entered April 11, 1870, for $1000.

Judgment of Rufus Addams, entered Dec. 2, 1870, for $2176.

Judgment of Reading Sav. Bank, entered Aug. 24, 1872, for $832 80.

Judgment of John S. Aulenbach, entered Nov. 23. 1872, for $304.07.

Mortgage of Henry A. Hoff, entered Oct. 29, 1873, for $3000.

On December 5, 1874, said Phillips became seized of another property in the city of Reading. On March 16, 1875, the judgment of Henrietta C. Addams was revived, and became a lien upon this second property. On July 7, 1875, Phillips conveyed this second property to Reiff, the present petitioner, who was a *bona fide* purchaser for value, and who had no knowledge in fact of the Addams judgment. On April 15, 1876, the first property was sold at sheriff's sale for $7434.47, and the proceeds paid into court. Upon a rule to show cause why the judgment of Henrietta C. Addams should not be paid out of the fund, Hoff filed an answer, setting forth that said judgment was secured upon other property, whereas his mortgage was a lien only upon the property sold, and he prayed the Court to delay distribution until the judgment creditor had exhausted his other resources. After argument the Court, on August 22, 1876, decreed that the Henrietta C. Addams judgment should be paid out of the fund, but that said judgment should not thereby be extinguished, but the said Henry A. Hoff should be subrogated to the rights of the plaintiff therein. This was without notice to Reiff, the purchaser of the second property. On December 15, 1876, Hoff issued a *fi. fa.* on the judgment, under which the property purchased by Reiff was levied on and condemned. A *vend. exp.* was then issued, and said property advertised to be sold.

Reiff then filed this petition, praying the Court to annul and vacate the order of subrogation in favor of Hoff, so far as it affected petitioner's property, and that the Court order said Hoff to release said property from Henrietta C. Addams's judgment. After argument, the Court (SASSAMAN, A. L. J., delivering the opinion) entered the following decree:—

"And now, January 8, 1877, it is ordered and decreed that so much of our decree of subrogation of August 22, 1876, in the premises as would affect the said George E. Reiff unjustly as grantee of the property named, be annulled, and all proceedings had under the said decree of subrogation are set aside to that extent; but for all other purposes the said decree is reaffirmed to be and remain in full force and effect."

Henry A. Hoff appealed, assigning for error this latter decree.

Cyrus G. Derr, for appellant.

As against Phillips the common debtor, Hoff was entitled to be subrogated to the rights of Mrs. Addams under her judgment.

Del. & Hud. Canal Co.'s Appeal, 2 Wr. 512.

If subrogation be an equity against the debtor, it must also be one against his vendee who purchases after the rights of the lien creditors have become fixed. Phillips could not give Reiff greater rights than those which he himself possessed; and if *he* could not ask to have this pro-

Digitized by Google

perty relieved from the lien of the Addams judgment, how can Reiff ask it?

Hoff's equity is superior to that of Reiff, as at the time of the conveyance to Reiff it already existed, and was apparent upon record, and he took the property with all its imperfections on its head.

The Court below seems to have considered the right of Reiff an *intervening right*, and to be saved under the rule that subrogation cannot be allowed to the prejudice of *intervening rights*. It is clear, however, that Reiff's rights are not *intervening*. Between what or whom do they intervene? All the rights of Miss Addams and Hoff were fixed when Reiff purchased. Reiff's rights *supervened;* they did not intervene. If there was any intervention of right it was in favor of Hoff.

William B. Bard, contra.

The rule that where a creditor has a lien upon two funds, and another has a lien upon only one of the funds, the second creditor is entitled to subrogation, only applies where both funds are in the hands of the common debtor of both parties.

Lloyd *v.* Galbraith, 1 C. 108.

In the present case Phillips had aliened one property to Reiff before the Court was asked to decree subrogation, and hence it did not remain in the hands of the common debtor.

Subrogation is founded upon principles of equity and benevolence, and is not to be allowed except in clear cases, where it works no injustice to others.

Wallace's Estate, 9 Sm. 401.

It is very evident that if the Court below had not annulled its decree as to Reiff's property, great injustice would have been done him, and he would have been compelled to part with property honestly acquired.

March 12, 1877. THE COURT. The liens against Phillips, the owner of the estate in question, stood in this order: the two mortgages to Nicholls, a judgment of Henrietta Addams, and a judgment of Rufus Addams, these all in 1870; then two judgments in 1872, and lastly Hoff's mortgage in 1873. In December, 1874, Phillips acquired title to the property in question. In March, 1875, Henrietta Addams revived her judgment against Phillips, and it then became a lien against this after-acquired property. In July, 1875, Phillips conveyed this property to Reiff *bona fide*, and for a full consideration.

In April, 1876, the property bound by the Nicholls mortgage, the judgment of Henrietta Addams, and the Hoff mortgage, was sold at sheriff's sale, and the proceeds applied to the Nicholls mortgages, the judgment of Henrietta Addams and part of the judgment of Rufus Addams. Hoff then got an order subrogating his mortgage to the judgment of Henrietta Addams. This was done without notice to Reiff, the purchaser of the after-acquired property. Hoff was proceeding to sell this property on the H. Addams judgment, when Reiff arrested his process, and the Court revoked the former decree of subrogation.

The simple question is, whose equity is superior, Reiff's or Hoff's? It is contended that Hoff's is, because H Addams' revived judgment was a prior lien when Reiff purchased. If Phillips, the defendant, were the party contesting Hoff's equity, there is no doubt that he must give way. But this is not a mere question of lien, but of equity in the administration of a matter of pure benevolence; and benevolence to Hoff, which is not of right, cannot be administered by ruining others. GIBSON, C. J. said in Miller *v.* Jacobs (3 Watts, 477), "The rule which gives a separate creditor the exclusive enjoyment of his own peculiar fund is founded in benevolence and regulated in its application by the nicest principles of justice, for which reason it will not be enforced to cast the debt on one who is but surety or is not otherwise bound to bear it." This principle has been frequently recognized. (McGinnis' Appeal, 4 Harris, 448.) Now when Phillips sold to Reiff he had a perfect right to sell, and Reiff to pay, so far as Hoff was concerned.

Hoff had no right at law to interfere. He had no lien on the after-acquired property sold to Reiff, and his mortgage was not taken in view of this property, as bound to others. The only risk Reiff took upon himself was of the judgment of Henrietta Addams. When she was satisfied, his property was cleared of her lien. Her judgment was extinguished by the sale of Phillips' other property. Phillips then stood in the relation of principal to Reiff, for by the covenant in his deed contained in the words "grant, bargain, and sell," he was bound to Reiff to remove the incumbrance from his property.

We have, therefore, the case of one who, in fact, stands superior to a surety, who was a *bona fide* purchaser of the property for a full consideration, who had no knowledge in fact of the lien of Henrietta Addams' judgment, who owed no duty to Hoff, upon whose land Hoff had no legal claim, and from which the burthen of Henrietta Addams' judgment was removed by a legal extinguishment of her debt. It is clear, therefore, that Hoff has no equity which he can work out, except by displacing a *bona fide* purchaser, who is prior in time, superior in claim on Phillips, the common debtor, and who must lose all his money in case he is displaced. When he purchased, Hoff had no lien on his land, and no equity to look to property not owned by Phillips when Hoff took his mortgage, and which

Digitized by Google

then was not bound to others as a security for their liens. It would not be pure benevolence to substitute him to the injury of Reiff.

The Court below was, therefore, right in revoking the improvident order of subrogation made without notice to Reiff, and leaving the parties as they were, when the proceeds of the sheriff's sale extinguished the Henrietta Addams judgment.

Decree affirmed, at the cost of the appellant, and the appeal dismissed.

Opinion by AGNEW, C. J. WILLIAMS, J., absent.

[*Cf.* Fessler's Appeal, *ante*, 71.]

Jan. '76, 178. **Vanarsdalen's Appeal.** Jan. 8, 1877.

Judicial sale—Lien of the city on equitable estate for unpaid taxes.

The fund arising from a sheriff's sale of an equitable interest under articles to convey, is subject to the lien of the city for unpaid taxes.

A. and B., copartners, were vendees of real estate under articles to convey from the owner of the legal title, and were in possession. A judgment was recovered against the partnership under which the property was sold at sheriff's sale. In the contest over the distribution of the fund between the individual judgment creditors of A. and B., and the city, claiming for unpaid taxes,

Held (affirming the judgment of the Court below), that the fund was liable to the claim of the city for unpaid taxes for the period the firm was in possession.

Appeal from the Common Pleas No. 2, of Philadelphia.

This case came before the Court below upon exceptions to the report of an auditor appointed to distribute the fund arising from a sheriff's sale of the realty of William R. Dickerson and Joel M. Vanarsdalen, copartners, trading as Dickerson and Vanarsdalen.

In 1870 Dickerson and Vanarsdalen formed a partnership in the law and real estate business under the firm name of Dickerson & Vanarsdalen, but there was no written agreement between them. On July 1, 1872, the said partners entered into a written agreement with Robert Whitaker, reciting that said Whitaker had, at their request, purchased the real estate No. 250 South Sixth Street, Philadelphia, and that they were desirous of purchasing the same for $18,072.27, and providing that the said Robert Whitaker should, upon payment to him of said sum, execute a deed in fee simple for said real estate "unto them, the said William R. Dickerson and the said Joel M. Vanarsdalen and the survivor of them," and, in the mean time, that "they, the said William R. Dickerson and Joel M. Vanarsdalen or the survivor of them," should pay to Whitaker the interest on said sum, together with the taxes and interest on incumbrances, amounting in all to $1445.65 in equal quarterly instalments. This agreement was acknowledged but not recorded. Dickerson and Vanarsdalen occupied the real estate, sub-let portions of it, and collected the rents. They paid the first quarter's instalment of interest, taxes, etc., but making default in their subsequent payments, the said Whitaker, on May 6, 1874, instituted proceedings, under the Landlord and Tenant Act of 1830, to recover possession of the property. While these proceedings were pending, the property was, on June 7, 1875, sold at sheriff's sale under a judgment against the firm of Dickerson and Vanarsdalen.

Before the auditor appointed to distribute the fund, the city of Philadelphia presented a claim for taxes on said property for the years 1873, 1874, and 1875, amounting to $728.32. This claim was resisted by individual judgment creditors of the partners. The auditor, upon the authority of Fisher *v.* Lyle (8 Phila. Rep. 1), decided that, as the defendants never held the legal title, the lien of the taxes was not divested by the sale of their interest, and hence that the taxes were not payable out of the fund. He therefore disallowed the city's claim. Upon exception the Court below reversed the decree of the auditor, and awarded to the city the sum of $728.33 out of the fund. Whereupon Kersey K. Vanarsdalen, an individual judgment creditor of Joel M. Vanarsdalen, and a claimant on the fund, appealed, assigning for error the decree of the Court.

H. McMiller, for the appellant.

In the absence of a recorded written agreement to bring their interest into partnership, the fund in controversy went to the individual creditors of Dickerson & Vanarsdalen, who were tenants in common, as individual property.

Lefevre's Appeal, 19 P. F. S. 122.

Under the agreement of July 1, 1872, the purchasers took only an equitable interest.

[SHARSWOOD, J. Does the city lose her taxes?]

No; the city has a lien on the realty.

[AGNEW, C. J. Whatever estate is sold, are not the taxes to come out? Were not Dickerson and Vanarsdalen liable to have their goods distrained upon for taxes?]

By the agreement of July 1, 1872, the taxes are to be paid to Whitaker and not to the City Collector. For these taxes, the Act of Feb. 2, 1854 (Purd. Dig. 1085, pl. 2), gives a lien on the real estate which is not divested by the sheriff's sale.

George L. Crawford, contra.

All liens for taxes are discharged *pro tanto* by a sheriff's sale of any estate in the premises.

Digitized by Google

Beekman's Appeal, 2 Wr. 385.

Whether Dickerson and Vanarsdalen are partners or tenants in common, is immaterial so far as the claim of the city for taxes is concerned. Dickerson and Vanarsdalen were vendees under equitable articles to convey, and were in possession. They had an equitable fee. By the Act of April 3, 1804 (Purd. Dig. 876, pl. 3), a mere tenant is liable for taxes during occupancy—*à fortiori* an equitable owner of the fee.

Jan. 18, 1877. THE COURT. The sale of the property held in common by the partners on a judgment against the partnership carried the title of the tenants in common, to the purchaser at sheriff's sale. This equitable estate to the extent of the paid purchase money being a part of the whole estate, was liable for the taxes, especially when they were in possession. The city had a right to claim her taxes out of the estate sold at judicial sale, whether legal or equitable, both being liable as parts of a single subject.

Decree affirmed with costs to be paid by appellant, and the appeal is dismissed.

PER CURIAM. WILLIAMS, J., absent.

Jan. '68, 67. Feb. 13, 1877.

Freck v. Blakiston.*
Freck's Appeal.

Partnership—Relations of partners inter se—Rights and duties of a partner who is a member of two firms dealing with each other.

A., the partner of B., having charge of the firm's business at a particular place, employed a firm of which he was a member to conduct it for a commission; the accounts rendered to B. showed that this was the course of dealing, and no objection was made, and the effect was to reduce the expense of transacting the business:

Held, that B. could not, after dissolution and settlement, demand an account of A.'s share of such commissions.

A. sold coal of his firm to another firm of which he was a member, with notice to his partner, and at the full market value:

Held, that he was not liable to account for profits received by him as partner in the purchasing firm, although said firm took the coal to fill contracts for delivery at a larger price than they paid for it.

Appeal from the late Nisi Prius.

This case was heard in the Court below on exceptions to a Master's report. The facts of the case were as follows:—

Blakiston and Freck became partners in 1864, in mining and selling coal, as J. M. Freck & Co. Freck agreed to mine and ship the coal, and Blakiston agreed to sell the coal in Philadelphia. Blakiston was also a partner in the firm of Blakiston, Graeff & Co., coal merchants, doing business in Philadelphia.

In 1866 the firm of J. M. Freck & Co. was dissolved. Freck, who kept the books, sent down a balance sheet, and by that some months afterwards, in April, 1867, a settlement was made, and the balance to the credit of Freck, deducting two uncollected items on the debit side, was paid him by Blakiston.

In 1868 Freck filed a bill for an account of the partnership. Blakiston pleaded an account stated. Freck then amended, claiming to surcharge and falsify the account-stated: (1) For an amount received by Blakiston for commissions received by him as a partner in the firm of Blakiston, Graeff & Co. on sales of the coal of J. M. Freck & Co. (2) For sales of coal to the firm of Blakiston, Graeff & Co. at less than market prices. (3) For profits on coal delivered to Repplier, with whom Blakiston was a partner to fill contracts with the government. (4) For profits on coal delivered to Wright under similar circumstances.

The case was referred to a Master, who reported, in substance, on the first point, that the arrangement for conducting the business by Blakiston, Graeff & Co. for a commission caused a great saving to the firm of J. M. Freck & Co.; that the mode in which the business was done was known to Freck; that monthly accounts-current and accounts-sales were rendered by Blakiston to Freck and were received by him, and his accounts in the firm's books were made out from them, and that no objection was made by Freck to this mode of doing business. But the Master held, as matter of law, that, as the commissions were earned out of dealings with the property of J. M. Freck & Co., Blakiston must account for his share of those commissions.

As to the second point, the Master found that the sale of the coal of J. M. Freck & Co. was made at full market prices; that accounts-sales were rendered to Freck showing the names of the purchasers and the prices paid, and no objection was made by Freck. The Master, however, reported that a point was made before him not taken in the pleadings, viz, that, inasmuch as Blakiston was partner in the selling and buying firm, he must account to his selling partner for the profits he made as purchaser.

The Master, however, reported that there was no right to have an account of profits made on sales by the purchasing firm which accrued to the common partner of both firms.

As to the 3d point, he reported that Repplier was the name in which government contracts had

* This report has been prepared by Mr. R. C. McMurtrie, of counsel for the appellees, with the exception of the argument of appellant's counsel, which was furnished by Mr. C. Stuart Patterson.

Digitized by Google

been taken by several persons and firms, among whom was Blakiston, Graeff & Co., J. R. Blakiston being one of that firm; that they did sell or deliver the coal of J. M. Freck & Co. to him, and he sold it to the government. But as it was proved that J. M. Freck & Co. received precisely the same price as the government paid Repplier, there was no ground for account.

Freck's counsel maintained that the coal thus used was to be treated as a contribution of capital, and thus he was entitled to the *pro rata* share of the profits on that basis. The evidence showed that the sales to Repplier were returned in the account-sales rendered Freck, and the proceeds carried into the accounts-current, and the balances accounted for between Blakiston and Freck. And it was also proved that there was a contribution of capital with which Freck had nothing to do, and the profits were not made out of the sales of J. M. Freck's coal.

As to the 4th point, the circumstances were precisely the same as those under the 3d, except that Wright did receive a profit on the coal, and the Master ruled that Blakiston must account for his share of that profit.

The Master thereupon reported that there should be a decree for an account by the defendant of the amount received for his share of the commissions paid to Blakiston, Graeff & Co. and of the profit derived from the Wright contract. He also reported that plaintiff should account to defendant for certain items which had been excluded from the settlement between them.

Both parties filed exceptions. The plaintiff's exceptions were, *inter alia*, because the Master did not direct an account of the profits received on the sales of coal purchased by Blakiston, Graeff & Co., and of the profits received under the Repplier contract. After a hearing on the exceptions the Court of Nisi Prius entered the following decree: "December 30, 1874, the exceptions filed by the defendant sustained, and also the 14th exception filed by the plaintiff. The other exceptions of the plaintiff are dismissed, and thereupon it is ordered and decreed that the bill be dismissed with costs." No opinion was filed.

Both plaintiff and defendant appealed, assigning for error the decree of the Court. Defendant's appeal was argued and decided in March, 1876, and is reported 2 WEEKLY NOTES, 669. The case now came on to be heard on the plaintiff's appeal.

E. O. Parry and *C. Stuart Patterson*, for appellant.

(1) The appellee's plea of "account stated" would be a bar to the appellant's prayers for a general accounting, if the plea had been proved. The Master finds against the plea, though he treats it as a question of estoppel. The decree of this Court, and the opinion of WOODWARD, J., in Freck *v.* Blakiston, Blakiston's Appeal (2 WEEKLY NOTES, 669), shows that the account stated does not bind the appellee in this case. How then can it bind the appellant? The account stated is, in terms, a settlement not of firm business, but of a mortgage, and the balance-sheet, therein referred to, had been repudiated by the appellee as a final statement of firm transactions. The plea not being proven, the appellant is entitled to a reversal of the decree below, and to a decree for a general accounting.

(2) If the plea were proven, the appellant would be entitled to "surcharge and falsify," and this he has done by his amended bill in three particulars, viz.:—

(*a*) As to the commissions on sales of coal. The firm articles bound the appellant "to superintend the working of the colliery," and the appellee "to sell or dispose of the product thereof." Neither partner contributed any money as capital, but the appellee loaned to the firm the money which constituted its cash capital, and that loan has been repaid with interest. The articles also provided that the firm profits should be equally divided. As the equivalent for his share in the profits, the appellee was bound to sell the coal. Instead of doing that, he employed his other firm of Blakiston, Graeff & Co. to perform that duty, and he compelled J. M. Freck & Co. to pay that firm three per cent. commissions on the sales, and two and a half per cent. guarantee commission. The guarantee commission is, in any possible view, unauthorized, for the articles obviously imply that the business experience and skill of the appellee should be so applied as to make sales to paying customers, and that the firm should be its own insurers as against bad debts. Nor is there better warrant for the commission on sales. The appellee was entitled to charge office rent, clerks' salaries, etc., if he sold the coal; but he had no right to wholly neglect to perform the one duty imposed on him by the articles, and then to charge the firm with the cost of having his duty performed by Blakiston, Graeff & Co., part of which cost went into his own pockets as a partner in the latter firm.

Selling through Blakiston, Graeff & Co. did not really save money to J. M. Freck & Co., for all the estimates relied on by the appellee include salaries for that service, as compensation for which the appellee received one-half the firm profits.

The appellee risked no capital, rendered no service to the firm, and received one-half of its profits, and, also, as partner of Blakiston, Graeff & Co. part of their profits on business done for J. M. Freck & Co.

(*b*) As to the sales by the appellee of J. M. Freck & Co 's coal to Blakiston, Graeff & Co. at less than "the current market price of the day."

Digitized by Google

(The testimony was commented on in detail to show that "the current market price" meant not the buying price of coal at Port Richmond, but the selling price; that the sales in question were made by the appellee at the former price when they should, in fairness to the appellant, have been made at the latter price; that the appellant never acquiesced in the commission, or the sales to Blakiston, Graeff & Co.)

(*c*) As to the application by the appellee of the firm coal to the uses of the Government contracts, in which the appellee was interested.

(The letters of the appellee and the testimony were referred to, to show that the appellee participated in the contracts on behalf of J. M. Freck & Co., and that that firm was entitled to share in their profits.)

Bast's Appeal (20 Sm. 301) is decisive in favor of appellant. That case holds, with regard to one of the very contracts in question here, that "there is an implied obligation among partners that their property shall be used for the benefit of the firm;" and that an interest in a Government coal contract, though taken by a partner, and intended by him for his individual benefit, must be held to enure to the benefit of his firm.

Paul and *McMurtrie*, for appellees.

(1) It is not disputed that all profits earned from firm business must be accounted for. Nor is it pretended that the account stated precludes an inquiry into that. But this was a substitution of the agreed mode of doing the business. It was the hiring of the firm of Blakiston, Graeff & Co., who were paid a commission in lieu of the expense. If the share of these must be accounted for, Blakiston, who paid his share of the expense, while Freck paid nothing, must be allowed that. And the question is, Can Freck, after acquiescing in this mode of doing the business, require such an account? His conduct shows he agreed to the substituted mode of performance

Collier on Part. 113.
Jackson *v.* Sedgwick, 1 Swanston, 460–9
Boyd *v.* Myall, 4 Alab. 79.
Stoughton *v.* Lynch, 1 John. Ch. 470.

It would be as proper to charge him for interest received on loans to the firm.

Chippendale *v.* German Mining Co., 4 De G., McN. & G. 19–36.

(2) The claim, as made by the bill, lacks the facts to sustain it. The claim now made is that a common partner must account for profits on goods bought because *they are firm property*. The vice of the argument lies in that statement, whereas by the purchase they ceased to be firm property of the sellers. That a partner may be also partner in another firm no one can doubt.

Glassington *v.* Thwaites, 1 Sim. & St. 124.

And transactions between firms having a common partner are treated in every respect as if the firms were composed of strangers, except as to the effect of notice.

1 Lind. on Part. 674.
Bolton *v.* Pullen, 1 Bos. & Pul. 546.
Phillips *v.* Crammond, 2 Wash. C. C. 446.
Collamer *v.* Foster, 26 Verm. 759.
Reno *v.* Crane, 2 Blackf. 218.
Parrish *v.* Lewis, 1 Freem. Ch. 309.
Coffee *v.* Brian, 3 Bing. 55.
Jackson *v.* Stopherd, 2 Cr. & Mees. 366.

The rule governing transactions between trustee and *cestui que trust*, that the purchaser must prove fairness, does not prevail.

Chambers *v.* Howell, 11 Beavan, 13.

So where it is between corporation and director.

Gordon *v.* Preston, 1 Watts, 385.

And the rules as to the evidence that proves the sale, and the exigency of pleading to sustain an account, prove the rule.

26 Verm. 789.
Kelley *v.* Greenleaf, 3 Story, 101.
Herrick *v.* Ames, 8 Bosworth, 118
Levi *v.* Karrick, 13 Iowa, 353.
Reno *v.* Crane, 2 Black, 218.
Perry *v.* Butt, 14 Georgia, 708–9.
Foster *v.* Andrews, 2 Penna. 161.

(3) There were no profits under the Repplier contract from the sale of the coal of J. M. Freck & Co., and the claim to a partner's profits derived in another firm, has not even a pretence that can be argued, unless it be law that being partner in one business draws to it all other business of all the partners.

(4) The Master thought this point was ruled by Bast *v.* Pearson. The ground of that decision was that the defendant sold his firm's coal, and claimed the right to keep all the profits. Here all the profits on the sale were accounted for. If the profits on the sale by the purchaser must be accounted for, the rule must be that firms having common partners can never deal with each other. And really it comes to this, that firm property can never become separate property of one of the partners. The absurdity of this argument was exposed in Ex parte Ruffin, 6 Vesey, 119, 127–128, where it is said if that were law a firm could never wind up, for that was only done by giving each a separate ownership in part of the common property. The rule, however, is well settled.

Ex parte Williams, 11 Ves. 3
Ex parte Fell, 10 Id. 348.
2 Swanst. 570.
1 Madd. 358.
And the cases cited under the second point.

The plaintiff does not even aver that the sales were secret; and that he was informed of them by the monthly accounts is not disputed in the evidence.

March 5, 1877. THE COURT. After a careful examination of this case we have not been

Digitized by Google

able to discover any substantial error in the decree made at Nisi Prius.

Decree affirmed with costs to be paid by the appellant and the appeal dismissed.

PER CURIAM. WILLIAMS, J., absent

Jan. '75, 199. Jan. 11, 1877.

Watson et al. v. The Chester and Delaware River Railroad Company.

Change of Venue—Acts of 14 *April*, 1834, *and* 28 *April*, 1870—*Not repealed by new Constitution.*

The Acts of 14 April, 1834 (P. L. 385), and of April, 1870 (P. L. 1292), relating to change of venue, are not repealed by the Constitution of 1874.

The effect of the second section of the Schedule to the Constitution is to preserve the laws then in existence wherever legislation is necessary to carry the provisions of the Constitution into proper effect.

Error to the Common Pleas No. 3, of Philadelphia County.

This was an action of debt originally brought in the Common Pleas of Delaware County by Watson and Folsom against the Chester and Delaware River Railroad Company to recover the amount due under certain Acts of Assembly for land taken and occupied by the defendants. On September 3, 1874, the plaintiffs removed the cause to Philadelphia County under the Acts of 14 April, 1834 (Purd. Dig. 1227, pl. 72), and 28 April, 1870 (Purd. Dig. 1064, pl. 3), making affidavit that a fair and impartial trial could not be had in the county in which the suit was originally brought; Philadelphia County having been indicated by the President Judge of Delaware County, in accordance with the provisions of the Act of 1870.

The narr (filed in the Common Pleas No. 3 of Philadelphia) averred that the corporation defendant had entered upon and occupied a portion of a tract of land belonging to the plaintiffs, and situated in the city of Chester, without making compensation therefor. The defendant pleaded to the jurisdiction of the Court, setting up that the cause of action, if any, had accrued to the plaintiffs at Chester in the county of Delaware, and further, that the Court had not since acquired jurisdiction of the said cause of action "by and in consequence of the filing in this Court, under the supposed authority of certain Acts of Assembly of this Commonwealth, of the record of certain original proceedings in the Court of Common Pleas of the said county of Delaware therefor therein had." The plaintiffs demurred on the ground that no reason why the jurisdiction should be ousted was shown by the plea. The Court below (LUDLOW, P. J., delivering the opinion) held that the Acts, under which the venue of the case was changed, were repealed by the present Constitution, Article III. providing that the power to change the venue shall be vested in the Courts to be exercised in such manner as shall be provided by law, and accordingly entered judgment for the defendant on the demurrer (reported 1 WEEKLY NOTES, 201). Plaintiffs took this writ, assigning for error the entry of judgment for defendant.

A. Sydney Biddle and *R. C. McMurtrie*, for plaintiff in error.

By the Acts of 1834 and 1870 any suit to which a corporation was a party might be removed to an adjoining county, on affidavit filed that a fair and impartial trial could not be had in the county where the suit was begun. This cause was removed under these Acts. We contend that there is no part of the New Constitution which repeals this legislation. The third section of Article III. plainly refers to future legislative Acts, where it provides that the General Assembly shall not pass any local or special Act on the subject of venue. Therefore if these Acts are repealed, it must be by the twenty-third section of the same Article. It reads, "The power to change the venue in civil and criminal cases shall be vested in the Courts to be exercised in such manner as shall be provided by law." This section in nowise affects the existing law, but needs future legislation to carry it into effect. It is not self-operative.

Shephard *v.* Collis, 1 WEEKLY NOTES, 494.
Lehigh Iron Co. *v.* Supervisors of Macungie Township, 3 Id. 29.

Thos. Hart, Jr., and *James E. Gowen*, contra.

The twenty-third section of Article III. made a present grant of power upon the subject of venue to the judicial branch, and this grant took effect upon the adoption of the Constitution. Therefore the *power* of action is in the judiciary, the *form* of the exercise only being left as a subject of legislation.

Jan. 22. THE COURT. The provision of the New Constitution contained in § 23 of Art. III. that "the power to change the venue in civil and criminal cases shall be vested in the Courts, to be exercised in such manner as shall be provided by law," was not immediately operative, *eo instanti* the constitution was adopted, so as to defeat existing laws. By the second section of the schedule "all laws in force in this commonwealth, at the time of the adoption of this constitution, not inconsistent therewith, and all rights, actions, prosecutions, and contracts shall continue as if this constitution had not been adopted." The effect of this saving section, intended to bridge over the chasm between the two frames of government, and make the transition from one to the

Digitized by Google

other easy and without unnatural disturbance of the affairs of the people, it has been held by us, is to preserve the laws in existence wherever legislation is necessary to carry the provisions of the New Constitution into proper effect. If the effect were held to be immediate, the consequence would be that there would be no law whatever to regulate the power, for in this case the power of the Court to change the venue is "to be exercised in such manner as shall be provided by law." Until the manner of its exercise is prescribed by a suitable law, it is evident the Court can have no guide as to the cases, the grounds, the mode of making the change. The power of changing the venue is not inherent in our county courts as it is in those whose jurisdiction extends over greater areas. It is a matter of jurisdiction which is confined to the county by the very constitution of these Courts.

Without a grant of the power they cannot transfer their jurisdiction from one to another. If the powers to transfer were inherent, the Court receiving by transfer could hand the case over to another, and the latter to the next, and so on *toties quoties*.

We think the Court below erred in giving judgment for the defendant upon the demurrer. The case was governed by the laws existing when the constitution was adopted.

Judgment reversed, and judgment is now given to the plaintiff, and the record ordered to be remitted with a *procedendo*.

Opinion by AGNEW, C. J. WILLIAMS, J., absent.

Jan. '75, 129. **Wallace's Appeal.** Feb. 16, 1877.

Receivers—When not chargeable with interest.

A receiver is not chargeable with interest, when by a complication of suits he is placed in such a position that he cannot pay out the fund, and there is no finding that he had personally used the money.

A. in his capacity as receiver of a partnership concern, but in his own name, brought suit against B., recovered judgment and collected the amount thereof. Upon a writ of error this judgment was reversed on account of the inaccurate title of the action. A. then amended his action and recovered judgment against B. for a larger sum. In the mean time B. had brought suit and afterwards obtained judgment against A. for the money collected by him upon the first verdict. A settlement was then had between A. and B., in which the said judgments were set off against each other, and A. paid B. a small balance found due on account of costs, in the settlement of A.'s accounts as receiver: *Held*, that A. was properly chargeable only with the amount collected under the first judgment without interest thereon.

Appeal from the decree of the Court of Common Pleas No. 3, of Philadelphia County, in the matter of the account of Henry E. Wallace, Receiver.

The account had been referred to an auditor, who reported in substance as follows: In 1860, Wallace was appointed receiver in a suit in equity, brought by De Hart against his partner, J. M. Yeager, Jr., and shortly afterwards Wallace brought an action of trover against J. M. Yeager, Sr., father of the defendant in the equity suit, to recover damages for the conversion of certain property of the firm. The receiver obtained a verdict and judgment, and by means of an execution collected $1520.30 thereon. Upon a writ of error the Supreme Court reversed this judgment, on the ground that the receiver had improperly brought suit in his own name. (See Yeager *v.* Wallace, 8 Wr. 294.)

The Court below then allowed an amendment of the title of the action, and the receiver again obtained a verdict, on which judgment was entered for $1835, and the defendant sued out another writ of error, which resulted in an affirmance of the judgment by the Supreme Court. In the mean time, however, the defendant (Yeager, Sr.) had brought an action to recover back the sum of $1520.30 obtained by Wallace in execution of the first judgment, and had obtained judgment against Wallace for $1702.72. Upon a writ of error the Supreme Court had directed that this last sum and interest should be paid into Court to await the final determination of the then pending suit of Wallace against Yeager. Wallace, however, did not pay the money into Court, and an action was brought upon his recognizance in error, which resulted in a judgment against him and his sureties. Upon a writ of error the Supreme Court affirmed this judgment, but said: "In order to give an opportunity to the parties to have these judgments properly set off against each other, we direct that execution upon the judgment now affirmed be stayed for the present, and until the further order of this Court be made in the premises."

In pursuance of this order the parties met on July 6, 1868, the judgments were set off against each other, were marked "satisfied," and Wallace paid Yeager, Sr. $73, being a balance found due him for costs.

The auditor reported that the accountant was chargeable with $1197.23, the net proceeds of the first judgment for $1520.30, and not with the amount of the second verdict, basing his decision upon the ground that the amount of the second verdict which represented the first, with interest and costs, never was received by Wallace; and he credited Wallace with the balance of $73 before mentioned.

To these findings Yeager excepted, and the Court of Common Pleas modified the auditor's report by charging Wallace with $1835, the

Digitized by Google

amount of his second verdict against Yeager; by charging him with interest upon the same, and by disallowing the credit of $73.

Wallace then took this appeal to the Supreme Court, assigning these findings for error.

H. C. Titus, for the appellant.

This case should be regarded as if the Supreme Court itself had amended the original judgment, in Wallace *v.* Yeager (8 Wright, 294), by changing the title, instead of reversing for the informality. Though technical accuracy required this change of form, it was impossible to disregard the original recovery in the settlement of the receiver's account. While the Court reversed the original judgment, it refused an order of restitution, and thus regarded it as the only recovery in the case. The reversal of the original judgment made the subsequent proceedings on the part of Yeager possible, and those on the part of Wallace necessary, for it was the latter's duty to protect his recovery until it should be finally assured. The receiver is not properly chargeable with interest, because the fund in his hands was subject to shifting litigation so that he could not account nor pay, nor prudently invest.

Greenbank, for the appellee, Yeager, Jr.

As the receiver receipted for $1835, and had that amount in his hands according to the record, he should be charged with that sum. If he previously collected money improperly and retained it illegally, he and not the partners should bear the loss.

March 5. The Court. We think the auditor was right in charging Mr. Wallace, only with the actual amount received. The last judgment was extinguished by the set-off of the judgment of Yeager *v.* Wallace, which seemed to be the most direct way of unravelling the complication into which the suit between Wallace and Yeager had run. The amount collected on execution, was really for the benefit of the partnership, as the action by the subsequent amendment became a regular proceeding. And we do not think that, under the circumstances of the case, the receiver should pay interest on the sum received. He was by the complication of suits placed in an attitude that he could not pay out the fund, and there is no finding against him as having personally used the money. A receiver is an officer of the Court, and is not to be dealt with harshly, especially when the litigation and delay are owing to the misconduct of the pursuing partner.

The decree of the Court below is reversed, and the report of the auditor affirmed, the costs to be paid out of the fund in the hand of the receiver, and distribution of the balance ordered to be made in conformity to the report of the auditor, after deducting the costs since accrued.

Per Curiam. Williams, J., absent.

Oct. and Nov. '75, 182. Nov. 21, 1876.

Huidekoper v. City of Meadville.

Constitutional law—Municipal claim—City of Meadville—Act 6th April, 1870, *P. L.* 967 *—Assessment of cost of paving streets upon owners of abutting property—Uniformity of taxation—Execution of power to pave streets and levy cost from owners of property—What ordinances sufficient.*

The paving of a street in a city is an act purely local, notwithstanding the fact that a general benefit may result to the public; and hence an Act of Assembly authorizing a city to pave its streets and collect the cost from the owners of adjoining property, is not a violation of Sect. 1, Art. 9, of the Constitution, providing for uniformity of taxation upon the same class of subjects.

The power conferred by such an Act of Assembly is well executed by a general ordinance regulating the paving of streets and the manner of collecting the cost thereof, followed by a special ordinance authorizing the paving of a particular street.

Error to the Common Pleas of Crawford County.

Scire facias sur municipal claim, filed by the city of Meadville against Huidekoper, for macadamizing 335 feet of the roadway and paving the gutter of a certain street in front of defendant's premises in the city of Meadville.

This macadamizing and paving was done by the Street Commissioner of said city, in pursuance of a resolution of the City Council instructing him so to do. The resolution was adopted under the authority of a general ordinance of the City Council in relation to paving streets, framed in accordance with an Act of Assembly, approved April 6, 1870 (P. L. 967), vesting in the Council of said city power "to pave, repair, or repave any public street or alley, or any part thereof, which is now, or may hereafter be, laid out and opened in said city; to levy and collect the cost and expense of work and materials used therein from the owners of the property bounded by and abutting on said street or alley, or any part thereof, by an equal assessment on said property in proportion to the number of feet the same fronts thereon," etc., and to file liens therefor, if necessary, etc.

The affidavit of defence to the *sci. fa.* set up substantially that the street in question had been opened, improved, and maintained by the public for more than seventy years prior to the work charged in this case, which work was only the usual repair or improvement of streets for the public, and should be at the public expense; that other and much the larger portion of the same street had been previously paved at the expense of the tax-payers generally; that the property against which the lien was filed had been taxed

Digitized by Google

for the year 1874 (the year in which the lien-improvement was made) uniformly with other property in the city for city purposes, including the improvement of streets and alleys; which tax had been paid by defendant before the filing of the lien; that the action of the plaintiff in attempting to levy the special tax in this manner for a public improvement was unjust and unequal and contrary to the Constitution; that the improvement charged for in the claim was for the general public benefit, and did not confer any special benefit upon the property or party charged; that macadamizing and paving the gutters was not such paving and repaving as was contemplated by the aforesaid Act of Assembly; and that no such ordinance as that contemplated by the Act had been passed by the City Council in relation to the macadamizing and paving in question.

A rule was taken on the defendant to show cause why judgment should not be entered for want of a sufficient affidavit of defence, which rule the Court below made absolute, LOWRIE, P. J., delivering the opinion, and holding that although streets were for public purposes, yet they were also necessarily local and for local purposes, and that the Act of Assembly under which this work was done, was therefore not unconstitutional, and that the facts set up in the affidavit of defence while they showed that the law was felt as a grievance, yet showed no argument against its validity.

The defendant took this writ, assigning for error the entry of judgment as above.

Douglas & McCoy and *Pearson Church*, for plaintiff in error.

Two methods of obtaining uniformity in taxation for the improvement of streets are common. In large and compactly built cities all streets are maintained at the expense of adjacent property. And in other and smaller ones they are made and maintained from a common fund, the proceeds of a general tax. In Meadville the latter system has been and must be pursued under its present charter; the other streets of the city have been made in that manner, and this fact, together with the one that the property in question has already paid its full quota to the common fund, renders any further tax, such as the present one, an infringement upon the constitutional rights of the party, under Art. 1, § 9, of the Constitution, which declares that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

A municipal assessment upon property for local improvements is a tax.

Washington Avenue, 19 Sm. 352.

An Act shifting the expense of making improvements from the city to individuals is not legislative, but a decree.

Sharpless *v.* City of Philadelphia, 9 H. 168.

The ordinance regulating the paving of streets, being general, was not a valid execution of the power conferred by the Act of Assembly. There should have been a special ordinance specifying the street, the character of the work, and containing such regulations as would show that the council duly considered and deliberated upon the subject. Municipal authorities cannot legislate retrospectively by a resolution referring to a previous ordinance.

Local assessments for public improvements, conferring no especial private benefit, are clearly unconstitutional.

Tide Water Company *v.* Coster, 3 C. E. Green, 518.
Hammett *v.* City of Philadelphia, 15 Sm. 146.
Washington Avenue, *supra*.
Weber *v.* Reinhard, 23 Sm. 370.

Thomas Roddy (with whom was *Christian M. Boush*), for defendant in error.

The expense of making local improvements is very generally met, in whole or in part, by local assessments; and the question whether it shall be met in this way, or by the property benefited, is one of legislative expediency.

Dillon on Municipal Corporations, 2d ed., vol. 2, § 596.

And such assessments, if locally made, are in general perfectly fair, for they enter into and enhance the value of the property assessed.

City of Philadelphia *v.* Tryon, 11 C. 404.
Hammett *v.* City of Philadelphia, 15 Sm. 155.

Even if the improvement made was for the public benefit, that constitutes no argument against its being for private benefit as well; and the other streets paved at the public expense may have all been so paved prior to passage of the Act vesting the city council with power to pave, etc., at private expense.

The word "paving" includes macadamizing.

Burnham *v.* Chicago, 24 Ill. 496.

Nov. 24, 1876. THE COURT. The Act of Assembly of 1870 confers the power upon the city of filing claims for paving as liens, according to the mode of proceeding under the mechanics' lien law of 1836. This power is well executed by a general ordinance regulating the paving of streets, and by a special ordinance authorizing a particular street to be paved. No question under the Constitution arises as to uniformity of taxation. The purpose is purely municipal and local. General benefit may result, but does not alter its local character.

Judgment affirmed.

Per CURIAM. WILLIAMS and MERCUR, JJ., absent.

[See Wistar *v.* City of Philadelphia, *ante*, 124; Seely *v.* City of Pittsburgh, *ante*, 413.]

Digitized by Google

Jan. 77, '88. Feb. 15, 1877.

Valentine's Appeal.
Poulson's Estate.

Attachment execution—Attachment against fund in Court—Effect of service on executors as garnishees—Order of Orphans' Court retaining fund until determination of attachment in Common Pleas—Interlocutory and not final—Errors and appeals—Practice.

Certain real estate was sold by executors under an order of the Orphans' Court for the payment of debts. The executors being unable to give the requisite security, the purchase-money was paid into Court. A judgment creditor of a legatee issued an attachment execution and served the executors as garnishees. The Orphans' Court directed that so much of the fund in Court as was payable to the legatee should be retained until the final disposition of the attachment. The legatee appealed:

Held, that as the jurisdiction over the attachment suit belonged to the Common Pleas, who could determine whether the fund was subject to attachment, and as the order of the Orphans' Court was not final but interlocutory, the appeal should be dismissed.

Appeal from the Orphans' Court of Philadelphia County.

This case was heard in the Court below upon exceptions to the report of an auditor appointed to audit the account of the executors of John Poulson, deceased. The facts were as follows:—

John Poulson left a will which was duly proved, and letters testamentary thereon granted to James Allen and Rebecca A. Valentine, executors. The will contained a bequest to said Rebecca A. Valentine of $650. The executors under an order of the Orphans' Court sold certain real estate of decedent for the payment of debts, but were unable to give the requisite security, and the purchaser, by leave of Court, paid the purchase-money directly into Court on the 10th of April, 1876.

One Benjamin Harper, having a judgment against the said Rebecca A. Valentine for $450, issued thereon an attachment execution, and served the said executors as garnishees. Pending this attachment, the Orphans' Court appointed an auditor to distribute the fund, before whom Harper appeared, and claimed the amount of his judgment out of the legacy due to Mrs. Valentine. The auditor sustained this claim, but exceptions to his award were sustained by the Court, the following opinion being delivered: "The auditor erred in awarding to the attaching creditor of the executrix the legacy bequeathed to her. If the attachment had been proceeded in to a final judgment against the executors as garnishees, then the award would have been regular, but it is still pending and undetermined in the Court of Common Pleas. Having notice of the attachment, the proper practice is to ascertain what amount, if any, will be payable to the defendant in the attachment after the payment of debts and expenses of the settlement of the account of the executor, and when ascertained direct the executor to retain the amount in this case. The auditor should report to the Court to retain the amount until the final disposition of the attachment. The exceptions to this award are sustained."

The report of the auditor was modified in several particulars, and referred back to him for correction in accordance with the opinion of the Court. A supplemental report was then made by the auditor, in which the share of Mrs. Valentine was fixed at $576.32—$500 of which the auditor reported should be retained in Court until the final disposition of the attachment suit. To this report Mrs. Valentine filed exceptions, which the Court dismissed, and the supplemental report was confirmed. From this decree Mrs. Valentine appealed.

Thomas H. Speakman, for appellant.

The remedy by attachment execution has been many times enlarged and extended in this State, but its foundation is still the 35th section of the Act of 16th of June, 1836 (Purd. Dig. 639, pl. 32), which provides for a clause of *scire facias* against the garnishee to appear "and show cause why such judgment shall not be levied of *the effects of the defendant in his hands.*" The only verdict, except for the garnishees, that can be rendered, is that the garnishees have such and such property and effects in their hands belonging or due to the defendant. But the fund here sought to be recovered is *not* in the hands of the executors, and never was; they are not responsible for it, they have no control over it, and are mere strangers as to it. An attachment served on empty-handed executors can no more bind a fund in Court that if it had been served on any other persons. The fund came not from personal estate, the title to which necessarily vests in and passes through the personal representatives, but from real estate. The executors had nothing to do with it, except that they were the agents of the law to effect the sale for the payment of decedent's debts.

Money is only attachable in the hands of the person who actually holds possession of it. The actual debtor of the defendant must be made garnishee, and not a person holding mere evidences of the debt. A plaintiff may also attach money in his own hands.

Gochenaur's Executors *v.* Hostetter, 6 H. 414.
Fowler *v.* Pittsburgh, F. W. & C. R. R. Co., 11 Casey, 22.
Raiguel & Co. *v.* McConnell, 1 Casey, 362.
Graighle *v.* Notnagle, Pet. C. C. Reps. 245.

Thus the actual and not a mere constructive possession of the money by the garnishee is the

Digitized by Google

test. No Court ever gives judgment against a garnishee but upon his unqualified admission or full proof that he has the money actually in hand or owes it. The Act makes a legacy attachable "in whose hands or possession soever the same may be." To hold that money in court could be attached by serving the executors, in whose hands it is not, is contrary to the Act, and would lead to complication. How can an attachment so served give the attaching creditor any lien or preference on the fund in Court over any other creditor claiming before the Auditor? It has been long settled that money in the hands of public officers cannot be attached.

Bulkley *v.* Eckert, 3 Barr, 369.

Edward Law (with whom was *Charles Fry*), contra.

This fund, arising from a sale of real estate under an order of the Orphans' Court, for the payment of decedent's debts, constituted the only assets of the estate. It is true that this money was not in the actual manual possession of the executors, garnishees, but those assets of a testator which an executor is entitled to take possession of are considered, after probate of the will, to have been in his *constructive* possession from the moment of decedent's death, and he may maintain trespass, etc., against any one who takes them.

Fisher *v.* Young, 2 Bulst. 268; 9 Bac. Abr. 454, 5.
North *et al.* *v.* Turner *et al.*, 9 S. & R. 244.

There is a strong analogy between attachment execution and foreign attachment, and it has been well settled that a proceeding in foreign attachment is not only a proceeding *in rem*, but also a proceeding against the garnishee personally, and constructive possession by the garnishee in foreign attachment is sufficient.

Childs *v.* Digby, 12 Harris, 23.
Drake on Attachments, 482.
Lane *v.* Nowell, 15 Maine, 86.
Robinett *v.* Donnelly, 5 Phila. 361.
Moore *v.* Holt, 22 Maine, 180.
Raiguel *v.* McConnell, 1 Casey, 362.
Straley's Appeal, 7 Wright, 89.
Ward *v.* Lawson, 6 Pick. 358.

The executors were the proper and only persons on whom to serve the attachment. They were the debtors to the legatee. The Clerk of the Court is merely a custodian for them, and could not be summoned as garnishee.

Gilmore *v.* Adams, 1 Weekly Notes, 76.
Raiguel *v.* McConnell, 1 Casey, 362.
Yeager *v.* Wallace, 8 Wright, 296.
Lorenz *v.* King, 2 Wright, 93.
Gochenaur's Executors *v.* Hostetter, 6 Harris, 414, 420.
Riley *v.* Hirst, 2 Barr, 347.

The effect of this attachment was to place the attaching creditor in the position of the legatee.

Reed *v.* Penrose Ex., 2 Grant, 472.
Fessler *v.* Ellis, 4 Wright, 248.
Strong's Ex'rs *v.* Bass *et al.*, 11 Casey, 333.

March 5, 1877. The Court. The Orphans' Court very properly ordered the share of the estate found to belong to Mrs. Valentine to be retained until the attachment of her legacy was finally determined in the Common Pleas.

It is clear that jurisdiction over the attachment belonged to the Common Pleas and not to the Orphans' Court. If the garnishee has a defence arising in the facts he sets up, that Court will determine whether it be sufficient, and a writ of error would bring his case before us. If found to be insufficient, and the money shall have been distributed, a judgment *de bonis propriis*—none of the estate being produced by him—will disclose the power of the Common Pleas to enforce its jurisdiction.

It would not be proper now to pass upon the merits of the defence, especially as the order of the Orphans' Court is only interlocutory and not final.

The order of the Orphans' Court being right and not final, the appeal is dismissed, with costs to be paid by the appellant.

Per Curiam. Williams, J., absent.

Jan. '76, 1-3. **Hopple v. Bunting.** Jan. 22, 1877.

Affidavit of defence law—Set-off—Unliquidated damages.

Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit by Bunting against Hopple upon a promissory note drawn by the defendant to the order of himself and by him endorsed. The following affidavit of defence was filed in this, and in two other similar cases, viz.:—

That the plaintiffs are dealers in boots and shoes in all varieties, which they sell to the trade by auction and on credit, which sales on credit are, and have been for a great many years past, a leading feature of their business, and their firm is the only one in the city where the trade can buy goods at auction and on four months' credit. That defendant knew of this peculiar feature of their business, having dealt with them many years ago, and about three years since, desiring to open a store for sale at retail of boots and shoes, he called upon the said plaintiffs and stated to them his desire to commence the retail boot and shoe business, and the said plaintiffs then and there agreed, contracted and bargained with this defendant to supply him with merchandise for the retail boot and shoe business on four months' credit on his individual note from time to time, thereafter, as he should need goods for his retail trade, the purchases to be made at their regular auction sales, and the individual note of defendant to be taken at four months' time for the amount of any and all such sales, and the contract to remain in force continuously so long as defendant should pay his said notes, so given, at maturity.

That on the faith of the said contract and bargain of plaintiffs this deponent then opened a store, for the sale at retail of boots and shoes, at No. 502 South Second Street, where he has since carried on the busi-

Digitized by Google

ness, and purchased the bulk of his stock from time to time from the said plaintiffs, for which in accordance with their said contract they received the individual notes of defendant at four months, and which said notes have always heretofore been paid at maturity.

That on the 23d day of November last, defendant attended one of the plaintiffs' regular and advertised sales by auction, and purchased of said plaintiffs for himself under said contract and bargain, a lot of boots and shoes, which were knocked down to and bought by and sold to him in separate lots and at various prices, amounting altogether to the sum of $265, and on the next day when defendant called to give his note at four months to said plaintiffs, and take away the goods so purchased by him, the plaintiffs refused to accept his said note therefor or to deliver the goods, so purchased, to him or to sell to him any further in accordance with the terms of their said agreement, contract and bargain with this deponent.

And defendant further says that his whole business was predicated on the faith of the contract and bargain of the plaintiffs above named to sell and deliver to him, continuously, their goods on his individual note at four months, and by their not complying with their part of the said contract, deponent has lost the said specific goods purchased by him on the 23d day of November last, which were worth to deponent at that time and since, at least $391, and by their continued failure and refusal to supply him with their goods, in accordance with their contract, defendant has been subjected to great loss and inconvenience, and has lost his whole time and the money invested by him in permanent fixtures, both of which were given to creating a demand for the goods of said plaintiffs at retail, and which demand he cannot otherwise supply than from the plaintiffs, and which money, time, and labor, he would not have invested in the said business but for the express contract of said plaintiffs with him to supply him on credit as aforesaid; and deponent says that by the failure of plaintiffs to keep their said bargain and contract with him, he believes he has, in addition to the inconvenience, suffered an actual loss exceeding $1200. All of which deponent believes to be true and expects to be able to prove on the trial of this cause.

Judgment was entered against the defendant for want of a sufficient affidavit of defence (reported 2 WEEKLY NOTES, 445). The defendant took this writ, assigning for error the entry of said judgment.

B. P. Wrigley, for the plaintiff in error.

Unliquidated damages can be made the subject of set-off.

Hunt *v.* Gilmore, 9 Sm. 450.

T. J. Diehl, contra, did not appear.

Jan. 22. THE COURT. The Judges of this Court being equally divided in opinion upon the merits of the affidavits of defence in these three cases, the judgment in each case stands affirmed.

PER CURIAM. WILLIAMS, J., absent.

[See Sitgreaves *v.* Griffith, 2 WEEKLY NOTES, 705.]

Common Pleas—Law.

C. P. No. 1. Feb. 19, 1877.

Wetherill v. Hanly.

New trial—Mental confusion of a witness on the stand preventing him from stating the facts of an occurrence at which he was present—Not ground for a new trial.

Motion for a rule for a new trial.

This was an action to recover damages for the killing of a mule by defendant's servant.

On the trial plaintiff called a witness who alleged he had seen the collision between the plaintiff's team and that of defendant; that it occurred on the north track of the Market Street Passenger Railway, about fifteen or twenty feet east of Market Street bridge, and that the plaintiff's team had not been off the north track from Twenty-third Street to the bridge.

The defence was that the accident occurred on Market Street, east of Twenty-third Street, and was due to the negligence of plaintiff's driver. Two witnesses were called who testified that they saw plaintiff's team cross Twenty-third Street, on the south side of Market Street, between the south track and the curb; that the mule's leg was then broken, but did not then see defendant's wagon.

Another witness, a young man named John Duffy, was then called by defendant. He was in the defendant's wagon when the collision occurred. On the stand he became very much confused, and, when asked where the accident took place, said at Twenty-third and Market Streets. This contradicted defendant's other witnesses, and was a total surprise to defendant.

The jury found for the plaintiff.

The affidavit of the witness Duffy was produced in support of the present motion, stating that the accident, in fact, occurred between Twenty-second and Twenty-third Streets, and was due to the negligence of plaintiff's driver; that he was so nervous and confused when on the stand that he did not state the truth.

Abraham M. Beitler, for the motion.

Where a party in a cause is surprised by the testimony of a witness who does not state before the jury what he has previously asserted, and where that witness subsequently, in an affidavit, states his mistake and his willingness to correct it, the Court should grant a new trial.

Ainsworth *v.* Sessions, 1 Root, 175.
Coddington *v.* Hunt, 6 Hill, 595.
Levy *v.* Brown, 6 English, 16.
Wilson *v.* Brandon, 8 Ga. 136.
Guy *v.* Hanly, 21 Cal. 398.
Rodriguez *v.* Comstock, 24 Id. 85.
Steele's Ex'rs *v.* Moxley, 9 Dana, 137.

Digitized by Google

This witness was a most material witness. He not only misstated the facts, but he flatly contradicted the other two witnesses for the defence. C. A. V.

March 3, 1877. Motion dismissed.

[See Wilmarth v. Tull, *post*, 475.]

C. P. No. 1. **Ashman v. Doerr.** Mar. 17, 1877.

Mechanic's lien—Lien for repairs—There is no lien for repairs where property is conveyed before the claim is filed.

Rule to open judgment.

Sci. fa. sur mechanic's lien. The claim was for paper-hanging, and was filed December 10, 1873. On December 12th, 1876, judgment was entered for want of an affidavit of defence.

The deposition in support of the present rule set forth that the building had been completed according to the original design in 1871, and since then had been sold three times prior to 1873, when the work had been done for which this claim was filed. That the contract for the work had been made with Doerr, who conveyed the property before the claim was filed.

Alexander, for the rule. Under the Act of June 16, 1836 (Purd. Dig. 1025), and the supplement of March 24, 1849 (Purd. Dig. 1029), there can be no lien for work done under these circumstances.

McCree v. Campion, 5 Philad. 9.

There cannot be a lien for repairs under the Act of Aug. 1st, 1868 (Purd. Dig. 1028, pl. 21).

Booth, contra.

Rule absolute.

C. P. No. 1. Mar. 17, 1877.

Bucknor v. Pitman et al.

Partnership—What constitutes—Affidavit of defence.

Rule for judgment.

Assumpsit on a book account for materials furnished defendants, being a bill for paints and painter's materials.

The affidavit of Bates, one of the defendants, set forth that he never ordered or received any of the goods charged, nor did any one ever order or receive them for or on his account; and further averred that he built a fence near the Centennial grounds in May, 1876, and entered into a contract with Pitman (the other defendant) by which the latter was to solicit advertisements for the fence, for which he was to receive half of what was made; that neither of them was to place any advertisement on the fence, but only to sell the right to other people to do so; and that Pitman was not authorized to buy any article or articles for or on account of the deponent, nor did he ever hold him out to the world as his partner.

Cheney, for the rule.

The contract entered into makes the defendants partners

Shakespeare, contra.

Rule discharged.

C. P. No. 1. **Meany v. Kleine.** Mar. 10, 1877.

Affidavit of defence law—Copy of book entries—An attorney's entries of charges for professional services are not within the Act.

Rule to strike off judgment.

The plaintiff filed the following statement, upon which he took judgment for want of an affidavit of defence:—

J. Kleine, To D. B. Meany, Dr. $10.00.

To professional service in defending the said defendant in the bill of indictment of which the above is a true copy (copy of indictment attached).

The affidavit in support of the rule suggested that the statement filed was not sufficient to entitle plaintiff to judgment.

Rex, for the rule.

Book entries of an attorney are not within the law.

Atwood v. Calverley, 1 Weekly Notes, 82.
Rogers v. Scullins, 2 Id. 535.
Hale's Ex'rs v. Ard's Ex'rs, 12 Wr. 22.

Bley, contra.

Rule absolute.

C. P. No. 2. **Hopper v. Hemphill.** Jan. 27, 1877.

Affidavit of defence law—Loan or advance of money—An advance by a broker of the purchase-money of stock, bought by him for a customer, not within the Act.

Rule for judgment for want of a sufficient affidavit of defence.

The copy filed was an affidavit of loan, setting forth, that in pursuance of a request by defendant, accompanied with a deposit by him of $500, as a margin, the plaintiff bought and advanced the purchase-money of certain stock for the defendant; and subsequently, at defendant's order, sold the same at a loss, over and above the said margin, of $745.48, which sum defendant promised to pay, and for which this suit was brought.

The affidavit of defence suggested that the affidavit of loan was not such as to entitle plaintiff to judgment.

Hannis, for the rule, contended that the plaintiff's affidavit set forth a sufficient "contract for the advance of money," within the 14th section of the Act of March 11, 1836 (Purd. Dig. 496, pl. 16).

Counsel, contra, not heard.

Digitized by Google

Rule discharged, the Court remarking that the Act applies only to a loan or advance of money *as money*, and not to cases ordinarily covered by a common count for money paid and expended for the defendant's use.

[See Barr *v.* Ambler, 2 Weekly Notes, 262; De Castro *v.* Castos, 1 Id. 156; Ohman *v.* Winsmore, *ante*, 157.]

C. P. No. 3. **Held v. Clemens.** Jan. 27, 1877.

Amendment—Affidavit of defence law—Mistake in copy filed—Amendment at bar not permissible to supply omission in the copy filed—Practice—Jones v. *Gibson, ante* 329, *followed.*

Rule for judgment for want of sufficient affidavit of defence, and motion to amend copy filed.

Assumpsit on a promissory note.

The plaintiff filed what purported to be a copy of the note sued upon, which copy contained no date. The affidavit averred that the copy filed was insufficient.

Plaintiff's attorney produced the note, which was dated, and stated that the date was omitted from the copy by inadvertence. He asked leave to amend the copy at bar, and thereupon take judgment, as no defence upon the merits was shown.

Alex. R. Cutler, contra.

Unless the plaintiff makes out a *prima facie* case, by filing a sufficient copy, no affidavit of defence on the merits is required. A mere suggestion of the insufficiency of the copy is enough to prevent judgment.

The statutory period for filing the copy having expired, it is now too late to amend.

C. A. V.

Feb. 2, 1877. Rule discharged, and motion to amend not granted.

[The above decision is contrary to that in Guth *v.* Anderson, decided by the same Court (C. P. No. 3), *ante*, 133, but is in accordance with that in Jones *v.* Gibson, C. P. No. 4, *ante*, 329, in which Thayer, P. J., delivered a carefully considered opinion, which will probably settle the practice in such cases hereafter.]

C. P. No. 3. **Wilmarth v. Tull.** Mar. 6, 1877.

New trial—Mental confusion of a witness on the stand preventing him from stating the facts.

Motion for a rule for a new trial.

Assumpsit on a promissory note.

At the trial the defendant called his brother and offered to prove by him certain facts, as a defence, relating to the making and endorsement of the note. When asked by defendant's counsel to state what he knew in reference to the case, the witness became confused, and said he knew nothing about the note.

The verdict was for the plaintiff.

The affidavit of the witness was produced in support of the motion, setting forth fully the facts, and stating that he became so nervous and confused on the stand that he said what he did not intend to say.

William A. Manderson, for the motion.

The witness states now that he became frightened, and he narrates the facts exactly as I opened to the jury, and as he had repeatedly told them to me.

Ludlow, P. J. We will grant the rule. Hereafter we will determine the question which arises here. We do not decide that the defence is a good one, but we place the case on the argument list, and it is possible we may discover something in it which may enable us to grant a new trial.

[See Wetherill *v.* Hanly, *ante*, 473.]

C. P. No. 4. Feb. 24, 1877.

Wasserman v. Bank, Garnishee of Sommers.
Garsed v. Bank, Garnishee of Heilbrun.

Attachment execution—Leave given to pay into court money attached by simultaneous writs, and interpleader awarded.

Rules for leave to pay money into court, and for an interpleader.

These were two distinct writs of attachment execution, in different suits by different plaintiffs, attaching a fund deposited in the Centennial National Bank. The answers of the garnishee to the interrogatories filed in each case, admitted an amount of money deposited with the bank, in the name of L. Sommers (one of the above-named defendants), but suggested that the same was claimed as the property of the other defendant, Heilbrun; that the two writs had been served simultaneously. The garnishee disclaimed any interest in the subject-matter, and prayed that it might pay the money so attached into court, and that an interpleader be awarded.

A. J. D. Dixon, for the rules, referred to—

Act of 11 March, 1836, § 4; Purd. Dig. 499, pl. 31.
Moore *v.* Moore, 34 Leg. Int. 12.
Ware *v.* Western Bank, 1. T. & H. Pr. 433.

T. J. Diehl, contra.

The Court made both rules absolute.

Orphans' Court.

Whitehead's Estate. Feb. 23, 1877.

Citation to administrator d. b. n. to file account of deceased executrix—Practice.

Sur petition for citation to administrator *d. b. n.* to file an account.

E. T. Whitehead died, leaving a will by which he appointed Elizabeth Ditche his executrix and

Digitized by Google

legatee. The executrix died without having filed her account, and an administrator *d. b. n.* of decedent's (Whitehead's) estate was then appointed. A petition was then filed by a creditor of decedent for a citation to compel the administrator *d. b. n.* to file the account of the deceased executrix.

W. H. Livingood, for petitioner.

Eo die. THE COURT. We cannot compel the administrator *d. b. n.* of E. T. Whitehead's Estate to file the account which Elizabeth Ditche, as executrix, was bound to file. The proper mode of proceeding is to present a petition for a citation against *her* executors to file the account which she ought to have filed. The petition is dismissed.

Per HANNA, J.

Stewart's Estate. March 21, 1877.

Guardian—Act March 29, 1832—Construction of—Administrator of deceased guardian, not surety, should be cited to file account—Practice—Application by prochein ami irregular—When new guardian should be appointed.

Sur petition of Henry C. Stewart and Mary C. Stewart, by their mother and next friend, Mary C. Stewart, for a citation to surety of deceased guardian, to file account.

The petition set forth that on the 20th January, 1865, James Morrell, Jr., was appointed guardian of the petitioners, Henry C. Stewart and Mary C. Stewart, and the said James Morrell, Jr., gave as surety in this Court, one William C. Stevenson, and that the said James Morrell, Jr., has never filed an account. The petition further suggested the death of James Morrell, Jr., and alleged that the petitioners had been, and are still, without the allowance named by this Court for their support, and prayed "that a citation be awarded to said Wm. C. Stevenson, said surety of deceased guardian, to file a just and true account of the guardianship."

The answer of William C. Stevenson set forth, by way of demurrer, that he was advised that "said petition is defective in this, that it should have been presented by a guardian or guardians of said petitioners duly appointed by this Court to succeed the said James Morrell, Jr., deceased." The answer also averred that the said James Morrell, Jr., had regularly during his life paid all sums as ordered by this Court; that an administrator of his estate had been appointed, and that respondent had no knowledge of said Morrell's affairs, books, papers, or accounts.

H. Galbraith Ward, for the petitioners.

The Act of 1832, sec. 57 (Purd. Dig. 1106, § 22), does not compel us to cite the administrator. The Act is vague, but a citation to the surety, if the guardian is dead, is within its contemplation.

[O'BRIEN, J. There is certainly nothing in the Act to compel a surety to file the account of his principal, although cases might possibly arise where the guardian being dead, or out of the way, the ward would be powerless.

HANNA, J. The account should be filed by the administrator, and when the estate is settled, if there is any indebtedness you might proceed against the surety.]

This Court has all the powers of a Court of Chancery to reach the consciences of parties, guardians, *sureties*, and every one else having knowledge of the accounts and doings of a guardian.

Commonwealth to the use of Raser *v.* Raser, 12 Smith, 436.

A petition for a citation by a prochein ami is perfectly formal, and well established in this State.

Turner *v.* Patridge, 3 Pen. & Watts, 172.

W. W. Wiltbank, contra.

Sureties may be cited when a guardian cannot be found, but the Act contemplates a continuing in life of the principal. It does not apply when he is dead (Report of Commissioners on Revision of Civil Code, 1866), and, if the administrator cannot be found, perhaps the surety might be cited, but here no effort has been made as to the administrator, although one was duly appointed.

Even if the citation were regular, the law has remained as adjudged in Bowman *v.* Executors of Herr (1 Pen. & Watts, 282), that at the death of the guardian the guardianship ends, and the administrator may be compelled to settle, and pay over any balance in his hands. As the principal cannot be held until a *devastavit* be shown, the surety cannot.

Commonwealth to use *v.* Moltz, 10 Barr, 527.

March 24, 1877. THE COURT. The petition in this matter, being to compel the filing of the account of a deceased guardian, is presented by the minors through their next friend.

In this instance the party cited to file the account of the deceased guardian is his surety, and not his administrator, who in law is his personal representative. We think the latter is the proper party to file the account, and against whom the citation should issue. If he refuses or neglects, then, under the Act of Assembly, an auditor will be appointed by the Court to state the account.

The proper practice, however, would have been to first procure the appointment of a new guardian, who would then appear for, and prosecute any proceedings necessary to establish the rights of the minors. This is apparent from the fact that upon a settlement of the account of the deceased guardian, the balance of the minor's estate could only be paid to a successor when appointed and qualified.

For these reasons the petition must be dismissed

Opinion by HANNA, J.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, APRIL* 5, 1877. [No. 27.

Supreme Court.

Oct. & Nov. '76, 252. Nov. 9, 1876

Commonwealth ex rel. Magee v. McCarthy.

Constitutional law—New Constitution of Penna. Art. VIII. Sec. 3, construed—Change in the time of holding charter elections—Mayor of city of Pittsburgh.

The effect of Art. VIII. Sec. 3, of the new Constitution, to wit, "All elections for city . . . . officers for regular terms of service, shall be held on the third Tuesday of February," is to substitute a fixed day for the charter election of all cities; and this provision is to be applied to each particular charter, as the question arises.

In the city of Pittsburgh, before this provision took effect, the charter election was fixed for the first Tuesday of December in each year, the term of office beginning on the first day of February following.

Held, that the Constitution merely set back the time of election from December to February in the same year.

Error to the Common Pleas No. 1, of Allegheny Co.

Quo warranto, on the suggestion of Christopher Magee, against Wm. C. McCarthy, to show by what authority he exercises the office of Mayor of the city of Pittsburgh. The material facts of the case were as follows:—

Prior to and at the time when the new Constitution of Pennsylvania went into operation, the various laws governing municipal elections in the city of Pittsburgh provided, in effect, that the annual election for members of councils, and the triennial election for mayor, should be held on the first Tuesday of December, the mayor elect to enter upon his official duties for a term of three years on the first day of February ensuing his election. Under the provisions of these laws, James Blackmore had been elected and entered upon his official duties for the term of three years, to expire the first day of February, eighteen hundred and seventy-five (1875). If no change had been made in the law, the successor to Mayor Blackmore would have been elected on the first Tuesday of December, 1874.

In accordance with Art. VIII. Sec. 3, of the new Constitution, to wit: "All elections for city, ward, borough, and township officers, for regular terms of service, shall be held on the third Tuesday of February,"—an election was held in Pittsburgh on the third Tuesday of February, eighteen hundred and seventy-four (1874), for a mayor to serve three years from February 1, eighteen hundred and seventy-five (1875), at which election Wm. C. McCarthy, the respondent, received a majority of all the votes cast, and having been duly qualified he entered upon the duties of the office on the 1st day of February, 1875.

On the third Tuesday of February, eighteen hundred and seventy-five (1875), a second election for mayor was held in alleged pursuance of the new Constitution, at which the relator, Christopher Magee, received a majority of all the votes cast, and was, by the Judges of the Court of Common Pleas, declared duly elected, but the respondent, Wm. C. McCarthy, on demand being made, refused to deliver up the office, claiming to be entitled thereto until the 1st day of February, 1878.

On August 28, 1875, by agreement of parties, a writ of *quo warranto* was issued to test the right of McCarthy in the premises.

A demurrer was filed, averring that the election of the third Tuesday of February, eighteen hundred and seventy-four (1874), was premature and unauthorized.

After argument, judgment was entered on the demurrer in favor of defendant. The relator took this writ, assigning for error the entry of said judgment.

John H. Bailey, Geo. W. Guthrie (with whom was *J. K. P. Duff*), for plaintiff in error.

The question is, was the election of the third Tuesday of February, 1874, held at the proper time?

At common law there must be a vacancy in the office existing at the time of the election, for one cannot be elected to a corporate office in reversion. An election to fill an anticipated vacancy is not valid unless expressly authorized by the charter or by statute.

Dillon on Municipal Corp. p. 161.
Angell and Ames on Corp. p. 123.

If elections to offices in reversion are permitted, what is to prevent elections, years in advance, of a long list of officers each to succeed the other, thus practically denying, to future generations, the right to choose their own officers?

If the respondent's position is correct, he was elected to fill a vacancy which would not occur till nearly a year thereafter. Such a position cannot be maintained, in the absence of an express provision of the law, especially as a contrary intention is deducible from section 24 of the schedule which provides that existing officers should hold over until their successors were duly qualified. The Convention knew that they had changed the time of electing many officers, and must be presumed to have known that the terms of certain offices in Pittsburgh would terminate not long

Digitized by Google

before the February election in 1875. They must have contemplated a postponement of the election until after the term had expired, and therefore provided for the contingency, by declaring that the existing officers should hold over.

George Shiras, Jr., and *M. W. Acheson* (with whom was *Geo. P. Hamilton*), contra.

The only change made by the new Constitution, was to change the time of the annual municipal election from the first Tuesday of December to the third Tuesday of February of the same year. The very first Act of Assembly passed after the present Constitution went into operation, was an Act to regulate elections, approved Jan. 30, 1874 (P. L. 31), which distinctly recognizes the third Tuesday of February, 1874, as the time for holding the first municipal and township elections under the Constitution, and elections were held at that time in all the cities, boroughs, and townships throughout the Commonwealth for the usual local officers for regular terms of service. Thus the executive and legislative branches of the government, and the people themselves, have given the construction to the Constitution we contend for. Contemporaneous and legislative expositions of constitutional provisions are frequently resorted to, to remove and explain ambiguities, and are entitled to great weight.

Sedgwick on Construction of Statute & Con. Law, 412.
Stuart *v.* Laird, 1 Cranch, 299.
Moers *v.* City of Reading, 9 Har. 188.
Cooley's Con. Lim. p. 67-69.

No legitimate argument can be drawn from the supposed inconvenience of electing city officers so long in advance, for if it have any force it must apply to all future elections in the city of Pittsburgh under the existing charter; and if this be an inconvenience, the corrective power exists only in the Legislature which can make a change in the commencement of the official terms.

Nov. 20, 1876. THE COURT. The only change made by the 3d Section of the 8th Article of the new Constitution as to cities, is to substitute a fixed day for the charter elections of all cities. It reads: "All elections for city, ward, borough, and township officers, for regular terms of service, shall be held on the third Tuesday of February." No year is fixed and no time for the commencement of its operation. It is, therefore, only a question of the application of constitutional provision to each particular charter as the question arises. In the city of Pittsburgh the charter election was fixed for the first Tuesday of December in each year, when the constitution was adopted and took effect. The term of office was made to begin on the first day of February following. In applying the constitutional provision to the city charter, it would not be proper to make the election take place two weeks after the term of office was to begin. The constitution, therefore, merely set back the time of election from December to February in the same year. If legislation be needed to make the time of the commencement of office of any city begin more nearly to the time of election, it must be procured; but it would be improper as a mere matter of application of the constitutional provision to existing and various charters, to so apply it, as actually to cut off a part of the term. This is the only question worthy of notice.

PER CURIAM. Judgment affirmed with costs to be paid by the private relator.

Jan. '76. 41. June 6, 1876.

Susquehanna Boom Co. v. Rogers.

Contract—Construction of—Notice to bailee by stranger not to deliver property—Effect of such notice unaccompanied by claim of title—Refusal to deliver after such notice without bond of indemnity—Liability for subsequent loss of property—Negligence.

A notice to a bailee which forbids him to deliver certain goods to his principal, but which contains no evidence or claim of title, is insufficient to justify the bailee in refusing to deliver the goods to his principal, or in demanding a bond of indemnity as a condition of such delivery.

If in such case the goods are lost in consequence of the refusal of the bailee to deliver them, he is responsible to the owner for their value irrespective of the question of negligence in his care of them.

A. received of B. certain moneys in consideration of which he agreed to run into the Williamsport Boom 2500 logs, which logs were to remain under the control of B., who was to saw them, sell the lumber, and after paying all bills for boomage, interest on advances, and retaining five per cent. commission on sales, was to pay the balance of the proceeds of the lumber to A.:

Held, that the property in the logs did not pass to B. by this agreement, and that A. might afterwards prosecute an action of trover against the Boom Company for their conversion.

Error to the Common Pleas of Lycoming Co.

Trespass on the case by Daniel Rogers against the Susquehanna Boom Company. The declaration contained counts in trover and in case for negligence.

The facts of the case were as follows: In the spring of 1870, plaintiff cut a quantity of logs, marked them with a bull's-eye (known to the defendant as his mark) and floated them into the boom of the defendants at Williamsport. On April 26, 1870, he entered into the following agreement with Gibson & Merriman, of Williamsport, who had advanced him certain sums of money:

"This is to certify that I have this day received of Gibson & Merriman their note for three months pay-

Digitized by Google

able at the Lumberman's National Bank, Williamsport, and ten dollars cash, on account of which I am to run into the Williamsport Boom about twenty-five hundred white pine saw logs this spring, of the following mark ["bull's-eye"], which logs are now and are to remain under the control of said Gibson & Merriman for the coming year; they are to saw the logs into lumber and pile on their yard, and are to sell said lumber, and when all bills are paid for booming, sawing, piling, and hauling, and interest on all advances and moneys paid out, and five per cent. commission on all sales the said Gibson & Merriman shall make of said lumber. The said Gibson and Merriman are to have full control of said lumber. I am to have the balance of the proceeds of said lumber after said Gibson & Merriman are paid for the above expenses. I am to receive pay from said lumber as fast as proceeds are received from said sales. DANIEL ROGERS."

In accordance with this agreement, Rogers gave Gibson & Merriman an order on the Boom Co. to deliver the logs marked "bull's-eye" to them. Before the delivery of any of the logs the Boom Co. were, on May 5th, served with this notice:—

"This is to forbid the delivery of any logs marked (bull's-eye) to any parties without an order signed by me. MARTIN ROGERS per FRANK KINNEY."

Messrs. Gibson & Merriman on presenting their order for the logs were informed that they would not be allowed to remove any of them, in consequence of the above notice, without first furnishing a bond of indemnity to the Boom Co. Mr. Merriman offered to furnish such a bond, and shortly afterwards tendered one signed by himself and Mr. Gibson to the secretary of the company, offered to pay the boomage, and demanded the logs. The secretary refused to deliver the logs, alleging that the bond was informally executed, as it specified no amount, but he then furnished Merriman with the form of bond required by the company, which Merriman took away with him. At the time of this interview with the secretary some of the logs had been rafted out of the boom and tied to piles in the river. In the latter part of May, shortly after this interview, a flood occurred, and a number of the logs floated down the river. After this flood had subsided more logs were rafted into the river, and in the month of June a second flood carried away additional logs. Prior to the first flood an employé of Gibson & Merriman, at the request of his employers, had requested of the boom-keeper a delivery of the logs for the purpose of taking them to the mill to be sawed, and had also been refused. Before the second flood Mr. Forsman, a member of the firm of Gibson & Merriman, made a third demand for the logs, accompanied with an offer to pay the boomage, and offered to have them taken to his saw-mill, stating that they were in danger of being lost in the river. The company again refused to deliver without the bond previously required. Subsequent to the June flood Merriman again demanded the logs, tendering the bond furnished him at his last visit, duly executed, and was informed that he could have the logs without the bond, as Martin Rogers's order not to deliver had been withdrawn.

The defendants presented, *inter alia*, certain points, which, with the material portions of the answers of the Court (GAMBLE, P. J.) thereto, are as follows.—

(1) That the contract given in evidence by the plaintiff, bearing date April 26, 1870, under the evidence in this cause, was a contract of sale and delivery.

Answer. As to this article of agreement, we have read it carefully, and we cannot construe it to be a contract of bargain and sale. We do not think the parties so understood it, nor do we think it would properly bear that construction. It is an agreement on the part of Daniel Rogers to deliver these logs to Merriman & Gibson, and give them the entire control of the logs for the purpose of sawing them, piling the lumber on their ground, and disposing of the lumber after the logs were manufactured, and for the service of selling they were to receive a commission of five per cent. We cannot conceive that it was a change of the right of property, although it gave to these men absolute control and right of possession until the logs were manufactured into lumber, and until the lumber was sold; then the proceeds were to be paid to Rogers. Hence we cannot answer that point in the affirmative.

(4) That this case is an action *ex delicto*, and to authorize a recovery on the part of the plaintiff he must have had title to the property at the time suit was brought, and he must have made a demand on the defendant for the delivery of the property to him.

Answer. We answer that point in the affirmative, with this qualification: That the demand may have been made by himself or by any other person authorized by him to receive the logs from the Boom Company.

(8) That inasmuch as a dispute had arisen in regard to the ownership of the logs, and the defendant had been forbidden to deliver the same to any parties without an order signed by Martin Rogers, which notice had been brought home to the knowledge of the plaintiff and to Gibson & Merriman, who claimed the logs under the plaintiff, it was right and proper for the Boom Company, defendant, to require a bond indemnifying the company against such adverse claim, and to retain the logs until such bond was so executed.

Answered substantially as follows: There is no evidence of any dispute as to the ownership of the logs. Martin Rogers simply ordered the defendant to refuse delivery, assigning no reason for it. As the point assumes facts not in evidence, we do not feel bound to answer it.

The Court left to the jury the question wheth-

Digitized by Google

er the loss of the logs was a consequence of the defendants' refusal to deliver them to Gibson & Merriman, and instructed them that if it was, the defendants were liable.

The Court further charged the jury as follows: If, in consequence of the refusal to deliver them, the logs were lost, and you are so satisfied from the evidence in the cause, then it is of no consequence what care was taken of them afterwards; not one particle, whether well cared for or poorly, whether there was negligence or no negligence. If they were lost in consequence of that refusal, that is the end of it.

Verdict and judgment for plaintiff for $1005. Defendants took this writ, assigning for error the answers of the Court below to their points, and the part of the charge above set out.

John W. Maynard and *J. O. Parker* (with them *John Eulermarks*), for plaintiff in error.

The agreement of 26 April, 1870, was an absolute contract of sale and delivery of the logs to Gibson & Merriman. That the transaction was not a bailment is evident, as there is no provision for a restoration of the goods when the purpose of the bailment is answered; a very important element.

2 Kent's Com. 437.

Lonergan *v.* Stewart, 55 Ill. 45.

Hence the plaintiff had no title to the logs at the time the suit was brought, and consequently no right of action.

The right of action, if any, resided in Gibson & Merriman, and being in form *ex delicto*, could not be assigned to the plaintiff.

The notice given by Rogers, forbidding the delivery of the logs, was sufficient to warrant the defendants in believing that the title thereto was disputed, and justified them in demanding indemnity before delivering them to the plaintiff or his order. If, therefore, the logs were lost before such indemnity was given, without negligence on the part of the defendants, they are not liable therefor.

Merriman, by consenting to give the indemnity required by the defendants, waived the previous demands for the logs.

Bur. Law Dict. 688; 1 Tidd's Pr. 513.

No subsequent tender and demand having been made, the company is not liable for logs lost prior to the waiver.

J. J. Metzger and *R. R. Allen* (with them *J. M. Gamble*), contra.

No property in the logs passed to Gibson & Merriman by the agreement of April 26. They were simply given control of them for the purpose of manufacture and sale, and the right of action for the loss of the logs, therefore, accrued to Daniel Rogers. The paper signed by Martin Rogers asserted no title, absolute or qualified, to the property, and furnished no ground for a demand of indemnity by the defendants.

June 9. THE COURT. We are of opinion the property in the logs in question did not pass from Daniel Rogers to Gibson & Merriman by the agreement of April 26, 1870. The control given by it to the latter was for the purpose of manufacture and sale. No possession ever had vested in them, and the right of action, therefore, on the part of Rogers is clear. This is the controlling question in the case, which relieves it from most of the assignments of error. The notice forbidding the Boom Company from delivering the logs to Gibson & Merriman was insufficient to prevent delivery, and there being no dispute of title, the company had no right to demand a bond of indemnity before delivery. The circumstances relating to this part of the case were laid before the jury without any substantial error. There is no assignment of error raising the question of waiver of their demand by Gibson & Merriman; and the point does not seem to have been made in the Court below. Upon the whole case we discover no real or substantial error.

PER CURIAM. Judgment affirmed. SHARSWOOD and WILLIAMS, JJ., absent.

Jan. '75, 126. Feb. 16, 1877.

Millar & Withers v. Saving Association.

Bills of lading—Negotiability—Pledge to secure draft—When title to goods does not pass to consignee until payment of draft—Principal and agent—Broker—Right to pledge bill of lading.

D., a broker in St. Louis, bought meat for M. in Philadelphia, for $13,000, M. advancing $5000 as margin, and D. raising the balance of the purchase money himself by hypothecating the warehouse receipt. M. having requested a shipment of a portion of the meat, D. shipped two car loads, drew on M. for $3600, and procured one S. to discount the draft, endorsing to S. as security therefor the bill of lading. M. received and sold the meat, but refused to accept the draft, alleging that it was for a larger amount than the proportion due upon the shipment and for more than the amount due by him to D. In an action of trover by S. against M. for the value of the meat:

Held (affirming the judgment of the Court below), that no property in the meat passed to M. until payment of the draft, and S. was therefore entitled to recover.

Error to the late District Court for the City and County of Philadelphia.

Trover by the State Saving Association of St. Louis against Millar & Withers, to recover damages for the alleged loss of 72,695 lbs. of meat. Plea, not guilty.

At the trial (before HARE, P. J.) the following facts appeared:—

Digitized by Google

Millar & Withers, the defendants, provision merchants in Philadelphia, received the following letter:—

"St. Louis, February 11, 1871.

"I have this day bought of Messrs. Wm. Matthews & Co., of St. Louis, Mo., for account of Millar & Withers, of Philadelphia, 150,000 lbs., some more or less, of dry salted shoulders, ... P. Cunningham & Co.'s packing; which shoulders are to be weighed and delivered at the pork house of P. Cunningham & Co., at Warsaw, Ill., between the first and last day of March, 1871, buyer's option. Terms of purchase eight cents per lb., cash on delivery; buyer paying brokerage.

M. C. Dreysel, Broker."

On March 15, 1871, the defendants wrote to Dreysel: "If the shoulders should be accepted, can you have them carried on margin for us, and on what terms?" And on March 20 they wrote: "Make arrangements to carry them 60 to 90 days. . . . You will, of course, have them insured, and draw for margin."

The total purchase money of the meat was $13,384.15. $5000 had been paid by defendants to Dreysel as margin, and he advanced the balance of the purchase money, obtaining the same by hypothecating the warehouse receipt of the goods given by Cunningham & Co. On April 24, 1871, the defendants wrote to Dreysel to send them two car-loads of the meat, and to draw for the proportion due on them.

Dreysel then wrote to Cunningham & Co. to forward to Millar & Withers the meat ordered by them, to their address, and to charge it to Matthews & Co., who would endorse the delivery on the warehouse receipt. Under Dreysel's orders, Cunningham & Co. shipped 57 casks of the meat to the defendants, the bill of lading being in the following form:—

Warsaw, Ill., May 11, 1871.

Received from Cunningham & Co. the following packages, . . . viz.:

Marks.	57 casks shoulders, 72,695 lbs. Marks M. W. P.
Millar & Withers, Philadelphia.	Marked and numbered as per margin, to be transferable . . . until the said goods shall have reached the point named in this bill of lading. . . . Consignees are to pay freight and charges upon the goods . . . as they may be delivered to them. . . . This contract is executed and accomplished, and the liability of the companies as common carriers thereunder terminates on the arrival of the goods at the depot of delivery, . . . and unless removed by the consignee within 24 hours of their said arrival, they may be removed and stored by the company.
This bill of lading is from Warsaw, Ill., to Philadelphia.	

Cunningham & Co. sent the bill of lading to Matthews & Co., who delivered it to Dreysel. On May 15 Dreysel drew on Millar & Withers for $3600. Dreysel took the draft to the corporation plaintiff, who discounted it for him, taking as a pledge the bill of lading, which was endorsed by Cunningham & Co. and by Dreysel. The President of the corporation plaintiff testified that he had no positive knowledge of Dreysel's being agent for the defendants, but that he supposed that he had full power to pledge the goods. Dreysel applied the proceeds of the draft toward the amount he had borrowed for the purchase of the meat. Plaintiffs sent the draft and bill of lading to Philadelphia for collection. Defendants refused to accept the draft, and it was protested, but they received the meat and sold the same for $4000. The draft was protested, whereupon this action was brought.

Depositions of one Noble, an attorney at St. Louis, were read. They stated his opinion under the Statutes of Missouri, that the endorsement and delivery of the bill of lading connected with the draft, negotiated at that time, passed the legal title in the goods to the endorsees, and that they were entitled to the property named, as the consignee had neither accepted nor paid the draft, and that it would make no difference if the consignees were already the creditors of the consignors or endorsers, for advances made on account of prior shipments.

Defendants offered to prove that at the time the goods were shipped they had advanced to Dreysel an additional $3000, and that there were other amounts chargeable against him. Offer overruled. Exception. They also offered to prove that the draft drawn by Dreysel was for more than the proportion due upon the goods shipped. Offer overruled. Exception.

The defendants presented various points to the Court, substantially to the effect that the bill of lading was not negotiable by any one except defendants; that if plaintiffs received it with notice that Dreysel was only the broker for defendants, they took the risk of his authority, and that, in fact, Dreysel had no authority to draw upon defendants for more than the balance due him upon a settlement between them. These points were all refused, the Court delivering the following charge:—

"If you credit the testimony in this case, the possession of the bill of lading, in view of the circumstances, was evidence of an authority to Dreysel to pledge, and at all events justified the plaintiffs in believing he had such authority; and if such is the case, it is immaterial that he pledged it for a greater sum than the defendants expected or authorized. This might be the rule under the general commercial law, and I instruct you that such is the rule under the Statutes of Missouri and the law of Missouri, as detailed in the commission."

Verdict and judgment for the plaintiffs for $3078.77.

Digitized by Google

Defendants took out this writ, assigning for error the rejection of their offers of evidence, and of their points, and the portion of the charge quoted.

John G. Johnson (with whom was *J. W. Latta*), for the plaintiffs in error.

All the assignments of error may be considered together as involving two points: (1) May the shipper of goods under a bill of lading, wherein they are consigned to the real owner, without any reservation to consignor's order, pass title by his endorsement of said bill? (2) Were the defendants, under the circumstances of this case, bound by what Dreysel did in violation of his instructions?

Cunningham & Co. could pass no title. They were mere warehousemen. The defendants below could have proved that they had fully paid for the goods, and, therefore, independently of the bill of lading, the meat belonged to them. Prima facie the bill of lading was notice of an ownership in the consignees, and as the actual ownership was also in them, the endorsements of the consignors had no effect.

Sally Magee, 3 Wallace, 453.
Evans *v.* Martell, 12 Modern, 156.
Potter *v.* Lansing, 1 Johnson, 265.
Griffith *v.* Ingledew, 6 S. & R. 427.
Conard *v.* Ins. Co., 1 Peters, 387.

It was said in the Court below that no consignee was named in the bill of lading, but any fair construction of that instrument would make Millar & Withers the consignees.

The defendants were not bound by what Dreysel did in violation of his instructions. The plaintiffs carelessly accepted a pledge from Dreysel without asking about his authority. They swore they *supposed* he had authority. From the circumstances of the case they should have known that a written authority, if any, would have been given, and they should have asked to see it.

Story on Agency, § 3.

The law of Missouri has nothing to do with the case, as the goods were shipped from Illinois. The defendants' rights could not be forfeited because Dreysel negotiated the draft in another State. But even the law of Missouri would not give validity to the endorsement on the bill of lading in this case.

R. L. Ashhurst and *E. S. Miller*, contra.

The evidence shows that Cunningham & Co. were the vendors, and that they sold the goods for Matthews & Co., retaining the bill of lading as security. The plaintiffs below succeeded to the position of Cunningham & Co. as vendors.

There is nothing to show that the goods were shipped to the order of Millar & Withers. Dreysel merely instructed Cunningham & Co. to ship them to "their *address*." But the consignors can pass the title in a bill of lading by endorsement.

Bank *v.* Jones, 4 Comstock, 498.
Bank *v.* Dearborn, 115 Mass. 219.
Allen *v.* Williams, 12 Pick. 300.

The delivery of a bill of lading passes the property. A formal assignment is not necessary.

City Bank *v.* R. R. Co., 44 N. Y. 138.
Bank *v.* Dearborn, *supra*.

In none of the cases cited by the plaintiff in error is it questioned that title to the goods consigned passes by the transfer of the bill of lading.

If the law of Missouri governs, the case is free from doubt, under the statutes of that State. If the law of Pennsylvania governs, the plaintiff below can recover under—

Bissell *v.* Steel, 17 Sm. 443.

The letters of Millar & Withers to Dreysel establish his general agency. It is text-book law that if an agent acts within the apparent scope of his authority, third parties dealing with him in good faith are entitled to hold the principal, though the agent may have actually violated his instructions.

Dyer *v.* Pearson, 3 B. & C. 38.
Dracachi *v.* The Navigation Co., 1 L. R., 3 C P. 190.
Gabarron *v.* Kreeft, L. R., 10 Exch. 277.
Story on Agency, § 443.

March 5. THE COURT. Dreysel was the broker of the defendants, and purchased for them on terms cash on delivery. He was not paid the purchase-money, but requested to carry the purchase for a term of credit upon a margin. When the fifty-seven casks of shoulders, part of the purchase, were ordered to be shipped, Cunningham & Co., the owners, had not been paid, and they therefore retained the bill of lading, and took Dreysel's draft on his principals in lieu of cash, but with the security of the property shipped. This was done with the consent of Dreysel, through whom the whole transaction was managed. Now it is perfectly clear that Cunningham & Co. did not intend to part with their property in the goods shipped, and in obeying the instructions of Dreysel as to the shipment, the property was sent subject to the payment of the draft. This being the condition, no property passed to Millar & Withers until payment of the draft.

PER CURIAM. Judgment affirmed.

[*Cf.* Henry *v.* Warehouse Co., 2 WEEKLY NOTES, 389; Bank *v.* Shaw, Id. 542.]

Digitized by Google

Jan. '76, 120. Feb. 9, 1877.

The German Society v. The City of Philadelphia. The City of Philadelphia's Appeal.

Landlord and tenant—Covenant by lessee to pay taxes—Act exempting premises from taxation for charitable purposes—Taxes subsequently payable to lessor, as rent.

An incorporated charitable association demised certain real estate to the Philadelphia Gas Trustees, the lease containing a provision that the lessee should pay all taxes assessed on the premises during the term. Subsequently the Legislature, by a special Act, exempted the premises from taxation so long as the revenues received from the premises should be used for charitable purposes:

Held, that the provision in the lease being part of the consideration between the lessor and the lessees, the former could recover from the latter, as rent, the taxes subsequently assessed upon the premises.

The effect of a general Act, providing for the taxation of all property from which revenue is derived, upon a prior special Act exempting particular premises from which revenue is derived, not decided.

Appeal from the Court of Common Pleas No. 3, for the county of Philadelphia.

The bill in this cause was originally filed on the equity side of the Supreme Court at Nisi Prius, and was transferred, under the provisions of the new Constitution, to the above Court. The bill set forth that the plaintiffs, an incorporated charitable society, owning the premises Nos. 20, 22, and 24 South Seventh Street, in the city of Philadelphia, on June 2, 1856, leased a portion of these premises to the Trustees of the Philadelphia Gas Works at the rent of $1250 per annum; and by a new lease, dated April 16, 1866, the same premises were leased to the said trustees for twenty years, at the same rental, with the provision that the lessees should pay all city and State taxes assessed against the premises during the term; that, under another provision of the lease, extensive improvements were made by the lessee. That an arrangement was made between the lessors and lessees under which application was made to the Legislature for the passage of an act exempting the said premises from taxation, with the understanding that the said exemption should enure to the benefit of the plaintiffs; that in consequence of this application the Legislature passed the following Act, viz.:—

"An Act to exempt the property of the German Society from taxation: Be it enacted, etc., That the property of the German Society of Philadelphia, situated on South Seventh Street, between Market and Chestnut Streets in said city, be, and the same is hereby exempted from the payment of all taxes, except for State purposes, and such exemption shall include the year one thousand eight hundred and sixty-nine, and shall continue to be so exempted so long as the revenues received from said building are used for charitable purposes." Approved Feb. 18, 1869, P. L. 210.

That defendant has refused, since the passage of the act, to pay to the plaintiffs the amount of the taxes assessed against the said premises, although requested so to do; and the taxes for the years 1868, 1869, 1870, and 1871, amounting to $4420, have been retained by the defendant.

The bill prayed that the defendant be decreed to pay to plaintiffs the sum of $4420, being the amount of the said taxes assessed against the premises; and that the lease be reformed so as to establish the right of the plaintiffs in the matter.

A demurrer filed to the bill was overruled by AGNEW, J., and the defendants allowed to answer.

The answer admitted the leasing to the Gas Trustees, and their refusal to pay to plaintiffs the amount of the taxes, but averred that no lease of the premises was ever taken by persons authorized to act for the City of Philadelphia; that the Gas Trustees had no power to bind the City by such a contract; that the Act of Assembly referred to in the bill did not impose upon the defendant the obligation of paying the amount of the taxes to the plaintiff; that the Gas Trustees never agreed to pay to the plaintiff the amount of the taxes, and that if such agreement had been made, it would have been without consideration, and not binding on the defendant; that if the meaning placed upon the said Act of Assembly by the plaintiff be true, said act is unconstitutional and void.

The cause was referred to an Examiner and Master, who reported that the liability of the City of Philadelphia to pay to the German Society a sum equal to the municipal taxes assessed upon their property occupied by the Gas Trust, had been established.

Exceptions to the report filed by the defendants were dismissed, and a decree entered requiring the defendants to pay to the plaintiffs the amount of the taxes already accrued, and hereafter to accrue, during the term, or so long as the premises should continue exempt from taxation.

The defendant took this appeal, assigning for error the entering of the said decree.

C. H. T. Collis, City Solicitor, and *R. N. Wilson*, Assistant City Solicitor, for the City.

The plaintiffs had an adequate remedy at law. An action of covenant or debt would enable them to recover all that they can possibly recover under the present claim.

Even if the act should be construed to express an intention that the City should pay the amount of taxes in question to the German Society, it would not be binding, because it would materially alter the terms of the contract. The lessee became bound to pay the city and State taxes, but not to the lessor; much less was there any covenant to pay the amount of such taxes to the lessor when the law should make them uncollecta-

Digitized by Google

ble. The City was acting in the capacity of an ordinary contracting party, and the Legislature had no more power to alter her contract than to alter the contract of a natural person.

Western Saving Fund Society *v.* City, 7 C. 175, 185.

To compel the City to pay the plaintiffs the amount of the taxes is going further than the Act went. It appears to be by no means a forced construction of the statute to interpret it as intended immediately for the relief of the lessee, and ultimately, when the lease should be ended, for the benefit of the lessor.

The decree, even if it were correct in other respects, is obviously improper in this, that it imposes upon the City the duty of paying to the plaintiffs the taxes to the expiration of the lease. The later general Act of May 14, 1874 (P. L. 158), must be held to operate as a repeal of the Act exempting the property from taxation, because "income or revenue is derived" from it. The premises, therefore, became subject to municipal taxation from and after the year 1874.

Henry D. Wireman and *E. Spencer Miller*, for appellees.

The plaintiffs had no adequate remedy at law. The bill prays, *inter alia*, a reformation of the lease, which can only be done by a court of equity. The equity of the bill was settled by the overruling of the demurrer, which was not appealed from. The taxes to be paid by the Gas Trustees were in the nature of rent; by the covenant to pay them that much was in fact and in law added to the *redditus* or return from the property.

Shaffer *v.* Sutton, 5 Bin. 228.

If the lessees had not paid them, the German Society having paid them, or being threatened with suit or distress, could have sued the City for them, as part of the rent.

Fry *v.* Jones, 2 R. 13.

The Act of 1869 was an Act in favor of the Society, and not of the City; it was not intended, nor should it have the effect of releasing the City from that part of their rent. The effect of the Act was to assign the taxes, as rent, to the Society, or to subrogate them to the position of those for whose benefit the taxes had before been paid.

Succession of Wills, 15 Louisiana Annual Report, 381.
Russell's Appeal, 9 Sm. 405.
Mosier's Appeal, 6 Id. 80.
Steel's Appeal, 22 Id. 102.

The Act of May 14, 1874, does not operate as a repeal of the Act of 1869. The Legislature having directed that the German Society should be exempt "so long as the revenues from said building are used for charitable purposes," it requires express language to effect a repeal. The law does not favor a repeal by implication.

Dwarris on Statutes, 674.

A special exemption of particular property from municipal taxation will not be affected by a subsequent general statute giving cities power to tax all property within their limits, there being no express repeal.

Blain *v.* Bailey, 25 Ind. 165.

Even if the Act of 1874 does repeal the Act of 1869, the effect would be only to render the Society liable for taxes after its passage. The taxes in Philadelphia are assessed on or as of the 1st of January of every year, and the amount of the taxes for 1874 was due and payable by the City to the Society before the Act of May 14, 1874, was passed.

Feb. 19, 1877. THE COURT. The German Society, "for and in consideration of the payment of the rent hereinafter reserved, and the performance of the covenants hereinafter set forth, which on the part of the party of the second part (the City) is and are to be paid, and performed, hath demised and set, and to farm and let," etc. So reads the lease. A covenant following on the part of the City is to "pay the City and State taxes on the whole of said premises during the term of this lease."

Thus it is express, that the payment of the taxes was a part of the consideration of the lease. Had the City not so agreed, the Society would have added the sum necessary to pay the taxes to the rent. The Society is a charitable institution, and for this reason the Legislature, by special Act, released its property from the payment of all taxes, except for State purposes, "so long as the revenues received from said buildings are used for charitable purposes." It is evident the purpose of this act was to benefit the charity. If not, what purpose had the Legislature? The City was bound to pay the taxes by the covenant in the lease, and if the purpose was not to benefit the charity, but to relieve the City, of what use was the qualification in the Act? The City could not control the revenues of the Society, and it was of no use to the Society to apply all its revenues to charitable purposes, for it would not be benefited by so doing. Clearly, as the taxes were a part of the consideration, the Act was intended to be in relief of the charity, and the qualification was a condition which would compel the Society to use its revenue thus derived for the purpose the Legislature had in view.

We are satisfied that the true interpretation was given to the law in the opinion rendered at Nisi Prius, and followed by the Court below. This interpretation of the Act may have some influence upon the effect of the Act of 14 May, 1874, § 1, relating to exemptions, but the point does not seem to have been raised below, and we shall give no opinion now, excepting to say that the taxes of 1874 are not affected by the Act of

Digitized by Google

May, 1874, which was passed after they were assessed. In regard to taxes thereafter, the question is left open to future inquiry, and this portion of the decree will stand, subject to such inquiry and without prejudice to the City in a proceeding hereafter to question her liability for the subsequent taxes.

Decree affirmed, without prejudice to the right of the City of Philadelphia to inquire into and obtain a decree, relieving her from the payment of the accruing taxes to the German Society after the year 1874, if she be entitled at law, to be so relieved; and the City is ordered to pay the costs, and her appeal is dismissed.

PER CURIAM.

July, '76, 125. Jan. 30, 1877.

Richards v. Bisler.

Affidavit of defence law—Insufficiency of averment—How a record of another suit should be set forth—Errors and appeals—Writ of error taken for delay—Penalty—Act of 25 May, 1874.

When the subject matter of a defence set out in an affidavit of defence is matter of record, the record should be set out *ipsis verbis*, or be introduced by a *prout patet per recordum*.

Error to the Common Pleas No. 2, of Philadelphia County.

Case by Bisler against Richards and Culin upon a promissory note for $154.56, and a copy of original book entries. The following affidavit of defence was filed:—

That plaintiffs brought suit against defendants in this Court as of December Term, 1875, No. 817, in summons case, and filed a copy of said claim against defendants in said suit as follows, viz., a certain promissory note given by defendants to plaintiffs for $165.07, dated September 21st, at three months; and the book account, whereof a copy is filed in the present case, and whereon plaintiffs now claim; it being the very identical book account, item for item, and amounting to the sum of $122 25.

That the defendants filed an affidavit of defence in said suit commenced in December Term, as aforesaid, admitting the amount of said promissory note, and offering judgment for the same; that plaintiffs took judgment for the amount of said note as allowed by defendants' affidavit, viz., for principal and interest, amounting to the sum of $166.20, on the 29th day of January, 1876, and that defendants subsequently entered stay of execution on the same; and the balance of plaintiff's claim in said case *was allowed* by plaintiffs; and deponent is advised that plaintiffs cannot again claim or sue for the same, to wit, for the amount of said book account, a copy whereof is again filed herein.

The Court below having entered judgment for want of a sufficient affidavit of defence, the defendants took this writ, assigning for error the entry of said judgment.

E. Hunn; Jr., for plaintiff in error.

The plaintiff below, having taken judgment in the first suit for the amount admitted to be due therein, cannot now bring this action for the balance. It is against the policy of the law that a question which has once been adjudicated should be again made the subject of an action.

R. C. Dale, Jr., contra.

The affidavit filed in this case did not contain a copy of the record in the first suit. The Court below, however, had the record of the former suit produced, and it appeared that though that action was brought upon these book entries and a certain note for $165.07, the affidavit of defence in that case simply averred that the goods charged for in the book entries had been sold upon a credit, which had not expired when the action was brought, and that an order, of which the following is a copy, was made before judgment was entered for the amount of the note: "And now, January 29th, 1876, the Court orders that the said plaintiffs have leave to withdraw from this suit their claim upon the original book entries filed in this case, without prejudice to their right to proceed for the same in another action." Judgment was then entered against the defendants for the amount of the note.

If the plaintiff in error should take the ground that the Court below erred in considering, upon a rule for judgment for want of a sufficient affidavit of defence, the record and order of the former action, of which, however, there can be no doubt, (Kennedy *v.* Ross, 1 Casey, 256), the judgment still could be sustained, because the affidavit was insufficient in not distinctly setting out before the Court below the nature of the record in the first suit, or annexing a copy of it.

Marsh *v.* Marshall, 3 Sm. 396.

Feb. 5. THE COURT. This affidavit of defence is quite defective. The record referred to is not set out, nor is it introduced by a *prout patet per recordum*. It is also entirely unintelligible and vague as to the book account, which, it avers, "was allowed" by the plaintiff.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

Feb. 17. *Dale*, having previously obtained a rule on the plaintiffs in error to show cause why the penalty prescribed by the Act of 25 May, 1874 (Purd. Dig. 1874, pl. 5), for suing out a writ of error for purpose of delay, should not be imposed, now read the affidavit of one of the de-

Digitized by Google

fendants in error, to the effect that he believed the writ of error had simply been taken for purposes of delay.

C. A. V.

Feb. 19. PER CURIAM. Rule absolute.

July, '75, 22. Jan. 23, 1877.

Girard College Pass. R. W. Co. v. Middleton.

Negligence—Collision—Passenger Railway Co.—Contributory negligence—Evidence—When negligence a question for jury.

A carriage while being driven across the track of a passenger railway was struck by the pole of a car and injured. In an action against the passenger railway company for damages:

Held, that the questions of the alleged negligence of the respective drivers of the carriage and car were questions of fact to be submitted to the jury.

Error to the Common Pleas No. 4, of Philadelphia County.

Case by Middleton against the Girard College Passenger Railway Company for damages caused by a collision between his carriage and one of the defendant's cars. Plea, not guilty.

Upon the trial it appeared that the plaintiff was driving up Sixteenth Street, and in crossing Ridge Avenue the pole of one of the defendant's cars coming down the Avenue struck the hind wheel of the plaintiff's carriage, causing it to overturn, whereby it was greatly injured. There was much evidence bearing upon the question of the alleged negligence of both the plaintiff and the driver of the defendant's car, which questions were left by the Court to the jury. The defendant presented the following points:—

(1) The plaintiff's own evidence having established without any contradiction that he saw the defendant's car coming on a down grade towards him, within about the width of Sixteenth Street from the line of his course, and nevertheless crossed on a walk in front of it, he has himself made out a case of contributory negligence on his part and cannot recover. *Refused.*

(2) If the jury believe that the plaintiff saw the defendant's car coming towards him on a down grade within about the width of Sixteenth Street from the line of his course, and nevertheless crossed on a walk in front of it, he was guilty of contributory negligence and cannot recover. *Answer;* I leave it to the jury to say whether the car was so near that it was imprudent for the plaintiff to attempt to cross, and, consequently, whether he was guilty of negligence in attempting to do so. I also leave it to you to determine whether the plaintiff crossed with sufficient celerity, and whether he was guilty of any negligence in that respect. There is evidence that the car was hauling up to stop for two ladies on the corner of Sixteenth Street, and was about to stop for that purpose; that it was proceeding at a very slow rate. Whether the plaintiff was guilty of negligence in crossing as he did, depends upon the distance between the car and his carriage and upon the rate of speed at which the car was moving when he crossed. These are questions of fact for your determination, and the question of negligence arising out of them is consequently for you also. If the car was approaching at such a rate of speed that it was imprudent for plaintiff to cross at the distance he was from the car, then that was negligence on his part and he cannot recover. If the car was proceeding rapidly, it was negligence in the plaintiff to attempt to cross within the distance mentioned in the defendant's point: but if the car was proceeding so slowly that a cautious and prudent man would not apprehend danger in crossing, then I cannot say that his crossing within the distance mentioned was negligence in law. The whole question of negligence is for you, for it depends upon the facts which you find.

Verdict and judgment for plaintiff for $834.30.

Defendants took this writ, assigning for error the answers to their points.

E. Spencer Miller, for the plaintiff in error.

The jury were properly instructed that negligence on the part of the *defendant* was not to be presumed but was to be proved by satisfactory evidence. Now all the facts, which are relied upon to show negligence on the part of the driver of the car bear with equal directness against the prudence of the plaintiff. If the facts prove negligence on either side, they prove it on both. The presumption is against the driver of a carriage who can choose his own course rather than against the driver of a car, which is restricted to the track. It was therefore under the circumstances incumbent upon the plaintiff to show both that his own acts were blameless and that the defendant's were culpable. The event proved that the attempt to pass in front of the car was not safe, and therefore the plaintiff was guilty of contributory negligence.

R. P. White, contra. This question was properly left as one of fact for the jury. Nothing can be said against the instructions of the Court below, unless the defendant takes the extreme ground that the case should have been taken from the jury.

Jan. 29. THE COURT. This case was fairly submitted to the jury upon the facts relating to the questions of negligence direct and contributory. These questions depended so greatly upon the distance, position, and speed of the car and the conduct and intention of the driver, and upon the same relative facts in relation to the carriage and driver of Dr. Middleton, altogether creating

Digitized by Google

such a conjunction and relation of circumstances, a Court could not pronounce upon the negligence of either party without deciding facts and trenching upon the province of the jury.

There is no error which should reverse the judgment.

PER CURIAM. Judgment affirmed.

July, '76, 71. **Myers v. Hulseman.** Jan. 16, 1877.

Landlord and tenant—Distress—Goods eloigned—Surety for payment of rent—Liability of, after distress and eloignment of articles distrained.

In an action against a surety for the payment of rent it is no defence that goods of the tenant have been distrained upon and then eloigned, unless the plaintiff or his bailiff has been guilty of negligence.

Error to the Common Pleas No. 2, for the County of Philadelphia.

Covenant by Hulseman against Myers upon his bond as surety for Barbara Corson, a tenant of the plaintiff. Pleas, covenants performed, payment with leave, set-off.

Upon the trial (before HARE, P. J.) it appeared that, the rent having fallen in arrear the plaintiff distrained upon the goods found on the premises. While the goods thus distrained upon were on the premises, but before the sale, they were clandestinely removed by some person unknown to the constable, but there was some evidence leading to the belief that the tenant had taken them. The defendant presented the following point:—

That if the plaintiff distrained on the goods found on the premises, the defendant is entitled to a credit for their value, and it is no objection to the distress as a defence that the goods were lost, or eloigned, or taken away from the officer. *Answer:* "The defendant is not entitled to a credit by reason of the distress made, unless the fruits of the distress were lost from want of due care and diligence."

There was a verdict for the plaintiff for the full amount of rent in arrear, and judgment thereon. The defendant took this writ, assigning for error the answer to this point.

E. K. Nichols, for the plaintiff in error.

The tenant had goods on the premises sufficient to pay all the rent which was in arrear. The landlord chose his remedy of a distress, and, selecting his bailiff, levied upon the goods. The power of collecting the rent was then in his hands, and it was his duty to proceed and satisfy his claim. The failure to accomplish this was the fault of his bailiff—his own agent. Once his bailiff had made the levy, he was responsible. He should not leave the goods to be taken off at will by the tenant or by a stranger.

Cathcart's Appeal, 1 Harris, 416.

R. P. White, contra.

The landlord under the circumstances need not have proceeded at all—but having proceeded (which was for the interest of the surety), his failure to collect cannot prejudice his claim, unless such failure was caused by negligence or default. The jury, by their finding, have negatived this. A surety may be released by the negligence or default of the creditor, but certainly never by the failure of vigilant efforts on his part to collect the debt from the principal.

Jan. 22. THE COURT. The verdict of the jury on the evidence before them has disposed of any question of neglect or want of care as to the distress. It was probably founded on the fact deduced from the evidence that the goods distrained were never out of the possession of the tenant in possession.

PER CURIAM. Judgment affirmed.

[*Cf.* McNamee *v.* Cresson, *ante*, 450.]

July, '76, 66. Jan. 31, 1877.

Eby v. National Fire Insurance Co. of Philadelphia.

Promissory note—Liability of endorser—Protest, when not essential—Errors and appeals—Matters within discretion of Court below not reviewable.

Actual protest of a promissory note is not essential to establish the liability of the endorser. An averment by plaintiff that the defendant waived protest, which is not denied, is sufficient.

The refusal to open a judgment is a matter within the discretion of the Court below, and is not reviewable on writ of error.

Error to the Common Pleas No. 3, of Philadelphia County.

Assumpsit on a promissory note of S. J. Stein for $2500, brought by the National Fire Insurance Co. of Philadelphia against J. R. Eby, one of the endorsers. With the copy filed was an averment that protest had been waived by the defendant.

The defendant filed the following affidavit of defence: "That the note on which the above suit was brought, was given as an accommodation note; that no consideration passed; that the note was not protested at maturity. Therefore deponent believes and is informed that as endorser he is not liable. That he is in no way indebted to plaintiff, but that said plaintiff is largely indebted to him."

Digitized by Google

The plaintiff took a rule for judgment for want of a sufficient affidavit of defence, upon the hearing of which the Court granted defendant leave to file a supplemental affidavit. This not being filed in due time, the rule was subsequently made absolute, and judgment entered for plaintiff. Afterwards a rule to show cause why the judgment should not be opened was granted, upon an affidavit of defendant explaining the delay in filing a supplemental affidavit, and setting forth, as a defence, that no notice of the drawer's non-payment of the note was given to the defendant, or demand for payment made upon him, before the commencement of the suit; and that "the defendant did not waive protest, or notice thereof, of the note, as averred," and that he had a set-off which exceeded the amount of the note. Depositions were taken in support of this rule, but it was finally discharged by the Court. (Reported 2 WEEKLY NOTES, 558.)

The defendant thereupon took this writ, assigning for error the action of the Court in entering judgment for want of a sufficient affidavit of defence.

T. Greenbank (with him *J. E. Faunce*), for plaintiff in error.

Protest of a promissory note is necessary to charge the endorser, unless waived by him. The statement that the defendant had waived a protest, is denied in his supplemental affidavit. Moreover a copy of the waiver of protest should have been filed by the plaintiff.

Sharp & Alleman, contra.

Protest of a promissory note payable where drawn is not necessary. The defendant's denial of a waiver of protest is of no avail, for it occurs only in the so-called supplemental affidavit, which was filed as ground for a rule to open the judgment. The question of opening the judgment was a matter within the discretion of the Court below, and is not here reviewable. It is to be presumed that the depositions did not sustain the denial of the waiver.

February 12, 1877. THE COURT. This affidavit of defence is not sufficient. Want of protest only does not constitute a good defence. There may have been a demand and notice of non-payment sufficient to establish liability. The affidavit to open the judgment cannot help out the case. The Court in its discretion refused to open the judgment, and for this no writ of error lies.

PER CURIAM. Judgment affirmed.

July, '76, 45 **Weichart v. Hook.** Feb. 2, 1877.

Arbitration—Agreement for reference—Compromise agreement—Mutual performance—Accord and satisfaction.

A dispute between two parties was referred by them to their respective attorneys with full power "to settle and adjust their differences and to enter into any agreement touching the premises." The attorneys made an agreement that the dispute should be settled by mutual performances. Upon a suit subsequently brought by one of the parties against the other upon the original cause of action:

***Held*, that the agreement of the attorneys could not operate as an award for want of a definite submission.**

***Held, further*, that an affidavit of defence was insufficient which merely set up the agreement of the attorneys without alleging performance or tender of performance by the defendant of his part of the award.**

Error to the Common Pleas No. 2, of Philadelphia County.

Assumpsit by Hook against Weichart *et al.* upon certain promissory notes given by the defendants to the plaintiff in pursuance of an agreement made January 1st, 1875, which provided in substance as follows: That Hook should transfer to the defendants on the books of the Hook Smelting Company 1300 shares of its capital stock, in consideration of $130,000 to be paid in the following manner; $40,000 in cash, and the balance in twenty-three promissory notes, payable at successive intervals, with proviso that, if default should be made in the payment of any note at maturity, all should immediately become due. The stock for which the notes were given in payment was to be held by the plaintiff as collateral. This agreement was filed at the same time as the copies of the notes. The defendant filed an affidavit of defence as follows:—

"That differences having arisen between the plaintiff and the defendants concerning the notes in suit, as well as other matters, such differences, and all matters and affairs between them, were, about the 1st day of January, A. D. 1876, referred to E. Hunn Hanson, as the attorney of the plaintiff, and E. R. Worrell, as the attorney of the defendants, with full power and authority to settle and adjust such differences, and to enter into any agreement touching the premises; such reference being made by the plaintiff to E. Hunn Hanson, and by the defendants to E. R. Worrell. That after numerous consultations, said E. Hunn Hanson, and E. R. Worrell, did agree in and about the premises, as follows, such agreement being made the 15th day of January, 1876.

"(1) That the papers, books, business, and affairs of the Hook Smelting Company shall be fully examined, on the part of H. W. Hook, between the 15th of January, 1876, and the 1st of March following, and if the same shall then, or at

Digitized by Google

any time between the 15th February and 1st March, 1876, be found to have been, since the 1st January, 1875, managed and carried on according to law and the charter and by-laws of the said company, and if it shall be further found that the condition of its capital stock, assets, and money affairs truly corresponds with that set forth in the books and papers of the company and that the said company is solvent; (2) Thereupon the said parties shall cancel the obligations existing by virtue of an agreement heretofore made, and dated 1st January, 1875, and that the said H. W. Hook shall pay to the other parties (the defendants) jointly the sum of $20,000 (that sum being all of the sum mentioned in said agreement, to wit, $40,000, paid by the proper moneys of the said defendants), and deliver to them jointly the notes mentioned in the said agreement dated 1st January, 1875. (3) That simultaneously with such payment and delivery, the said defendant shall transfer upon the books of the company to H. W. Hook the said 1300 shares of the capital stock of the said company, mentioned in the said agreement of 1st January, 1875, and shall deliver to him the said certificates of the said shares, discharged of all and every claim and demand by them, or by any person on their account, or through them or either of them. (4) That the election of officers of the said company shall not be held at the annual meeting of 17th January, 1876, but that the said election shall be adjourned until after the transfer of the said 1300 shares of capital stock to H. W. Hook. And that all the certificates of the said shares not in the possession of H. W. Hook shall, from this date until the 1st March, 1876, together with the stock transfer book, be and remain in the joint possession of Mr. Worrell and Mr. Hanson, attorneys of the parties.

"And the deponents aver that the business of the Hook Smelting Company was, since the 1st January, 1875, managed and carried on according to law and the charter and by-laws of the said company, and that at the date of the agreement, to wit, January 15th, 1876, the condition of its capital stock, assets and money affairs truly corresponded with that set forth in the books and papers of the company, and that the said company was solvent.

"The agreement of 1st January, 1875, referred to in the agreement of 15th January, 1876, being the one of which a copy is filed, and the notes mentioned in the agreement of 15th January, 1876, and to be delivered to the defendants, being the notes in suit."

The defendants also filed a supplemental affidavit setting forth substantially the same defence in greater detail, but without averring that the arrangement made by the said attorneys had been executed, or that the defendants had performed or tendered performance of their part of the proposed settlement.

Judgment having been entered against the defendants for want of a sufficient affidavit of defence, the defendants took this writ, assigning for error the entry of said judgment.

E. R. Worrell, for the plaintiffs in error.

The Court below was of opinion that the agreement of the referees was an award, but that the affidavit of defence was insufficient because performance of the award was not averred. The agreement possessed the elements of a good award because it was within the powers given, it was certain, it was possible to be performed, lawful, and reasonable. It is not necessary that the performance of an award must be averred to constitute a good defence. As a compromise it was as effective in law as an accord and satisfaction.

N. H. Sharpless, contra.

This agreement was not a good award because it does not set up the exact terms of the submission. It is not good as an accord because there is no averment of satisfaction.

March 5th. THE COURT. The defendants below, plaintiffs in error, complain that an error was committed by the Court of Common Pleas, in entering judgment against them for want of a sufficient affidavit of defence. Whether such complaint be well or ill founded, depends upon the character of the facts set forth in the affidavit. If a case is thereby made out which ought to have been submitted to a jury, or which, upon demurrer, would have warranted a judgment for the defendants, then the decision of the Court was wrong; but if such a case be not made out, the complaint is without merit. The notes in suit were given by the defendants to the plaintiff in part consideration for the transfer of thirteen hundred shares of the stock of the Hook Smelting Co, as set forth in the agreement of the parties dated January 1, 1875. The affidavit alleges nothing involving the *bona fides* of these notes, but sets up, by way of estoppel or defence, an agreement made for the parties by Messrs. Hanson and Worrell, their attorneys, who, it is said, had full power and authority to make such agreement, and to adjust and settle their disputes and differences. The agreement, thus referred to, provided that the papers, books, business, and affairs of the Hook Smelting Company should be examined by the plaintiff, and if he should find that the business of the company had been conducted according to law, and that its stock and assets corresponded truly with the showing of the books, and that the company was solvent, the plaintiff, in such case, was to cancel the notes and to refund the money paid; on the other hand, the plaintiffs were, simultaneously with such delivery and payment, to transfer to Hook the thirteen

Digitized by Google

hundred shares of capital stock mentioned in the agreement of January 1, 1875, discharged of all claims of them, the said defendants, and of any and all other persons on their account.

As a defence, this showing is open to several objections. The paper set forth can be operative only as an agreement; for, as an award, it is defective for want of a definite submission; but, as an agreement, its execution nowhere appears, either by the signatures, assent, or acts of the parties. As, therefore, what is not stated in an affidavit of defence is to be presumed not to exist (Lord *v.* Ocean Bank, 8 Har. 384), we must set it down as a fact, that neither the plaintiff nor defendants ever took a single step in the direction of its execution, and that it is, therefore, void for want of ratification. Passing this; the conditions therein contained are mutual and dependent, and then it follows that neither party can set it up without at least a tender of performance. This contract, in itself, neither satisfied the notes nor transferred the stock; either of these things could result only from a performance of its conditions, and without this it was inoperative. As the plaintiff had no right in or to the stock until he tendered payment of the money and cancellation of the notes, so the defendants had no right to such money or cancellation until they tendered a transfer of the stock. Hence it would be manifest injustice for a Court to treat the notes in suit as cancelled, and thus give the defendants the advantage of a contract with which they have never complied.

The judgment is affirmed.

Opinion by GORDON, J.

Jan. '77, 476. March 1, 1877.

Quigley v. The Commonwealth.

Murder in the first degree — Ingredients of — Juror — Sufficiency of description — Challenge to the array.

When the name and residence of a juror are correctly given in the panel, the identification is sufficient. A mere want of accuracy as to his occupation, arising from an addition which designates no known occupation or business, is not sufficient to support a challenge for cause.

The facts in this case held to be sufficient to warrant a verdict of guilty of murder in the first degree.

Error to the Court of Oyer and Terminer of Philadelphia County.

Patrick Quigley was indicted by the grand jury for the murder of his wife Catharine Quigley. At the trial, a man named William S. Thompson, having been called as a juror, testified on his *voir dire* that he was in no business at the then present time, but was formerly a butcher—a victualler. That he had lived at 1511 Thompson Street for the last twenty years. That no other man of that name had ever lived there, and that he knew of no such business as "whittier." The juror was thereupon challenged for cause by the prisoner, assigning as such cause that the juror was named in the return to the venire as "William S. Thompson, whittier, No. 1511 Thompson Street, 29th Ward." Challenge overruled. Exception.

The facts of the case as shown by the evidence are fully stated in the opinion of the Supreme Court.

The jury found a verdict against the prisoner of murder of the first degree, and sentence was passed thereon. The prisoner took this writ of error, assigning for error, *inter alia*, the overruling of his challenge of William S. Thompson, a juror, for cause.

A. S. L. Shields and *John O'Byrne* (with whom were *C. M. Smith* and *W. H. Ruddiman*), for the plaintiff in error.

The Act of Assembly, approved April 14, 1834, § 88, directs that the name, surname, and additional occupation and place of abode of the persons selected be put in the wheel, and shall be placed upon strips of paper for that purpose. In this instance the occupation of the juror called was not given properly, but on the contrary, the return shows an occupation of which the juror called knew nothing, and a business in which the juror never was engaged. It was, therefore, error to overrule the prisoner's challenge of the juror for cause.

Hagert (Assistant District Attorney), contra.

The word "whittier" in the return, was intended for "victualler:" even, however, if it was not, it is not to be treated as a nullity; for it does not appear by the testimony that this word does not represent some one of the numerous sub-divisions of old occupations or one of the many new occupations which have grown up with the advance in the arts, and with the introduction of machinery and the subdivision of labor. If, however, it is to be so treated, then we submit that this objection was properly a cause of challenge to the array, and in the case of Clark *v.* Comm. (5 C. 129), a similar objection was so regarded; for if the sheriff has failed to return the names, residences, and occupations of eighty persons, he has made a defective return. A default in the sheriff in making his return, as the omission to return a knight in a suit by a peer, and the failure to return the statutory number of hundredors upon the panel, was ground for challenge to the array; so if the bailiff of the liberty return any one out of his franchise. These are all grounds of principal challenge, and are in respect of the default of the officer who made the return, and not in respect of the person returned.

Co. Littleton, 156-156*b*, 470-3.

Comm. *v.* Salliger, 3 Penn. L. J. R. 511.

Digitized by Google

And no challenge to the polls can be taken, which might have been had to the array.

Co. Litt. 158*a*.

Under the English practice, challenges to the array must be spread in full upon the record, and should be so here, so that the opposite party may demur, plead, or answer, and so that the correctness of the decision of the Court upon the challenge may be examined into.

King *v.* Edmonds, 4 B. & Ald. 471.

Hesketh *v.* Braddock, 3 Burr, 1847.

The challenge made in the present case was a challenge to the *polls*, and if the Court below could inquire at all into the ground alleged in this case, it could only be for the purpose of determining whether the person who answered to the call was the identical person who had been selected, summoned and returned as a juror. Upon that question the Court was satisfied by the examination of the juror; and their decision, if reviewable here, like the decision of any other tribunal upon any other question of fact, is to be sustained, unless clearly repugnant to the evidence.

Treating this objection as ground for a challenge to the array, and no such challenge having been taken in the Court below, the case is within the protection of the Act of 21st of February, 1814, Purd. Dig. p. 838, pl. 82.

March 5. THE COURT. There is no merit whatever in the assignments of error in this case. The Court properly overruled the challenge to Wm. S. Thompson, a juror. He was identified by name and residence, both of which were correctly given in the panel. The want of accuracy as to his occupation was not sufficient to create a doubt of his identity. The addition was insensible, and not a change of his real occupation.

There was nothing to mislead, and therefore no inquiry arose, or could arise, from an addition which designated no known occupation or business. But the challenge was not to the array. A challenge to the array always arises from a cause which affects the whole panel. Such is not this case.

In regard to the ingredients of murder in the first degree there is no doubt. The case presents a clear one of murder in the first degree. Indeed the counsel did not themselves raise this question. It came as a merciful suggestion of a member of the court to afford an opportunity of investigating the facts. But this investigation satisfies us the prisoner was properly convicted. That Catharine Quigley, the wife of the prisoner, did not commit suicide but was killed by him, is a fact beyond any reasonable doubt upon the evidence, and has been found by the jury. That he shot her twice, once in the eye, the ball penetrating the brain, and once in the face halfway between the eye and the lower end of the nose, is not a subject of doubt, while all the circumstances surrounding the act, point to a wilful, deliberate, and premeditated intention.

He came from the bar-room into the kitchen and told her to take his coat up-stairs. She said, "yes, if you wish it," took the coat down from a hook and started up-stairs, and he walked up close behind her. The witness heard the door of the room above shut, and the latch click; nothing more was heard for some time, until the witness heard the two shots, one within fifteen or twenty seconds of the other. The pistol is identified as his, two chambers were found discharged, and an intermediate cartridge struck by the hammer but not exploded. The prisoner remained a long time in the room before he came out, and when he came down went to the hydrant and washed himself. His shirt from which the blood had been washed, was found in the room with stains upon it. He had changed it for a clean one. After a long time he came down, went to a neighbor to find a woman who occupied the upper story of his house, told her to come home, that his wife had met with an accident, had shot herself. When this woman and the man in whose shop she was found came to the room, the prisoner's wife was found lying on the floor, her head resting on the stove plate, and the pistol placed on the floor about three feet from her. She was still alive and sensible, and on inquiry at once accused him of shooting her, pointing to the place where the balls entered. She lived nine days, and never recalled her accusation.

When in the room, he sat on the bed, and refused to help his wife to get up or to relieve her from her uncomfortable position, giving as a reason that he did not want to bloody his shirt. When accused by her of the shooting he scarcely denied it, but after sitting on the bed for a time, he approached her and said: "Did I shoot you, dear Kate?" She said at once: "Yes, you shot me twice; use no endearing words, for if I should die to-morrow, you would lie. If I ever live to get over this, I will not live another day with you." During the whole affair he exhibited no feeling, smoked his cigar, and behaved with the utmost coolness, as well as with entire want of natural feeling. For about an hour and a half, he was engaged, in the room and coming down stairs and returning, making no disclosures of the fact, and evidently reflecting and preparing, as well as he could, to ward off suspicion from himself. They had lived unhappily together, and had had difficulties about property belonging to her. They had separated, and then come together. Perhaps the fault may have been mutual, but this does not detract from the influence of this unhappy life upon his motives and intentions.

Digitized by Google

The fact is still there that love had ceased and unholy feelings had taken its place. Under these telling circumstances, attending the homicide, there is no room to raise a defence to his horrid and unnatural act, none to palliate or excuse, none to detract from the intention which the law draws from the act of one who aims a deadly weapon at a vital part, who twice discharged it against this part, and who would have discharged it a third time, but for the failure of the cartridge to ignite. Much of the language in McCue *v.* Commonwealth (28 P. F. Sm. 185) might be applied to this case. Clearly the act was wilful and intentional, and death was the probable and natural consequence of the act.

What other intention, than an intention to kill, can rationally be inferred from the conduct of the prisoner? As was said in Cathcart *v.* Commonwealth (1 Wright, 112), "Human reason will not tolerate the denial that a man who intentionally, not accidentally, fires a musket-ball through the body of his wife and thus inflicts a mortal wound, has a heart fatally bent upon mischief, and intends to kill." Much less can human reason deny this wickedness of heart, when a husband not only fires one ball into the brain of his wife, but fires a second time at her head, and attempts to fire a third time.

There are many minor circumstances in this case, lending additional weight to the conclusion, but the main body of the facts is sufficient to support the verdict without their aid.

The sentence of the Court below is affirmed, and the record is ordered to be remitted to the Court of Oyer and Terminer, for the purpose of carrying the sentence into execution.

PER CURIAM. WILLIAMS, J., absent.

July, '75, 84. Feb. 6, 1877.

City of Philadelphia to use, etc., v. The Philadelphia and Reading R. R. Co.

Errors and appeals—Act of April 18, 1874—*Affidavit of defence law—Refusal of the Court below to enter judgment, when not reversed—Practice of the Supreme Court.*

Where a writ of error is taken to the order of a lower court discharging a rule for judgment for want of a sufficient affidavit of defence, the Supreme Court will not, as a general rule, anticipate the final judgment by a discussion of the points of law raised by the affidavit; and will remit the case to the lower court when there are questions of fact which seem to require the intervention of a jury.

Error to the Common Pleas No. 4, of Philadelphia County.

Scire facias on a municipal claim, filed by the City to the use of O'Rourke against the Phila. & Reading R. R. Co., for paving done on Lehigh Avenue in front of the defendant's property.

The affidavit alleged, *inter alia*, that the paving was done on that portion of the highway which had been reserved for the erection of market-houses in the deed from the Morris estate dedicating the street to public use; that the use plaintiff, at the time of his application for the contract, failed to have the consent of the majority of property owners along the street in which the paving was done, as required by an ordinance of Councils; that the application with the signers' names was irregular, as not containing the residences of the signers; and that signatures had been obtained through the use plaintiff's misrepresentations that the expense of paving would be borne by the city.

A supplemental affidavit set forth that diligent search had been made for the deed of dedication of the street, and that it could not be found; but that defendant expected to be able to prove by parol the reservation therein of the lots for the erection of market-houses.

The plaintiff moved for judgment for want of a sufficient affidavit of defence; but, after argument, the Court discharged the rule, remarking that the case ought to go to a jury to determine the character of the deed of dedication. (See a full report of the case in 1 WEEKLY NOTES, 474.)

The plaintiff took out this writ, assigning for error the above-mentioned order of the Court.

D. W. Sellers, for the plaintiff in error.

T. Hart, Jr., contra.

Feb. 12. THE COURT. The Court below having refused to enter judgment for want of a sufficient affidavit of defence, this writ of error has been sued out under the provisions of the Act of April 18, 1874. (Pamph. L. 64.) In such cases, as a general rule, we do not deem it expedient to anticipate the final judgment by a discussion of all the points of law which may arise upon the affidavit. It is enough to say that, in our judgment, there are questions of fact presented which render the intervention of a jury trial necessary; and the Court below was right in remitting the case to that tribunal.

PER CURIAM. Order affirmed.

[See Griffith *v.* Sitgreaves, 2 WEEKLY NOTES, 707.]

Jan. '76, 14. **Bonniwell v. Hopson.** Feb. 10, 1877.

Errors and appeals—Enforcement of agreement in a lease that no writ of error shall be taken to a judgment confessed thereunder in an amicable action of ejectment—Writ of error quashed where no application had been made to the Court below to open judgment.

Sur rule to show cause why the writ of error should not be quashed.

This was a writ of error to the Court of Com-

Digitized by Google

mon Pleas No. 3, of Philadelphia County, upon a judgment confessed in a amicable action of ejectment by Hopson against Bonniwell for premises in the city of Philadelphia. The action was entered and the judgment confessed by virtue of the following clause contained in a lease from plaintiff to defendant, a copy of which was filed in the cause:—

"And if the lessee shall in any particular violate any one of his said promises, or fail to comply with any of the conditions of this lease, on notice given under the terms hereof, then the lessor may cause a notice to be left on the premi es of his intention to determine this lease, and at the expiration of ten days from the time of so leaving such notice, this lease shall absolutely determine; and any attorney may immediately thereafter, as attorney for the lessee, sign an agreement for entering, in any competent court, an amicable action and judgment in ejectment (without any stay of execution) against the lessee and all persons claiming under him, for the recovering by the lessor of the possession of the hereby demised premises, for which this shall be a sufficient warrant; and thereupon a writ of *habere facias possessionem* may issue forthwith without any prior writ, or proceedings whatsoever, and the lessee hereby releases to the lessor all errors and defects whatsoever in entering such action or judgment, or causing such writ of *habere facias possessionem* to be issued, or in any proceeding thereon, or concerning the same; and hereby agrees that no writ of error or objection or exception, shall be made or taken thereto."

Plaintiff also filed affidavits of a breach of the covenants of the lease and of service of the notice therein provided for. On the same day on which the judgment was entered a writ of *habere facias possessionem* issued. Defendant then, without making any application to the Court below to open the judgment, took this writ of error, assigning for error various alleged errors and omissions in the proceedings as shown by the record, the insufficiency of the proof of service of notice, and *inter alia* the following: "Said agreement is invalid because the lessee surrenders to the lessor the exclusive power of deciding whether its provisions have been violated, and takes from the lessee all right to make any objection or exception to the decision or consequent action of the lessor."

On Feb. 3, 1877, *Henry J. McCarthy*, for defendant in error, obtained a rule to show cause why the writ of error should not be quashed, on the ground that the plaintiff in error had expressly released all errors and defects in entry of judgment, and had agreed that no writ of error or objection should be taken thereto.

Henry T. King (with whom was *Neal F. Campbell*) now showed cause.

Such a sweeping agreement as that contained in this lease cannot be sustained. No man can give away his right to resort to the Courts of law, which have been founded by the people to protect them in their rights and redress their wrongs. No matter what the error, what the defect, what the wrong, what the oppression, the lessee agrees to make no objection, no exception. Such an agreement is not binding. If there are defects, errors, or wrongs in the proceedings, this Court will correct them.

Orlady *v.* McNamara, 9 W. 192.
Wynn *v.* Bellas, 10 C. 160.

A judgment on warrant of attorney is as much an act of the Court as if it were formally pronounced on *nil dicit* or a cognovit, and till it is reversed or set aside, it has all the qualities and effect of a judgment on a verdict.

Hageman *v.* Salisberry, 24 Sm. 280.
Braddee *v.* Brownfield, 4 Watts, 474.

This judgment then is the act of the Court; it is a final judgment. Why then should not a writ of error lie? And what principle of law required us to ask the Court below to open this judgment more than any other final judgment? And if we had moved to open it, nothing would appear before this Court beyond the fact that we asked and had been refused. No testimony given there would appear before this Court. Nothing but the record, the same as it is now presented. It would be but an appeal to the discretion of the Court below, which this Court would not review. We should still have our right to a writ of error to this Court, and the refusal of the Court below to open the judgment would throw no light on the matter. This Court would not be bound, and would not be influenced by the refusal of the Court below to open the judgment.

Henry J. McCarthy (with whom was *W. Nelson West*), contra.

An agreement that no writ of error should be taken has been often enforced

Wynn *v.* Bellas, 10 C. 160.
Bingham's Trustees *v.* Guthrie, 7 H. 418.
Davis *v.* Hood, 1 H. 171.

Feb. 12. PER CURIAM. Writ quashed.

Common Pleas—Law.

C. P. No. 1. March 10, 1877.

Allen v. Graham et ux.

Husband and wife—Separate estate—Liability of feme covert for work and materials furnished for her separate property—Affidav of defence law—Averment supplementing copy of book entries—The fact that materials sold to a married woman were for repairs to her separate property can be shown by averment.

Rule to show cause why judgment should not be stricken off. This was an action of assumpsit, in which plaintiff filed a copy of book entries

Digitized by Google

charging the wife, and appended thereto the following averment:—

Plaintiff avers that the lumber charged for in said book account was sold and delivered to the said Bridget, wife of Robert Graham, at and upon the special instance and request of the said Bridget, and was actually delivered to and used by her for the purpose of repairing the separate real estate owned by her, which repairs were necessary for the preservation and enjoyment of said real estate, to protect the same from dilapidation and to render it tenantable.

An affidavit of defence was filed by the husband; on a rule for judgment for want of a sufficient affidavit of defence the Court entered judgment; whereupon the present rule was taken by the wife.

Stein (with whom was *Stover*), for the rule.

A *feme covert* cannot be held liable upon a contract, except for necessaries, or unless the articles furnished were for necessary repairs to her separate estate; but whether such was the case can only be determined by a jury. It cannot be shown by an averment.

The ground of a wife's liabili y is the *consideration*, and not the contract evidenced by the book entries.

Glyde *v.* Keister, 8 Cas. 88.

Act of 11th April, 1848, § 8, Purd. Dig. 1006, and cases cited in note.

Simpson, contra. By the 6th section of the Act of April 11, 1848, a married woman is empowered to contract debts for the improvement of her separate estate; and being thus able to contract, she is *sui juris* to that extent, and can be sued as any other contractor.

Rule discharged.

[As to what may be shown by an averment supplementing a copy of book entries filed, see Dickerson *v.* McCausland, *ante*, 327.

As to taking judgment against a married woman under the affidavit of defence law, see Scott *v.* Wilmer, 1 WEEKLY NOTES, 41; Burton *v.* Seaton, Id. 50; Gallagher *v.* Silva, Id. 130; Town *v.* McIlvane, 2 Id. 428; Eisenbrey *v.* Negus, Id. 445; Debraham *v.* Walker, *ante*, 26.

The judgment against the wife in the above reported case differs materially from a judgment obtained in a *sci. fa.* sur mechanic's claim to charge the wife's separate estate, in that the former is a general judgment binding all her real estate, and not merely the property benefited by the repairs.]

C. P. No. 1. Jan. 24, 1877.

Roberts et al. v. Dobbins.

Pleading—Variance between declaration and agreement declared on, if not material, is no ground for demurrer—Craving oyer and filing the deed has the effect of setting out the instrument on the record in full, and entitles party to demur to same.

Demurrer to declaration.

This was an action of covenant on a contract The delaration set forth that plaintiffs contracted to furnish and deliver to defendant all the iron required in the construction of the Main Exhibition Building, and also to put together and paint the same, and in consideration thereof defendant agreed to pay plaintiffs certain specified sums; that plaintiffs in accordance with said agreement had delivered to defendant 8,393,351 lbs. of iron, and had put together and painted the same, whereby the sum of $80,000 became due to plaintiffs, and was still unpaid.

Oyer of the agreement being craved, a copy was furnished, which defendant's counsel filed with the prothonotary and then demurred to the declaration. The demurrer did not set out a copy of the agreement. It alleged: (1) That the declaration was insufficient, inasmuch as it did not aver performance by the plaintiffs of their precedent covenants; (2) that the indenture declared upon was not fully and correctly recited; (3) that there was no averment that the iron mentioned was delivered on cars at the Centennial Grounds, ready to be set up; (4) that there was no averment of performance of the conditions of the contract to the satisfaction of the architects and building committee; (5) that there was no averment that the building had been completed and accepted by the architects and building committee, nor that payment had been made to the defendant; (6) that there was no averment that the plaintiffs commenced the delivery of iron work by February 1, 1875, as required by the agreement.

C. L. Lockwood (with whom was *R. P. White*), for demurrer.

There is a variance between contract declared on and contract set out on record on oyer. Stipulations in contract as to time and place of delivery and time and conditions of payment are omitted.

1 Chitty Plead. 303.
Peck *v.* Waters, 104 Mass. 345.

Plaintiffs should have averred performance of their precedent covenants.

1 Chitty Plead. 317.
Cunningham *v.* Marrell, 10 Johns. 203.
Gould *v.* Banks, 8 Wend. 562.
Butler *v.* Tucker, 24 Wend. 447.
Martin *v.* Schoenberger, 8 W. & S. 367.

Oyer having been granted, and the contract spread upon the record, the Court will notice the variance on demurrer.

1 Chitty Plead. 432, 434, 666
Steph. Plead. 72.
1 Tr. & H. Prac. 364.
Bender *v.* Fromberger, 4 Dall. 436.
Mansley *v.* Smith, 6 Phila. 223.
Hobson *v.* McArthur, 3 McLean, 241.

The declaration is bad on its face without oyer. It alleges contract to deliver "all iron required," and avers delivery of "a large quantity of iron" only.

Digitized by Google

C. Hart (with whom was *Chapman Biddle*), contra.

It is sufficient if the substance of the contract be pleaded, and a variance if material may be taken advantage of on trial.

1 Chitty Plead. 306, 314.

In covenant as well as assumpsit, a contract may be set out fully or according to its tenor.

1 Chitty Plead. 367.

And the breaches may be set out, but it is not requisite.

1 Chitty Plead. 369.

To set out the tenor is the correct practice, as it avoids prolixity.

Steph. Plead. 355.

It is not necessary to set out the condition of a bond.

Steph. Plead. 360.

It is not necessary to anticipate the answer of the other side in pleading.

Steph. Plead. 350.

And, therefore, any non-compliance with a condition is matter which should rather be set up by defendant than presumed against the plaintiffs. Defendant has failed to set out the indenture on the record. To file a copy of the instrument furnished upon demand of oyer, is not the setting out of the instrument on the record, contemplated by the law. The defendant should have set out a copy of such instrument in the pleading succeeding the demand of oyer. Having failed to do this, the instrument is not before the Court, and the demurrer, which is founded upon the terms of that instrument, must fall.

C. A. V.

Feb. 10, 1877. THE COURT. The plaintiffs in this case bring an action of covenant, making profert of the agreement under seal, on which it is founded. The defendant craves oyer, and having been furnished with a copy, files it in Court and demurs.

In Pennsylvania, craving oyer undoubtedly makes the instrument a part of the record. (Douglas *v.* Beam, 2 Binn. 76.) Being part of the record the effect is the same as if the tenor of the deed had been originally set forth in the declaration. (1 Saund. 317; 1 Chitty, 666.) This being so, all the matters which the defendant claims should have been set out in full in the declaration, have now become, by this craving oyer, a part of it. His demurrer is then addressed to the declaration as it now stands.

The ground upon which a party may set out a deed on oyer and demur, is explained in a note to Sacheverall *v.* Froggatt (2 Wms. Saund. 751), viz.: "It has already been observed that the proper way of declaring, upon a deed of demise, is to set out only so much of the deed as is necessary to entitle the plaintiff to recover, and no other covenants besides those on which breaches are assigned, and even then not to set them out in letters and words, but merely their substance and legal effect. For even if the defendant should plead *non est factum*, the differences in the phrases and sentences between the deed stated in the above-mentioned manner in the declaration, and the deed itself, when read in evidence, will be no variance. It is also holden that the plaintiff is not bound to show more of the deed in his declaration than what makes for him. However, if any part of the deed be omitted in the declaration which the defendant conceives would, if shown, induce the Court to construe the deed in his favor in point of law, and decide against the plaintiff, the proper mode is to pray oyer of the deed, and after setting it out *in hæc verba* to demur."

To the same effect is Ross *v.* Parker (1 Barn. & Cress. 358). "A variance between a deed declared on, and as set out on oyer, if not material to the cause of action, is no ground of demurrer on account of variance."

Esteeming, therefore, the variance as set out in the demurrer in this case as in no way material to the cause of action, the demurrer is overruled.

Opinion by BIDDLE, J.

C. P. No. 4. Jan. 20, 1877

French et al. v. Kaign.

Mechanics' lien law—Apportioned claim for materials furnished—Houses located on opposite sides of a street—Claim covering the whole a nullity.

Rule to strike off liens.

This was an apportioned claim for materials furnished to twenty-four houses, twelve of which were located on the north and twelve on the south side of "De Lancey Place or Street." The claim was apportioned among the twenty-four houses at $18 per house. De Lancey Place lies south of Spruce Street, the blocks upon which the houses were built, running through from Twenty-third to Twenty-fourth Street.

R. Alexander, for the rule.

By the claimant's own showing there are two distinct and separate blocks of buildings on opposite sides of the street; a claim covering the whole is a nullity.

Goepp *v.* Gartiser, 11 Casey, 130.
Young *v.* Chambers, 3 Harris, 265.

The rule applies to different blocks on the same side of the street or on different sides of the same street, and in all cases where the structure is not substantially one building.

Campbell *v.* Furness, 1 Phila. 372.
Boyd *v.* Mole, 9 Phila. 118.

George W. Thorn, contra.

How can the Court determine whether this is a highway? It is described as De Lancey Place, and its being a street does not make it a public

Digitized by Google

highway. It may be but a private passage-way. And a claim against two series of houses on opposite sides of a private alley is not thereby rendered invalid.

Fitzpatrick *v.* Allen, 2 WEEKLY NOTES, 265.

[BRIGGS, J. The law requires us to take notice of the geography of our city.]

[THAYER, P. J. A street is a public passage-way, and the buildings are stated in the lien to be on different sides of the street.]

Rule absolute.

[*Cf.* Millett *v.* Allen, *ante*, 374.]

C. P. No. 4. Dec. 14, 1876.

Le Van v. Pennsylvania R. R. Co.

Railroad company—Duty to furnish seat to traveller holding ticket—Expulsion from sleeping car of passenger holding transportation ticket only — New trial — Excessive damages.

Rule for a new trial.

This was an action on the case to recover damages for an expulsion of the plaintiff from the cars of the defendant.

On the trial, before BRIGGS, J., the following facts were proved: The plaintiff purchased a ticket at Harrisburg for Philadelphia, the train leaving the former place about 10 o'clock P. M. November 13, 1868. As the train was unusually crowded, the plaintiff took a seat in a sleeping-car. Shortly after the train had started the sleeping car conductor requested the plaintiff to produce his berth ticket or pay for the use of a berth. The plaintiff had no berth ticket, but produced a first-class ticket and refused to pay the extra amount demanded, or to leave the car unless furnished with a seat elsewhere. The train conductor subsequently explained to him that he would be required either to leave the car or pay extra, at the same time telling him that at Middletown he would be able to procure a seat in one of the ordinary first-class cars. Shortly after passing Middletown, the conductor saw the plaintiff and informed him that there were vacant seats in the car immediately in front of the sleeping car, and that the train would stop at Landisville when he would be expected to move. When the train stopped at Landisville, the plaintiff refused to move into another car, and the conductor laid his hands upon him intending to remove him, whereupon the plaintiff remarked that force having been used he would leave, and did so, getting off on the platform of the station at Landisville. When the train resumed the journey, the plaintiff endeavored to get upon the cars, but was prevented by the brakesman. The plaintiff also testified that in consequence of his expulsion he was compelled to walk to Lancaster, a distance of between seven and eight miles, and was injured in health. The plaintiff called his wife to prove that a complaint from which he had suffered for upwards of twenty years had been aggravated by the expulsion and consequent walk. This was objected to, but was admitted.

THE COURT charged the jury that the defendant was bound to furnish the plaintiff with a first-class seat, and that a passenger who had inquired where he should go, and had exhausted his means of information, had done his duty, and, if refused information by the defendant's servants, could occupy any unoccupied seat on the train.

The jury found a verdict for the plaintiff for $8500.

C. Biddle, for the rule.

Dougherty, contra.

Rule absolute, on the ground that the verdict was excessive.

C. P. No. 4. Mar. 10, 1877.

Bunting et al. v. McCormick.

Assignment—Execution—A fi. fa. issued by a creditor against property assigned for the benefit of creditors, the assignment being alleged to be fraudulent, will not be set aside.

Rule to set aside *fi. fa.*

The defendant made an assignment for the benefit of creditors dated February 15, 1877, recorded the next day, and possession was immediately delivered by the assignor of all his estate and effects to the assignee, who entered security, and filed an inventory and appraisement.

On the 24th of February, a *fi. fa.* was issued by the plaintiff and a levy made thereunder.

It was averred that the assignment was a fraudulent one.

J. D. Bennett, for the rule. During the thirty days which the assignee has to file an inventory, etc., the goods are exempt from execution.

Mitchell *v.* Willock, 2 W. & S. 255.

[ELCOCK, J. But here it is averred that the assignment is fraudulent. They may go on and sell, and the vendee will take subject to the assignment. Where there is a contested title, the only way is to go on with the sale.]

The property cannot be seized in the hands of the assignee on a creditor's execution.

Vandyke *v.* Christ, 7 W. & S. 373.

W. R. Murphy, contra. A *fi. fa.* issued by a creditor against property assigned for the benefit of creditors will not be set aside when the validity of the assignment is denied.

Troubat & Haly, 847.

Neel *v.* The Bank, 1 Jones, 18.

Stewart *v.* Coder, 1 Jones, 91.

[THAYER, P. J. The proper method would be to try the title by an action of replevin after the sale.]

Rule discharged.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, APRIL* 12, 1877. [No. 28.

Supreme Court.

Oct. & Nov. '75, 153.

Frew et al. v. Clark.

Will—What constitutes—What sufficient proof of—Evidence—Competency of devisee as a witness in an issue devisavit vel non—Act of April 15th, 1869.

In a feigned issue to try the genuineness and testamentary character of a written instrument, as follows, viz.:—

"Know all men by these presents, that I, James McCully, of Pittsburgh, Pa., do hereby order and direct my administrators or executors, in case of my death, to pay Robert D. Clark the sum of seventy-five thousand dollars, as a token of my regard for him, and to commemorate the long friendship existing between us.

Witness my hand and seal, this 17th day of April, A. D. 1872.

$75,000.00. JAMES MCCULLY. [L. S.]"

Held (by a majority of the Court), that the instrument in question possessed all the essential characteristics of a will.

There were no *subscribing* witnesses to the paper, and it was admitted that the entire instrument, except the signature, was in the handwriting of Clark, the sole beneficiary thereunder, who testified that he alone was present at its execution:

Held, that proof of the signature by two witnesses was sufficient.

Held further (the Judges of the Court, upon a reargument of this point, being equally divided in opinion), that Clark, the sole beneficiary under the will, was a competent witness in the issue *devisavit vel non*.

Bowen *v.* Goranflo, 23 Sm. 357, followed.

AGNEW, C. J., doubts as to the interpretation of the Act of 1869, as decided in the case of Goranflo.

PAXSON and SHARSWOOD, JJ., dissent from the majority of the Court, holding (1) that the paper in controversy was not a testamentary writing; (2) even if testamentary, it was not sufficiently proved; (3) that while the admission of Clark as a witness to sustain the alleged will was not error under the authority of Bowen *v.* Goranflo, the gravity of this issue would have justified the Court in reconsidering that case and the proper construction of the Act of 15th April, 1869.

Error to the Common Pleas No. 1, of Allegheny County.

This was, in the Court below, a feigned issue to determine the validity of a certain paper which had been admitted to probate by the Register of Allegheny County as the will of James McCully, deceased. The following is a copy of the instrument in question:—

"Know all men by these presents, that I, James McCully, of Pittsburgh, Pa., do hereby order and direct my administrators or executors, in case of my death, to pay Robert D. Clark the sum of seventy-five thousand dollars, as a token of my regard for him, and to commemorate the long friendship existing between us.

Witness my hand and seal, this 17th day of April, A. D. 1872.

$75,000.00. JAMES MCCULLY. [L. S.]"

The evidence submitted at the trial showed the following facts: James McCully, a native of Ireland, came to Pittsburgh when about twenty-one years of age, and lived there until his sudden death by an accident in 1873, being then about seventy-five years of age. He commenced life poor, but left an estate estimated at not less than $1,500,000. He was industrious, simple in his habits, economical almost to closeness, reticent, cautious, and eccentric. He had no immediate family, and at his death left no will other than the paper in controversy. He was seldom known to give to objects of charity, would not lend money to his best friends, but was liberal in endorsing for a number of persons, and to large amounts.

Robert D. Clark, the defendant in error, was also a native of Ireland, and came to Pittsburgh in 1850. He soon became acquainted with and afterwards intimate with McCully. About 1869 Clark, by the advice of McCully, who also proffered him assistance by accommodation endorsements, went into the grocery business, McCully becoming surety for his rent. Between that time and the day of his death he endorsed for Clark at various times, amounting in the aggregate to about $180,000. At his death his outstanding endorsements for Clark amounted to $45,000. He was, besides, surety for Clark on a bond for $20,000.

In relation to the paper in controversy, Clark testified at the trial, under objection and exception, that some five months before its execution McCully, being in conversation with him, remarked that he was getting old, that he was on a great deal of his (Clark's) paper, and spoke of making a provision for him, so that in the event of his (McCully's) death, he would not need an endorser. Later he renewed the subject, and directed Clark to have a paper prepared. Clark accordingly consulted Edgar Cowan, Esq., of Greensburgh, a member of the bar, who prepared a paper similar to the one in controversy, with the date, amount, and signature left blank. McCully, being shown the paper, directed Clark to prepare a similar one for execution, and insert in it the sum of $75,000, which was done accordingly, and the instrument signed by McCully in Clark's presence at the Diamond Savings Bank, April 17th, 1872. The body of the instrument,

Digitized by Google

including the seal (scroll), *i. e.*, all except the signature, was in Clark's handwriting. It was written upon what had been a sheet of foolscap paper, a portion of which had been torn off above and below the writing. Clark explained that he tore a strip off the top because, when commencing to write it, he spoiled his first attempt, and he tore off the piece below because "there was no use having so much waste paper."

There were no subscribing witnesses to the instrument. It remained in Clark's possession, and was shown to no one till after McCully's death. At the trial there were called to prove McCully's signature, Clark, who testified that he saw him sign the paper, and others, familiar with his handwriting, who gave it as their opinion that the signature was genuine. Several witnesses testified that McCully was in the habit frequently of trying his pen before signing papers, by writing his name on pieces of paper, which he left undestroyed.

The defence relied upon four grounds, viz., (1) that the paper was not testamentary; (2) that even if testamentary it was not sufficiently proved; (3) that the signature of James McCully to the paper was a forgery; and (4) that even if genuine, he was fraudulently induced to sign it, not knowing its contents or its legal effect, and without any intention that it should operate as a will.

The plaintiff presented the following points: (1) that the writing of April 17th, 1872, in controversy in this case, is a testamentary writing. *Affirmed.* (2) That subscribing witnesses to a testamentary writing are not necessary to its validity. *Affirmed.* (3) That the presumption of law is in favor of innocence, and a party who sets up the defence of fraud or forgery against a will or testamentary writing is bound to establish the same by satisfactory evidence. *Answer.* Answered in the general charge. (4) That there is no evidence in this case to warrant the jury in finding that the signature of James McCully to the paper in controversy was procured by fraud or imposition, [and there is no evidence in the case of want of testamentary capacity in James McCully]. *Answer.* This point is double, and involves two distinct propositions. The first is refused; the second, in brackets, is affirmed.

The defendant presented, *inter alia*, the following point: (4) That it being shown by the evidence clearly, and not controverted by the plaintiff, that the body of the alleged testamentary paper is in the handwriting of the plaintiff, that he was not related by blood to James McCully, that it is without subscribing witnesses, that he is the sole person to be benefited thereby, that it was produced by the plaintiff after Mr. McCully's death, and that no witness other than the said plaintiff is claimed to have seen said McCully sign said paper—such admitted facts raise a strong legal presumption against the genuineness of the signature of James McCully to said paper, and that the alleged testamentary paper was not the voluntary act of said McCully, and it lies upon the plaintiff to show by clear and satisfactory evidence that the said James McCully signed said paper, and at the time of so doing had knowledge of its contents, and intended it to be valid and operative as a will. *Answer.* This point is refused as it stands. The facts alleged do not raise a strong legal presumption, nor any legal presumption against the genuineness of the instrument in suit, but they do present such a case as is calculated to excite suspicion, and make it the duty of the jury to be vigilant and careful in examining the evidence in support of the genuineness of the instrument.

Where a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally, and, in connection with the other facts stated in this point, in *this case* undoubtedly, calls upon the jury to be vigilant and jealous in examining the evidence in support of this paper. This, however, is a mere circumstance of suspicion demanding care and circumspection in investigating the case, so that they may not recognize the instrument as the will of James McCully without the same has been fairly and satisfactorily established by the evidence.

The Court (E. H. Stowe, J.) charged the jury, *inter alia*, as follows: "The first question that arises in this case is, is the signature to the paper the actual writing of James McCully? Did he write the name James McCully on this paper, or did some one else write it? Upon this question the burden of proof is upon the plaintiff; that is to say, the plaintiff must satisfy you that such is the case; otherwise he cannot recover in this suit. No will is valid in Pennsylvania (except in certain cases of which it is not pretended this is one) unless in writing signed at the end thereof, and proved by at least two witnesses. It is not necessary, as we have already stated to you, that those two or more witnesses should have seen deceased write his name or heard him acknowledge that he had written it. It may be proven by parties who are able to swear that the signature is in their opinion the genuine writing of the testator, as has been done in this case. . . . It is incumbent upon the plaintiff, under all the evidences of the genuineness of the signature, to satisfy you reasonably and fairly that the signature is *genuine*. The burden of proof as to this is upon the plaintiff from first to last, and if he has failed to thus satisfy you under all the evidence, your verdict should be for the defendants.

"But in case you should be satisfied that

Digitized by Google

James McCully did actually sign his name to the paper set up here as his will, then the rule changes, and the burden of proof is cast upon the defendants, and it is their duty to satisfy you that fraud or imposition was practised upon McCully, and that he signed the paper in ignorance of its contents, or that somebody wrote the body of the instrument above the name of McCully without his knowledge and consent.

"The law will not presume this. Indeed the law under this state of facts presumes the other way, in favor of honesty and fair dealing, where an instrument, deed or will is shown to have been signed by a person, and no other proof is adduced. The law presumes without more that it was signed voluntarily and with knowledge of its contents. And so where a paper bears no sufficient evidence of fraud upon its face, but presents just such an appearance as it would naturally have, if everything was done just as it is alleged by a party that it was done, and the fact of the signature being genuine is established, the legal presumption of the genuineness and validity of the whole paper as set out arises, and before a jury can properly find the other way the evidence in the cause must fairly lead it to that conclusion, and if it fails to do so their verdict should be in favor of the validity of the instrument."

Verdict and judgment for plaintiff. The defendant took this writ, assigning for error, *inter alia*, the admission of Clark as a witness, the answers to the points above given, and the portions of the charge quoted.

John H. Hampton (with whom was *John Dalzell*), and *Thos. M. Marshall*, for plaintiffs in error.

We claim that James McCully died intestate. The paper in controversy is not a will, but an imperfect and informal paper, no larger than one's hand, lacking all the legal requisites and solemnity that should attach to such an instrument. It is what many text-writers call an imperfect paper, and the presumption is always against such a paper operating as testamentary.

Redfield on Wills, part 1, page 170, sec. 7.

The Supreme Court of Pennsylvania has never followed the adjudications of the English Ecclesiastical Court and some United States Courts in admitting such informal papers to probate.

Plumstead's Appeal, 4 S. & R. 544.
Shields *v.* Irwin, 3 Yeates, 389.
Murray *v.* Murray, 6 W. 353.
Rose *v.* Quirk, 6 Casey, 225.
Frederick's Appeal, 2 Sm. 338.
Eckman *v.* Eckman, 18 Sm. 460.
Patterson *v.* English, 21 Sm. 454.
Weigel *v.* Weigel, 6 W. 528; S. C., 5 W. 486.

The paper does not contain any of the usual words employed in wills, and names no executors: It was not dictated by McCully. It is text-book law that revocability is the essence of a testament. This paper, being under seal, was, *after delivery*, irrevocable, and its testamentary character, if it ever had any, was destroyed.

Mack's Appeal, 18 Sm. 233.
Trough's Estate, 25 Sm. 115.
Zimmerman *v.* Streeper, 25 Sm. 147.

The will was not properly proven. The question to be determined by this Court is, will it be sufficient proof under the Act of 1833, of a will, without subscribing witnesses, and not found among testator's papers, to prove by one witness, who is the sole beneficiary under it, that he saw the testator sign it, and to prove by another that the signature is genuine in his opinion, where the body of the will is not in the handwriting of the testator, but in that of the beneficiary who was present when it was signed, and who immediately took possession of it?—in the absence of any proof by other witnesses that before or after signing by the testator, he declared he intended to or had made such a will, or in any manner recognized it or had knowledge of its contents; and where the signature of the will is assailed as a forgery and obtained by fraud?

To prove the signature alone is not proof of the will, but only of a fact out of which a presumption may arise that the testator knew the contents of the paper he signed. Evidence was given of intimacy between Clark and M Cully, but no witness was called to prove any fact connected even remotely with the execution of the paper. We contend that the circumstances of this case require clear proof that the testator had actual knowledge of the contents of the paper, and that it would operate as a testamentary disposition.

Boyd *v.* Boyd, 16 Sm. 283.
Vernon *v.* Kirk, 6 Casey, 218.

It is supposed that the case of Bowen *v.* Goranflo (23 Sm. 357) settles the point against our objection to the competency of Clark as a witness, he being the plaintiff and sole legatee under the paper. But we submit that the question now presented was not in that case. There the making of the will was not disputed.

The equality of litigants before the Court and jury is the aim of the statute of 1869, and that intent will be wholly defeated by allowing Clark to testify in a matter known only to himself and McCully. We regard the statute as not affording such protection to one man, and doing injustice to another who is helpless to fight an adversary, who builds his case upon the acts and deeds of a dead man. The Act of 1869 did not repeal the Act of 1833 as to the mode of proving a will.

Karns *v.* Tanner, 16 Sm. 297.
McBrides's Appeal, 22 Sm. 481.

M. W. Acheson, contra.

The essence of the definition of a will is that

Digitized by Google

it is a disposition to take effect after death; and whatever the form of the instrument, if it vests no present interest but only directs what is to be done after the death of the maker, it is testamentary.

Turner v. Scott, 1 Sm. 126.
Frederick's Appeal, 2 Sm. 338.
1 Redfield on Wills, 272.

The form of the paper does not affect its title to probate. In Rose v. Quick (6 Casey, 225), a paper in the form of a power of attorney was held to be a will. A gift or bequest after death is the very essence of a will, and determines a writing, whatever its form, to be testamentary.

Patterson v. English, 21 Sm. 458.

The instrument in controversy in the present case is not a promise to pay money nor an acknowledgment or evidence of a debt. It is a testamentary gift. It was not to take effect until after McCully's death, and was essentially ambulatory and revocable. It conforms strictly to the requirement of the Statute of Wills. It is in *writing*, and is *signed* by the testator at *the end thereof*.

Proof of the signature of the testator to a will by two witnesses, who are not subscribing witnesses, is *prima facie* evidence of its execution, although the body of it be not in the handwriting of the testator.

Weigel v. Weigel, 5 Watts, 486.
Hight v. Wilson, 1 Dallas, 102.
Havard v. Davis, 2 Binney, 418.
Rohrer v. Stehman, 1 Watts, 463.
Carson's Appeal, 9 Sm. 493.

Clark, the plaintiff below, was a competent witness under the Act of April 15th, 1869 (Pur. Dig., vol. i. p. 624), as construed in the case of Bowen v. Goranflo (23 Sm. 357). That was an issue *devisavit vel non* to try the validity of a paper purporting to be a will. The plaintiff, who was also a devisee under the alleged will, was admitted as a witness, and this Court held rightly so.

January 6, 1876. THE COURT. This was a feigned issue to try the genuineness and testamentary character of a written instrument, of which the following is a copy, to wit:—

"Know all men by these presents, that I, James McCully, of Pittsburgh, Pa., do hereby order and direct my administrators or executors, in case of my death, to pay Robert D. Clark the sum of seventy-five thousand dollars, as a token of my regard for him and to commemorate the long friendship existing between us.

"Witness my hand and seal this 17th day of April, A. D. 1872.

JAMES MCCULLY. [L. S.]"

"$75,000.00."

Twenty errors have been assigned, yet all the substantial matters may be considered in answering the following questions:—

First. Is the instrument of a testamentary character? Secondly. Is the signature thereto in the handwriting of James McCully? Thirdly. Was his signature obtained through fraud or imposition; or in his ignorance of the contents of the instrument?

The first is a question of law; the others questions of fact.

First. A will is defined to be the legal declaration of a man's intentions, which he wills to be performed after his death. (2 Black. Com. 500; Bouvier's Law Dic.; 1 Jarman on Wills, 11.) An instrument in any form, whether a deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. (Habergham v. Vincent, 2 Ves. Jr. 204.) It may be an endorsement on a note (Hunt v. Hunt, 4 N. H. 434), or by letter (Morrell v. Dickey, 1 Johns. Ch. 153). Whatever be the form of the instrument, if it vests no present interest, but only directs what is to be done after the death of the maker, it is testamentary. (Turner *et al.* v. Scott, 1 P. F. Smith, 126.) The essence of the definition is that it is a disposition to take effect after death. (Redfield on Wills, 5; Turner v. Scott, *supra.*) Nor does it matter if the person intended to make a note instead of a will. If he used language which the law holds to be testamentary, his intention is to be gathered from the legal import of the words he employed. (Idem.) No formal words are necessary to make a valid will. The form of the instrument is immaterial if its substance is testamentary. (Patterson v. English, 21 P. F. Smith, 454; see also Rose v. Quick, 6 Cas. 225; Frederick's Appeal, 2 P. F. Smith, 338.)

This instrument is in writing. It is signed at the end thereof. It contains no admission of indebtedness. It furnishes no evidence of a debt. It contains no promise to pay. It vested no present interest. It was not to take effect until after the death of McCully. In the mean time he could revoke it at his pleasure. It therefore possessed all the essential characteristics of a will, and was undoubtedly testamentary in its character.

Second. The 6th section of the Act of 8th April, 1833, requires that a will "in all cases shall be proved by the oaths or affirmations of two or more competent witnesses." The Act does not require them to be subscribing witnesses. (Jones v. Murphy, 8 W. & S. 295; Carson's Appeal, 9 P. F. Smith, 493.) Although the body of the will be not in the handwriting of the testator. (Weigel v. Weigel, 5 Watts, 486; Ginder v. Farnum, 10 Barr. 98; Deer v. Greenawalt, 26 P. F. Smith, 254.) It may be proved then by competent witnesses, two or more in number. In this case some fifteen witnesses testified

Digitized by Google

to the authenticity of McCully's signature. Among the number was Robert D. Clark, the defendant in error. It is claimed that he was incompetent. If so, it must be on the ground of either interest or policy. The first section of the Act of 15th April, 1869, declares, "no interest or policy of law shall exclude a party or person from being a witness in any civil proceeding." The proviso to the section, after wholly excluding from the operation of the Act several classes of cases, declares, *inter alia*, the Act shall apply "in issues and inquiries *devisavit vel non.*" This was an issue *devisavit vel non.* It was the very question in controversy. It is then just the case in which the Act of Assembly says Clark is a competent witness, although a party and interested. To deny this is to disregard the specific terms of the Act, and to refuse to give effect to the language cited.

It was, therefore, held in Bowen *v.* Goranflo (23 P. F. Smith, 357), that one who was a party to the issue, and both executor and devisee under the will in controversy, was a competent witness. A careful review of the Act confirms us in the correctness of the conclusion at which we then arrived. We do not see how effect can otherwise be given to the clause in question. It is claimed, however, that this construction of the statute will open the door to fraud and perjury. It may be so. It is possible that permitting parties to testify in any case has caused much perjury. The good and the bad in this world are very much blended. Many an Act of the Legislature may not produce unalloyed good, yet we must give effect to its provisions. If the evil preponderates in obeying its mandates, the corrective power is lodged in the Legislature to modify or repeal what they have enacted.

We therefore see no error in permitting Clark to testify. The evidence in favor of the signature being McCully's was most ample to submit to the jury. On that testimony they had a right to find, as they did find, the signature to be genuine.

Third. The learned Judge said to the jury there was no evidence in the case of want of testamentary capacity in James McCully. A careful examination of the testimony leads us to the same conclusion. He appears to have been a man of plain tastes and of economical habits. He was intelligent, careful, and sagacious. Industrious and self controlling, he had the ability to retain as well as to make property. No foolish bargains characterized his conduct. He had a vigorous and well-balanced mind. His testamentary capacity was very clear. The question whether any fraud or imposition was practised on McCully; or that he signed the paper in ignorance of its contents; or that some one wrote the body of the instrument over his signature, and without his knowledge and consent, were all fairly submitted to the jury. The burden of proving these allegations rested on the party alleging them. If he signed the instrument, the presumption is that he did so voluntarily, with a full knowledge of its contents.

It is claimed, however, that when the principal beneficiary under a will is a stranger, having no claims from relationship, direct proof is not required of undue influence in procuring the making of the will. In support of this view Boyd *v.* Boyd (16 P. F. Smith, 283) is cited. That case, however, is predicated on general evidence of power exercised over a testator of comparatively weak mind. If the mental capacity of McCully had been impaired; if he had become weak from age or bodily infirmity, although not to such an extent as to destroy his testamentary capacity, it might have shifted the burden of proof and required the defendant in error to negative, by evidence, a presumption of undue influence. It is shown, however, that McCully's mental capacity was not impaired. He had not become weak through age, bodily infirmity, or otherwise. His mind was clear, strong, and discriminating. His judgment was good and self-reliant.

It is further urged that Clark occupied a semi-confidential relation to the testator, growing out of the fact that the body of the will is in the handwriting of Clark; that this is a suspicious circumstance requiring the fullest explanation. Granted. Yet, if Clark is believed, a full explanation was given. He gave a minute statement of all the circumstances under which the will was prepared.

The Court said substantially to the jury that while the facts proved did not create any legal presumption against the genuineness of the instrument, yet they were calculated to excite suspicion, and made it their duty to be vigilant and careful in examining the evidence in support of the genuineness of the instrument, and not to recognize it as McCully's will unless it had been fairly and satisfactorily established by the evidence. The jury were thus cautioned and warned—cautioned to examine carefully all the evidence casting any suspicion on the will—and warned against disregarding those facts on insufficient evidence.

As bearing on the question of the absence of imposition on the testator, it was relevant to show that he possessed a large estate and died worth from one and a quarter to one and a half millions of dollars; that he had neither wife nor child; and that his relations with Clark were of an intimate business and social character. In the absence of persons having strong natural claims on McCully's bounty, he might more reasonably have donated a small portion of his large estate "to commemorate the long friendship existing between" them.

Digitized by Google

When a witness is called to prove a signature from his knowledge of the handwriting of the alleged signer and not from having seen the particular signature written, we think the better rule is to permit the witness to be cross-examined as to his means of knowledge before he testifies as to the genuineness of the signature in question. The Court departed from this rule in the case covered in the first assignment, but the plaintiff in error sustained no injury thereby. The subsequent cross-examination showed the witness to be fully qualified by his previous knowledge to state his belief in the authenticity of the signature.

We think the learned Judge ruled all the legal questions substantially correctly, and we discover no good reason for disturbing the judgment, therefore—

Judgment affirmed.

Opinion by MERCUR, J. PAXSON and SHARSWOOD, JJ., dissent.

I doubt as to the question of interpretation of the Act of 1869, as decided in the case of Goranflo.—AGNEW, C. J.

Dissenting opinion by PAXSON, J.

I dissent from the opinion and judgment of a majority of the Court in this case for the following reasons:—

1. That the paper in controversy is not a testamentary writing. It is an instrument for the payment of money, and was delivered by Mr. McCully in his lifetime to the person in whose favor it was drawn. Had it remained in the possession of McCully until after his death, it might possibly have been proved as a testamentary paper, but its delivery rendered it irrevocable, and it became a writing obligatory for the payment of money. As such it is within the rule in Mack's Appeal (18 P. F. S. 231), from which case I do not think the present one can be distinguished. As between the parties the seal imported consideration. In the absence of fraud or duress it is conclusive.

2. Even if a testamentary paper, it was not sufficiently proved. Clark drew the paper himself by which he was to be directly benefited to the extent of seventy-five thousand dollars. For this purpose he occupied a confidential relation to the testator, and under the authority of Boyd *v.* Boyd (16 P. F. S. 283) it was not enough to prove the formal execution of the will. It should have been shown that it was read over to the testator; that he knew what he was signing, and that it was the exercise of his free will. On the contrary, it appeared that the paper was not read over to him; that Clark withheld from him the fact that Mr. Cowan had advised him (Clark) that it would operate as a will. This, coupled with the fact that the paper commenced with the words "Know all men by these presents," and that it had nothing upon its face to indicate to the mind of an unlearned man that it was a will, or intended to operate as such, in my judgment brings the case clearly within the rule of Boyd *v.* Boyd. I will observe further, that while the admission of Clark as a witness to sustain the alleged will was not error under the authority of Bowen *v.* Goranflo (23 P. F. S. 357), the gravity of this issue would have justified the Court in reconsidering that case and the proper construction of the Act of 15th April, 1869 (P. L. 30). It is possible the exception in the conclusion of said Act had not been fully weighed, particularly the words "respecting the right of such deceased owner, between parties claiming such right by devolution on the death of such owner." It does not appear that any question respecting *the right of the deceased owner* was before the Court in Bowen *v.* Goranflo, nor do I see how any such question could arise in an issue *devisavit vel non.* But I am not prepared to say that it is impossible, and when such question shall arise, the exception in the Act would apply, and the parties would be competent witnesses. This view would preserve the Act as a whole, and avoid what I cannot but regard as a great evil. It is not too much to say, that no one probably comprehended when the Act was passed, or Bowen *v.* Goranflo decided, that such results would follow. While I would sternly apply the maxim *stare decisis* in all questions affecting rules of property, a decision upon a recent Act of Assembly in relation to a mere question of evidence, might well have been reviewed under the circumstances.

This decision can hardly fail to startle not only the profession, but the community also. It is now the law of Pennsylvania, that where a man produces a will, written by himself, without subscribing witnesses, and wholly in his own favor, purporting to be signed by a wealthy old man who is a stranger to his blood, he is not only a competent witness to sustain the will and prove the vital fact of its execution, but that proof is not required to show that the paper was read over to the testator, or that he knew the character of the instrument he was signing; I think it may be sustained even when it appears affirmatively that it was not read over and explained to the testator; and that the paper itself was of such a character as to convey to the mind of an unlearned man not even a suggestion of its real purport.

I concur in this dissenting opinion.—GEO. SHARSWOOD.

On motion of the plaintiff in error for a reargument of the cause, the Court (MERCUR and

Digitized by Google

GORDON, JJ., dissenting), on January 31, 1876, ordered a re-argument "upon the single question of the competency of Robert D. Clark as a witness in his own behalf on the trial of the issue in the Court below."

The case, accordingly, came on for a re-argument on November 2, 1876.

John H. Hampton (with whom was *John Dalzell* and *Thos. M. Marshall*), for plaintiff in error.

If the issue below had been tried prior to the Act of April 15, 1869, it is conceded that Clark would have been an incompetent witness in his own behalf. This Act is to be construed strictly, as it is in abrogation of the principles of the common law.

Mr. Justice MERCUR, in delivering the opinion of the majority of this Court in this case, when treating of the question of Clark's competency, says: "This was an issue *devisavit vel non*. It was the very question in controversy. It is, then, just the case in which the Act of Assembly says Clark is a competent witness, although a party and interested. To deny this is to disregard the specific terms of the Act, and refuse to give effect to the language cited."

If there was no more in the Act than cited, the conclusion would be correct, but the opinion wholly ignores the qualifications attached to those made competent. The *issues* and *inquiries*, whether *devisavit vel non* or others, in which the witness is competent, must respect, (1) the right of the deceased owner; (2) which right the "parties" must be contending about; (3) that they all claim it in the contest by devolution on the death of the owner.

Here Clark was a stranger, and could not take by devolution—that is, by operation of law, and is carefully excluded by the very words of the statute. There was no "right of the owner" to be tried in which he had an interest either by devolution or otherwise. He was seeking to prove the existence of a testamentary paper, a mode of conveyance, its execution, contents, and delivery to him by McCully.

This provision of the Act is reasonable, and in accordance with its general intent to secure equality. It seals the lips of the living in a controversy as to the rights claimed directly from the dead, and opens the mouths equally of both parties when the controversy must be unaffected by the dead man's testimony were he living.

Diehl *v.* Ewing, 15 Sm. 320.
Gyger's Appeal, 24 Sm. 48.
Hanna *v.* Wray, 27 Sm. 27.
Tioga Co. *v.* South Creek Township, 25 Sm. 437.
Eshelman's Appeal, 24 Sm. 48.
Karns *v.* Tanner, 16 Sm. 297.

The case of Bowen *v.* Goranflo (23 Sm. 357) differs essentially from the one at bar. The inquiry there went to the foundation of the decedent's right, to her capacity to devise; the issue was between parties claiming a right by devolution, thus uniting the two conditions precedent to competency. Here no right of McCully is called in question. His alleged act is itself denied. Here only the defendants take by devolution, while the plaintiff stands in an adversary relation, claiming against the law and its presumptions by reason of something that occurred between him and the dead man whose lips are forever silent.

M. W. Acheson, contra.

The Legislature, by the Act of 1869, made a radical change in the law of evidence. The general intention was to make parties and persons in interest competent witnesses in all civil proceedings. The rule is, that the Court, in dealing with a statute, will give effect, if possible, to the general intent, and the interpretation shall favor that end.

United States *v.* Dickson, 15 Peters, 1·5.

The exception clause of the Act embraces two classes of cases: (1) issues *devisavit vel non;* and, (2) other issues and inquiries. The concluding words, "respecting the right of a deceased owner," etc., refer not to the first, but the second; and leave it clear that the Legislature's intention was that the parties to issues *devisavit vel non* should be competent witnesses.

The counsel for plaintiff in error say that "devolution" in the statute means the transmission of the estate of a deceased owner to his heirs or next of kin by simple operation of law. If this be so, the word, as used in the Act, is inapplicable to issues *devisavit vel non*. It is impossible that both parties in such issues should claim by devolution, if the word means as the other side contends. If all parties claim by simple operation of law, there could be no contest about a will.

The counsel for plaintiff seem to claim that the proviso applies only to issues *devisavit vel non* between parties who are the heirs of the deceased owner, and who would take his estate under the intestate laws if the decision should be against the alleged will. But the Act nowhere speaks of ancestor, heirs, or next of kin. How can the word "parties" be cut down, and made to mean a particular class of claimants? The Act does not hint at a classification, nor are the litigants any the more on an equal footing, because they are all heirs to the deceased owner.

In the case of Bowen *v.* Goranflo (23 Sm. 357), the inquiry did not, as alleged, go "to the foundation of the decedent's right, to her capacity to devise." It was an issue *devisavit vel non*, in which the alleged will was assailed on the ground that it was procured by the undue influence and fraud of Goranflo, who was a devisee under the contested paper. The same objection was made

Digitized by Google

to his competency as was made to Clark's, and for the same reason. Under the intestate laws Goranflo would have taken no share of the decedent's estate. He took wholly as devisee, and yet he was adjudged a competent witness in his own behalf in an issue *devisavit vel non* between himself and the surviving husband of the decedent.

Jan. 8, 1877. THE COURT. The Judges of the Court being equally divided in opinion, the former judgment of affirmance is reaffirmed.

PER CURIAM. WILLIAMS. J.. absent.

Jan. '75, 13. Feb. 13 and 14, 1877.

Security Life Insurance and Annuity Co. v. Elliott.

Life insurance—Condition precedent in policy, waiver of—Principal and agent—Evidence—Admissibility of.

A policy of life insurance required payment of a premium in cash on a day certain. The agent accepted the note of the insured in lieu of cash. The note matured and was dishonored. The insured died, the premium being unpaid, otherwise than by the dishonored note.

Held, that the question whether the note was accepted as an absolute or a conditional payment of the premium was one of fact for the jury.

Held, further, that although the rights arising from the contract were unalterably fixed by the death of the insured, evidence of subsequent acts and declarations was admissible to interpret previous acts of the parties.

Error to the Common Pleas No. 2, of Philadelphia County.

Debt by Victoria R. Elliott against The Security Life Insurance and Annuity Company, upon a life insurance policy, dated October 5, 1871, on the life of J. T. Elliott, the plaintiff's husband. The policy, which was set forth in the narr., contained a clause providing that on failure by the insured to pay promptly the quarterly premiums due respectively on the fifth day of January, April, July, and October of each year, the policy should cease and determine. Plea, nil debet.

At the trial the plaintiff put in evidence the policy of insurance and receipts of the company for premiums paid, dated respectively January 5, April 5, July 5, and October 5, 1872. The receipts were all made out on the printed forms of the company. That of October 5, was as follows:—

Loan	$
Cash quarterly .	52.19
Int. on two loans .	12.16
Total	$64.35

Received amount as above this 5th day of October, 1872.
By E. WILLITS.

Security Life Insurance and Annuity Company.
New York, October 5, 1872.

Received (as per margin) premium and dues on Policy No. 31,638, in full for insuring the life of J. T. Elliott to January 5, 1873, but this receipt shall not be valid or in force until payment is made, as indicated in the margin, and this receipt countersigned by
WILLIAM F. WARING,
Assist. Secretary.

EZRA WILLITS,
Agent at Phila., Pa.

Evidence was also produced of the death of J. T. Elliott on November 13, 1872, and of due service of notice thereof on the defendant. The plaintiff then rested.

The defendant called E. Willits, its Philadelphia agent, who testified substantially as follows: "On October 5, 1872, Elliott came to my office and said he could not pay the premium then due, he wanted time. I told him I would give him 20 days, and hold him insured that length of time. He then gave me his note for the amount due, payable in twenty days. (Note put in evidence). At the same time the receipt was executed for the same amount as the note. The note has never been paid. On October 28th, the day when it became due, Elliott said he couldn't meet payment, he wanted a few more days. I told him that if he took them it was at his own risk. He did not want the note to go to protest, and, at his request, I went to bank and stopped the protest. On November 12th or 13th he came again to my office and asked where the note was. I told him it was in bank. On leaving he said, 'I shall find the note in bank?' and I replied, 'Yes, unless you have taken it out, it is there.' I never saw Elliott again." Cross-examined: "On the evening of November 14th, I wrote a note to Elliott, not knowing that he was then dead."

The plaintiff then offered in evidence the following letter as part of the *res gestæ*, as an interpretation of Willits's own act, to contradict him as to his construction of the transaction with Elliott, and to show that he did not disclose the whole affair:—

PHILADELPHIA, November 14, 1872.

MR. J. T. ELLIOTT:—

Dear Sir: I have just been to bank, expecting to find the amount of your note to my credit. It was not, and I drew the note from the bank, and it is now in my possession.

What shall I report to the Company—the policy lapsed or otherwise?

Yours,
E. WILLITS, per H. J. W.

Objections admitted; exception.

Digitized by Google

The plaintiff in rebuttal offered to prove by Henry Wheeler, the executor of the deceased, that, as such executor, he called upon Willits the day after Elliott's death, and tendered him the amount of the note, and that Willits replied that he had not the note with him, and that he would say nothing until he had received instructions from the company. Objection; admitted; exception.

The defendant presented, *inter alia*, the following points: (3) The evidence of the case wholly fails to show payment of the premium which fell due Oct. 5, 1872. Such payment was a condition precedent to a continuing liability upon the policy; for this reason the verdict must be for defendant. *Answer*. Refused. (4) Payment by promissory note, the note itself being overdue and unpaid at the time of the death of the party insured, is not a valid and sufficient payment to continue the policy in force and sustain this action for the recovery of its amount, and therefore the verdict must be for the defendant. *Answer*. "I negative this point and I reserve the question of law arising upon it. The fact itself is undisputed."

The Court (LYND, J.), after charging the jury that the main question for their decision was whether Willits accepted Elliott's note of October 5, 1872, as an absolute payment of the premium then due, or upon the understanding that it was only to become such when the note was actually paid, said, *inter alia*, in commenting on the evidence: "The receipt is the ordinary receipt of the company, and rather operates the other way; that is, against the theory of Mr. Willits. It is evidence of intention to take the note unqualifiedly. . . . The note was never tendered back to Elliott. You may consider this. You may consider this fact, and give it its force."

Verdict for the plaintiff for $10,526.07.

Judgment was entered in favor of plaintiff on the reserved point, and thereupon judgment on the verdict. A rule for a new trial was discharged by the Court (reported 1 WEEKLY NOTES, 121).

The defendants took this writ, assigning for error the admission of the testimony excepted to, the answers to points, and the portions of the charge quoted.

J. Q. Hunsicker and *C. S. Patterson*, for plaintiff in error.

Payment of the premiums on the dates stipulated was a condition precedent to a recovery upon the policy.

Roberts *v.* Ins. Co., 1 Bigelow Ins. Cas. 634.
Simpson *v.* Ins. Co., 2 Id. 497.
Roberts *v.* Ins. Co., 2 Id. 141.
McAllister *v.* Ins. Co., 1 Id. 292.
Baker *v.* Ins. Co., 43 N. Y. 283.
Pitt *v.* Berkshire Ins. Co., 1 Big. 284.
Mutual Benefit Life Ins. Co. *v.* Ruse, Id. 83.
Want *v.* Blunt, 2 Id. 201.
Acey *v.* Fernie, Id. 266.
Pritchard *v.* Ins. Co., Id. 544.
Want *et al.* *v.* Blunt *et al.*, 12 East. 183.
Acre *v.* Fernie, 7 M. & W. 151. (1 Big. 19, S. C., 2 Id. 266.)
Beadle *v.* Ins. Co., 3 Hill, 161; S. C., 2 Big. 143.
Howel *v.* Knickerbocker Ins. Co., 2 Big. 132.

A creditor's receipt of his debtor's promissory note is never *presumed* to be an absolute payment of the original debt; it becomes such only when the note is paid, unless a different understanding of the parties is shown.

Cumber *v.* Wayne, 1 Sm. Lead. Cas. 457.
Hays *v.* McClurg, 4 Watts, 452.
Weakly *v.* Bell, 9 Id. 273.
Darlington *v.* Gray, 5 Wh. 487.
Dougherty *v.* Hunter, 4 Sm. 382.

An agent, unless expressly authorized to do so, has no power to waive the rights of his principal. Evidence, therefore, of any act of his cannot be admitted to prove a waiver, unless it is shown that such act was ratified by the principal. Under this rule Willits's letter of April 14 was clearly inadmissible.

Bouton *v.* Ins. Co., 1 Bigelow, 51.
Hodsdon *v.* Ins. Co., Id. 218.
Story on Agency, § 134.
Stephens's Digest of Evidence, 24.
Roscoe on Evidence, 29.
Phillips on Evidence, 188, note 81.
Helyear *v.* Hawke, 5 Esp. 72.
Langhorn *v.* Allnut, 4 Taunt. 511.
Kirkstall Brewery *v.* Furness R. W., L. R., 9 Q. B. 468.
Packet Co. *v.* Clough, 20 Wall. 540.
Ins. Co. *v.* Mahone, 21 Id. 157.
Hough *v.* Doyle, 4 R. 294.
Patton *v.* Minnesinger, 1 C. 394.
Fawcett *v.* Bigley, 9 Sm. 413.

The letter does not contradict Willits's testimony. If the note had been paid, Willits could not have suggested that the policy had "lapsed." If the premium was not paid, it was natural that Willits should desire to give Elliott a chance to revive the policy; but his ignorance of the law cannot convict him of inconsistency in his testimony.

Wheeler's testimony, relating to matters subsequent to the death of the insured, was also irrelevant and totally inadmissible, for the rights and relations of the parties were unalterably fixed by such death.

No duty rested upon Willits to tender the note back to Elliott on the latter's failure to pay it when due, and therefore no legal consequence could flow from his omission so to do. There was error in the language of the charge, in so far as it asserted or implied the contrary.

B. H. Brewster and *R. M. Schick*, contra.

Whether there was an extension of twenty days or an unqualified payment of the premium by the note was the very question at issue. Its decision by the jury established necessarily both

Digitized by Google

the waiver of the agent and his authority to waive.

The letter of April 14 was not relied upon to establish the waiver of a cash payment of premium; it was offered merely in interpretation of Willits's previous acts, and to contradict him as to his construction thereof, and for these purposes it was admissible without showing its ratification by the company. So with Wheeler's testimony, which was offered to show that after Willits knew of Elliott's death, he did not at first pretend that the policy had lapsed.

Forfeitures are not favored by the law, and are strictly construed.

March 5, 1877. THE COURT. The only questions in this case depended upon matters of fact. Was the note at twenty days taken in payment of the premium due on the policy? Was there any agreement at the time that the policy should be extended for the term of the credit in the note, and in case of its non-payment the policy should fall? These matters were fairly submitted to the jury, and decided by them in favor of the plaintiff. That fixed the liability of the defendant, there being no other questions made upon the policy. We discover no error in the bills of exception.

PER CURIAM. Judgment affirmed. WILLIAMS, J., absent.

Oct. & Nov. '76, 25. Nov. 20, 1876.

Meyers v. The Commonwealth.

Criminal law—Murder in first degree—Drunkenness—Insanity—Degree of proof required—Reasonable doubt—Errors and appeals—Act 15 Feb 1870, "Schœppe Act"—Whether doubt in the minds of Supreme Court as to existence of an intention to kill, is a ground of reversal—Right of prisoner to have the jury instructed upon every question of law raised by the evidence—Special request to charge upon a particular point not esssential in trials for murder in the first degree.

When upon a trial for a crime the defence of insanity is set up, the burden rests upon the prisoner of proving his abnormal condition. But he is not required to produce proof which shall satisfy the jury beyond a *reasonable doubt*. The evidence need only be *satisfactory*, and the conclusion such as fairly results from a preponderance of the evidence.

A prisoner was tried for murder in the first degree, and pleaded insanity. The Court below charged the jury that before they acquitted on that ground they must be satisfied, "beyond a reasonable doubt," that the prisoner was insane at the time the act was committed. The prisoner was convicted of murder in the first degree.

Held, that the charge of the Court was too stringent and threw the prisoner on a degree of proof beyond the legal measure of his defence.

What is "reasonable doubt," and what is "satisfactory proof," considered.

Quære. Where a prisoner has been convicted of murder in the first degree, and sentence pronounced thereon, whether, under the Act of 1870, commonly called the "Schœppe Act," a doubt in the minds of the Supreme Court of the existence of an intention to kill will be a ground of reversal.

Per AGNEW, C. J. Where a jury who hear the witnesses and observe their conduct take the darker view and believe the intent to kill existed, and in this view are sustained by the Court below, it is a nice question how far our views of the evidence should prevail to grant a new trial.

Per PAXSON, J. It is the duty of a Judge, trying a man for his life, to charge fully upon the law as applicable to the facts, without regard to the points presented by counsel. The prisoner has the right to have the jury properly instructed upon every question of law, legitimately raised by the evidence, and this right he cannot waive, nor can his counsel do so for him.

Error to the Oyer and Terminer of Allegheny County.

Frederick Meyers was tried at March Session, 1876, in the Oyer and Terminer of Allegheny County, under an indictment for the murder of Augustus Dorn, *alias* "United States Baker," at Pittsburgh, on Feb. 29, 1876. Death resulted from Meyers having thrust a poker, heated to a "white heat," into the groin of the deceased and thence upwards into the abdominal cavity.

The material facts disclosed on the trial were as follows: At the time of the infliction of the injury, Meyers kept a drinking-saloon on Third Avenue in Pittsburgh, and Dorn lived with him upon friendly terms as a sort of man of all work, doing various chores, etc., for his board. Both were hard drinkers, and some two weeks before this time, Meyers had an attack of mania-a-potu, the effect of which was still present with him, as he drank on unrestrainedly. And two days prior, he bought a couple of bottles of rat-poison, and drank the whole of one bottle, with the apparent object of terminating his existence. A physician was called in, and he was afforded some relief, but, for the next few days, he lay about the house, suffering not only from the effect of the poison that he had taken but also from the bad liquor he had and was still indulging in. And such was his condition, physically, at the time he inflicted the injury on Dorn. A number of witnesses testified to their belief in the prisoner's insanity, both on the day of the act and previous thereto, most of them agreeing that such insanity was owing to the combined effects of liquor and ratpoison, and that in consequence thereof his mind became weakened and simple.

On the morning of the day on which the wounding took place, Meyers and Dorn had some slight altercation concerning a watch and chain which the former accused Dorn of stealing, but upon

Digitized by Google

Dorn's returning the watch, the trouble apparently passed away. Both drank copiously during the day, neither eating anything, Dorn lying on a settee in the bar-room most of the time, and Meyers only rising from his bed to drink, and returning immediately thereto. Late in the afternoon Meyers got up and played a game of casino with a woman residing in the house. During the game, Dorn came in and picked up the woman's cards, whereupon Meyers told him to let them alone and threw a glass of water into his face, but without much feeling being evinced on either side. Meyers returned to bed, but about 7 o'clock again got up, came down into the bar-room, and, after rousing Dorn and telling him to get up as he wished to lie on the settee himself, went to the stove in the room, picked up a small fire-poker, put it into the fire for a few moments until its point was white-hot, when, advancing to where Dorn was sitting, he began flourishing the poker round him in a laughing and fooling manner, Dorn's only resistance consisting in his saying, "Stop fooling, Fred, stop fooling." Finally, Meyers made a lunge at Dorn with the poker, which, as it afterwards turned out, resulted in the wound that caused Dorn's death, but, at the time, the latter gave no evidence of being hurt, and Meyers, putting the poker down, returned to his bed. Some ten minutes after a stream of blood was discovered issuing from Dorn's pantaloon leg, and, upon examination, it was found that the poker had entered his groin and abdominal cavity, to the depth of one or two inches. He was taken to a station-house, and then to the Homœopathic Hospital, where he subsequently died. At the time the poker was thrust into him, it was bent at the end, and physicians testified that they thought that if it had been straight at the time of penetration "it would have gone more downward and not upward," and so not have inflicted so severe an injury.

As soon as the injury was discovered, there was some talk about sending for a doctor, but Meyers objected, saying "there was no use, as he was not hurt bad." Testimony was also admitted to show that just before Dorn's death, he told two witnesses that "he didn't think Fred would have done it if he had been in his right sense, and if he had not been with that poison and drinking; that he blamed the poison for doing it."

To rebut this evidence of insanity the Commonwealth proved a number of acts done by the prisoner before and at the time of his arrest tending to show that he was of sound mind.

The Court [KIRKPATRICK, P. J.] charged the jury as follows:—

"Murder at the common law is defined and described to be, when a person of sound memory and discretion, unlawfully kills any reasonable creature in being, and under the peace of the Commonwealth, with malice aforethought, express or implied. The distinguishing feature and criterion of murder, so enumerated and defined, is *malice aforethought*. Murder, therefore, at common law, embraces cases where no intent to kill existed, but where the state or frame of mind termed *malice* in its legal sense prevailed.

By the Act of 31st March, 1860, of our Legislature, however, it is declared that "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree."

The *intention to kill*, in all of the very many cases which have been decided under this clause of the statute, has been universally held to be the very gist and essence of the offence. If that intention is wanting, therefore, there can be no conviction of murder of the first degree. All murder, therefore, which is not of the first degree, as suggested and defined by the statute, is *necessarily* of the second degree, and includes all unlawful killing under circumstances of depravity of heart, and a disposition of mind regardless of social duty, and fatally bent on mischief; but where no *intention to kill* exists, or can be reasonably and fully inferred. Therefore, in all cases of murder, if no *intention to kill* can be inferred or collected from all the evidence in, and circumstances surrounding the case, the verdict must be murder of the second—or it may be even of a lower degree. *Manslaughter* is defined to be the unlawful killing of another without malice, express or implied; which may be voluntarily, in a sudden heat, or involuntarily, but in the commission of an unlawful act. Voluntary manslaughter often so nearly approaches murder, that it is necessary to distinguish it clearly. The difference is this: manslaughter is never attended by legal malice or depravity of heart—that condition or frame of mind before spoken of, exhibiting wickedness of disposition, and recklessness of consequence, or cruelty. Being sometimes a wilful act (as the term voluntary denotes) it is necessary that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty. Therefore, to reduce an intentional blow, stroke, or wounding, resulting in death, to voluntary manslaughter, there must be sufficient cause of provocation, and a state of rage or passion, without time to cool, placing the prisoner beyond the control of his reason, and suddenly impelling him to the deed. If any

Digitized by Google

of these be wanting—if there be provocation without passion, or passion without a sufficient provocation, or there be time to cool, and reason has resumed its sway, the killing will be murder.

Insulting or scandalous words are not sufficient cause of provocation, nor are actual indignities to the person of a light and trivial kind. Whenever the act evidences a deadly revenge, and not the mere heat of blood; whenever it is the result of a devilish disposition, and not merely the frenzy of rage, it is not manslaughter, but murder.

Having thus stated the law of the crime, and noted the distinction between and different grades of felonious homicide, let us very briefly, and as clearly as we can, suggest the law of the evidence having application in cases such as you are here and now called upon to determine.

And first it may be stated as a general rule, that all homicide is presumed to be malicious—that is, murder of some degree, until the contrary appears in evidence. Therefore, the burthen of reducing the crime from murder to manslaughter, where it is proved that the prisoner committed the deed, lies upon him. He must show all the circumstances of alleviation or excuse upon which he relies to reduce his offence from murder to the milder degrees and kinds of homicide; unless, indeed, where the facts already in evidence show it. So, too, as in this case, where the prisoner claims not a lower degree of homicide only, but an absolute acquittal, he must show all the circumstances by way of excuse upon which he relies to bring about such a verdict, and the burthen of satisfying you that he is entitled to such a verdict, rests upon him, where, as in this case, the killing, and the killing by the prisoner, are equally and both alike admitted.

Let us, however, not be misunderstood. Although the homicide without the circumstances of alleviation or excuse, is presumed to be murder, it is not presumed to be murder of the first degree. The presumption against him rises no higher than murder of the second degree until it is shown by the Commonwealth to be murder in the first degree.

When death ensues, as in this case, from the use of a deadly weapon, the jury must scan closely the conduct of both parties, their former relations and behavior and the current of events as they transpired; the character of the weapon, the manner of its use, and all of the circumstances attending it; and by a careful survey of all the evidence, and a conscientious judgment and appreciation of all the facts and circumstances disclosed by the testimony, endeavor to arrive at the true motive and cause which prompted the fatal blow. In coming to a conclusion in this regard, you will take into consideration each and every circumstance connected with, surrounding and having bearing upon the homicide, and in any way tending to shed light upon its perpetration.

But it is claimed that the prisoner at the bar should be acquitted by reason of INSANITY, at the time of the perpetration of the act. That by reason of previous habits of dissipation long indulged in, and further, in consequence of poison taken by him some days before, and from the effects of which he had not fully recovered, his reason was dethroned, his judgment gone. That he had no control of his will and of his actions at the time, and so was wholly unconscious of this or any other act done by him. In a word, to put it in plainer phrase, he was not accountable for anything done by him at the time the homicide was committed.

What then is "insanity," and more especially that which in the judgment of the law is a sufficient defence to shield this prisoner from the effects and consequences of his crime? Let us inquire, and to this inquiry, so vital to the prisoner, and so pregnant with results, I beg your especial attention and most careful and conscientious observation and judgment.

INSANITY—*in* not—and sound—sound or sane—is the lack of, or the opposite of sanity—or as technically and philologically defined, "The state of being unsound in mind, derangement of intellect, madness. *Insanity* is chiefly used, and the word is applicable to any degree of mental derangement from slight delirium or wandering to distraction." One so conditioned mentally at the time of the commission of a crime, is held in law, as he is in morals, irresponsible, and can no more be convicted and punished for his offence than the child of tenderest years, or the lunatic confined by the walls of an asylum. The justice and humanity of this proposition are obvious. Applied practically to the case upon trial; if the prisoner at the bar at the time of the perpetration of this admitted homicide was insane, or so deficient in mental capacity, as to be unable to form an intent to take life, he cannot be found guilty of murder of the first degree, or, indeed, of any offence under this indictment, and is entitled to an acquittal at your hands, by reason of such insanity or mental weakness.

At the threshold of these instructions upon this branch of the case, it is proper that I should say, as I do, and beg to call your especial attention to the remark, that, though the law, in its charity, very properly always presumes men innocent until they are proved guilty, yet it is also a presumption, essential to the safety of society, as well as founded in experience, that every person is of sound mind until the contrary appears from the evidence; and the unsoundness of mind must be established by the defendant satisfactorily to the jury. The burden is upon him to establish this fact.

Digitized by Google

The law of this State is that, where the killing is admitted as in this case, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act, and a doubt as to such insanity will not justify the jury in acquitting upon that ground.

The law presumes sanity, when an act is done, if no insanity is shown by the evidence, and when and if it appears a man was sane shortly preceding the act, and shortly after, the presumption of sanity exists at the time of the act, and no jury have a right to assume otherwise, unless the evidence in the cause, and the evidence in connection with the act, fairly convinces them that the defendant was actually insane at the moment the act was committed.

And here let me enumerate, briefly, as I do, the circumstances upon which the Commonwealth rely to convict. It is claimed by the Commonwealth that this man, from the time that he got out of the workhouse until the evening of the perpetration of this terrible act, was sane; that his every conduct evidenced entire sanity; that he transacted his daily business; it is claimed further, as I gather it as I listened to the argument of the learned District Attorney as I was preparing these instructions, that upon the Saturday previous, the defendant was attending to his business as usual; he had mind to send for a barber to come and shave him by the man he afterwards killed; that the barber came on the Tuesday following and shaved him; that he directed the barber to shave his bar-keeper; that upon the afternoon of that day he sat down with the girl "Jennie" to play a game of casino; that he was sufficiently at himself, sufficiently up in his game to play his cards successfully, and to accomplish her defeat; and to join her in taking a drink; and this, too, a short time previous to the killing; that he had sense enough, in order to perpetrate this offence, to put the poker into the hole of the stove; to heat it by the fire to a "white heat," and to thrust it into the groin or person of the deceased; that he was sane enough when called upon by the officers, in the first place to demand a warrant, and then to declare that he would not go unless he was taken and carried; and then to declare that he would not go at all; and to declare that he would shoot the "son of a bitch" that would arrest him; and then when brought to his notice that he must go, that previously being in his stocking feet, he had sense enough to put on his slippers and go, etc.

From all these circumstances it is insisted that the defendant was sane at the time of the perpetration of the act. To this the defendant answers through the mouth of his witnesses, and it is urged upon you with great zeal and ability by his accomplished counsel, that he had prior to this thing been drinking to excess; that for months before that, from the time that he separated from his wife, he had given himself up to bad habits; that from the time he came out of the workhouse he was drinking to excess; that some two or three days previously he had taken poison, and from the effects of this and the drinks he had taken afterwards, he had not recovered; and that he was not in a condition to know what he was doing at the time. And as further evidence in that regard they put these girls upon the stand, not as experts, but as giving their views of his mental condition. They call men who were in the cell with him, and they call other men to testify to his conduct and his manner; from all of which they ask you to infer that at the time of the perpetration of the act the man was insane. As to his conduct in the cell it will be for you to say whether it was simulated or whether it was real. It will be remembered by you that Leigh detailed his conduct in the cell to you, how he sat down and told him about his troubles; the story about how he was committed, and cried about it. [These things will all enter into your deliberations in making up your minds as to his sanity, bearing in mind that, the killing by the prisoner being admitted, the duty devolves upon him, to clear himself of the killing, to satisfy you beyond a reasonable doubt that he was insane at the time the act was committed.] And in deciding upon this case, or upon any material part of it, such as the alleged insanity of the prisoner—which is the most material part of it—it is your duty to give the prisoner the benefit of any reasonable doubt arising out of the evidence which might prevent you from coming to a satisfactory conclusion. But this doubt—I call your attention to this—must fairly arise out of the evidence, and not be merely conjured up as a figment of the imagination. Jurors greatly mistake their duty when they go in search of a doubt outside of the evidence in the case. They have no right to raise a mere fanciful or ingenious doubt to escape the consequences of an unpleasant or painful verdict. It must be an honest, it must be a conscientious doubt; such a doubt as would cause an ordinary prudent man to hesitate; such a doubt as would fairly strike a conscientious mind, and cloud the judgment. When the law supposes a reasonable doubt, it does not mean that you are to speculate as to whether a matter is established by the evidence to your satisfaction, and might not have been otherwise; it means that you are to take nothing for granted upon mere assertion; and it means further that when you honestly hesitate upon a question whether certain evidence establishes certain propositions when at the truth, cannot come to a satisfactory conclusion as to the existence of a certain fact or not, as to its effect, then the doubt belongs to

Digitized by Google

the prisoner at the bar. The difficulty, the reasonable doubt, as we have said, must be suggested by the cause itself, by the evidence incident to it, and not by the imagination of the jury. If the beam waver, then the doubt is thrown into the defendant's scale; but the jury must not so hold the beam as to cause it to tremble either in favor of the Commonwealth or of the defendant.

[Returning again to this defendant's insanity, I again, and in one word, remind you, and impress upon you what I have already said, that where, as in this case, the killing by the prisoner is admitted, and insanity is alleged by way of defence, it is his duty to satisfy you, and the labor is upon him to convince you, that insanity, madness, actually existed at the time of the commission of the crime; and a doubt as to such insanity will not justify you in acquitting the prisoner upon that ground. If *he has so satisfied you, if he has so convinced you beyond a reasonable doubt, such doubt being of the kind and of the character we have already discussed and defined to you, then the prisoner* is not responsible for anything that he might have done,] and is entitled to a verdict of acquittal at your hands; but if, upon the other hand, he has not so convinced you and satisfied you, he should be convicted, in such form and in such degree as you, in the exercise of your best judgment and most conscientious deliberation, think just and right under all the evidence which has been submitted to you. With the consequences of your verdict you have nothing to do. Those who take up the sword, as we have it upon high authority, must perish by the sword, and he who sows the wind need not be surprised if he should reap the whirlwind. The defendant, and not the Commonwealth, has made the bed upon which he lies to-day; and if the bed is too short that he cannot stretch himself, or if it is so long he cannot cover it, it is the fault of the prisoner, and not of the Commonwealth. Should you be of the opinion, gentlemen, that the man is not insane, that he was sane at the time of the perpetration of the act, but if you should be of opinion that he had no intent to kill, which is the essence, which is the very heart of murder, if he was not guilty of wilful, deliberate, and premeditated killing, and still sane, then, gentlemen, you can find him guilty of murder in the second degree if you think it right under the evidence. Or still lower; if you think the evidence does not warrant that you can find him guilty of voluntary manslaughter, giving to the prisoner, as I have already said, the benefit of every reasonable doubt; as, for example, if you have a reasonable doubt that he had an intention to kill; that his conduct did not evidence wilfulness, deliberation, and premeditation, then you should find him guilty of murder in the second degree. If coming still further down, you find his conduct did not indicate such a degree of crime, and you have a reasonable doubt about it, then you should find him guilty of voluntary manslaughter; [and if, as I have already stated, you find him wholly irresponsible, *if he has satisfied you beyond a reasonable doubt*, a conscientious doubt arising out of the case, that he had no moral sense, that he was, in plain phrase, a madman, at the time of the perpetration of the offence, then he should be acquitted of all crime, and you should so note the fact, and acquit him upon the ground of insanity]"

The jury (after having requested further instruction on the subject of "reasonable doubt," which was given by repeating portions of the charge to them) found the prisoner guilty of murder in the first degree.

A motion for a new trial having been made and refused, sentence of death was accordingly pronounced.

The defendant took this writ, assigning for error, *inter alia*, the whole charge of the Court (*ut supra*), and especially the portions of it within brackets; and that the evidence adduced on the trial of the cause in the Court below, did not warrant a verdict of "Guilty of murder in the first degree."

John Coyle and *William Reardon*, for plaintiff in error.

The main question raised by the specifications of error is what *amount* of evidence is required to establish the defence of insanity in Pennsylvania. Without going into any extended review of the authorities, we respectfully submit that this question is so well settled in this State that it scarcely admits of any discussion.

In the case of the Commonwealth *v.* Ortwein (26 P. F. Smith, 420), it was laid down that, in order to support a defence on the ground of insanity, the law does not require proof to an extent to preclude a reasonable doubt of such insanity, but it should be such as to satisfy the jury from the *preponderance* of testimony that the prisoner was insane at the time of the killing. See also—

Lynch *v.* The Com., 27 Sm. 205.
Brown *v.* The Com., 28 Sm. 122.
Com. *v.* Eddy, 7 Gray, 583.
Laffner *v.* The State, 10 Ohio, 598.
People *v.* McCan, 16 N. Y. 58.
Com. *v.* Mosler, 4 Barr, 264.

If this be the doctrine in Pennsylvania, his Honor in the Court below, in this case, was certainly in error when he instructed the jury substantially that where the defendant relies upon the defence of insanity, he must produce evidence to satisfy and convince the jury to an extent to preclude or shut out a reasonable doubt of his sanity; in other words, that he must satisfy a jury beyond a reasonable doubt that he is insane.

Digitized by Google

And we insist that under all the evidence in the case (even admitting that there was no sufficient proof of the defendant's insanity), the defendant was not guilty of murder in the first degree, as there was an entire absence of motive or intent to take life.

E. A. Montooth, Dist. Attorney, contra, presented no paper-book.

Jan. 2, 1877. THE COURT. There is one error, for which the sentence in this case must be reversed. It appears in several parts of the charge, leaving no doubt as to the meaning of the learned Judge who presided at the trial. It must, therefore, have impressed the minds of the jurors. Without specifying each instance, it may be summed up in a single statement that the Judge instructed the jury, that they must be satisfied *beyond a reasonable doubt*, that the prisoner was insane at the time the act was committed. This statement is too stringent, and throws the prisoner upon a degree of proof beyond the legal measure of his defence. That measure is simply proof which is satisfactory—such as flows fairly from a preponderance of the evidence. It need not be beyond doubt. A reasonable doubt of the fact of insanity, on the other hand, is not sufficient to acquit upon a defence of insanity. This has been held in several cases. (Ortwein *v.* Com'th, 26 P. F. Smith, 414; Lynch *v.* Com'th, 27 P. F. Smith, 205; Braun *v.* Com'th, 28 P. F. Smith, 122.) Sanity being the normal condition of men, and insanity a defence set up to an act which otherwise would be a crime, the burthen rests upon the prisoner of proving his abnormal condition. But the evidence of this need be only satisfactory, and the conclusion such as fairly results from the evidence. Where the evidence raises a balancing question, and the mind is brought to determine its preponderance, there may be a doubt still existing in the mind, yet the actual weight may be with the prisoner; and this proof should be considered satisfactory. In cases of conflicting evidence, the preponderance must govern, there being no other rational means of decision. But if we say, in such a case, it must be satisfactory beyond a reasonable doubt, it is evident the expression implies more than a mere preponderance. It is difficult to define the precise difference between the two measures, yet we are conscious in our own minds that to be convinced, beyond a reasonable doubt, is a severer test of belief than to be satisfied that the preponderance falls on that side. Probably the true reason of the difficulty in defining the difference lies in the inability to define a reasonable doubt. A reasonable doubt must be an honest and conscientious difficulty in believing; one not merely subtle or ingenious, it must arise out of the evidence, and not be fanciful, or be conjured up to escape consequences; it must strike the mind with such force as to compel it to pause in yielding belief. These are characteristics, but do not define the measure of belief which is beyond a reasonable doubt. The Judge stated well all these characteristics, and yet in conclusion said, by way of illustration of his meaning, "If the beam waver, then the doubt is thrown into the defendant's scale, but the jury must not so hold the beam as to cause it to tremble either in favor of the Commonwealth or the defendant." Now, if we apply this illustration of the reasonable doubt which operates to acquit a prisoner, to the evidence of his insanity, and say that his proof of the fact shall be beyond a reasonable doubt, and if the beam wavers it is to be found against his defence, we discover that it implies a higher degree of proof to establish the defence of insanity than the law warrants. It must be not only satisfactory, but be satisfactory beyond a reasonable doubt. The beam must not waver when preponderating to the defendant's scale, but it must go down quickly. It seems to us, therefore, that this expression, so often repeated to the jury, must have impressed them with a belief that a high measure of proof of the insanity of the prisoner was required. The distinction may appear nice, yet we must not overlook the effect of language upon common minds, when the stake is life. Justice cannot suffer it to be imperilled beyond a just measure of belief in those who are the triers. Common minds do not analyze accurately the degrees of belief, or the nature of the doubts which affect it. We think, therefore, there was error in stating the degree of belief in regard to the defence of insanity too strongly.

This conclusion renders it unnecessary to decide the question whether "the ingredients necessary to constitute murder in the first degree were proved to exist." We would avoid the inquiry in this case, because it raises a new and difficult question under the Act of 1870, commonly called the Schœppe Act—that is to say, how far a doubt in the mind of this Court, of the existence of an intention to kill, will be a ground of reversal. We have held in the case of Grant *v.* Commonwealth (21 P. F. Smith, 495), that where the ingredients of murder in the first degree are proved to exist, the power of this Court to grant a new trial ceases.

But there may be cases, and perhaps this is one of them, where the facts from which the intention to kill (the principal ingredient of murder in the first degree) may be inferred, are so doubtful that different views of their operation may be taken. Where a jury who hear the witnesses, and observe their conduct, take the darker view and believe the intent to kill existed, and in this view are sustained by the Court below, it is a nice question how far our views of the evidence should prevail to grant a new trial.

Digitized by Google

We abstain from indicating any opinion on this question, yet it is not amiss to suggest, as there must be a new trial, that a careful inquiry should be made, how far the facts disclose any intent to take life. The intent to do grievous bodily harm was clear, and the prisoner's frame of mind was undoubtedly malicious, and hence the case was one of murder. But whether the prisoner intended to take the life of the deceased, is not so clear. The place at which he aimed the heated poker, viz., the groin, and not at a vital organ; and the direction the poker would have taken, to wit, downwards instead of into the abdomen, had not the end of the poker been bent; and the entire conduct and demeanor of the prisoner, before and after the occurrence, all together, are circumstances which may not convince the mind of an actual intention to take life, while they lead to a conclusive belief of an intent to do great bodily harm.

But for the error heretofore stated, the sentence is reversed, and a *venire facias de novo* awarded.

Opinion by AGNEW, C. J. WILLIAMS and MERCUR, JJ., absent.

Concurring opinion of PAXSON, J.

I would reverse this judgment upon the ground of the inadequacy of the charge. I hold it to be the duty of a Judge, trying a man for his life, to charge fully upon the law as applicable to the facts; and this without regard to the points presented by counsel. The rule that a Judge is not to be convicted of error for what he omits to say, unless his attention is called to the subject by a point or request to charge, is well enough in civil cases, but ought not, in my judgment, to be applied to a capital case. The prisoner has a right to have the jury properly instructed upon every question of law legitimately raised by the evidence. This right he cannot waive, nor can his counsel do so for him.

In this case the charge was wholly inadequate. This was probably owing to the fact that the prisoner's counsel mistook their line of defence. They relied to a great extent upon the ground of insanity. Upon this point there was no evidence worth submitting to the jury. There was nothing to show that general insanity which dethrones reason and relieves from legal and moral responsibility. But there was abundant evidence of that condition of partial insanity produced by drinking, which, while it is no excuse for crime, is nevertheless sufficient to prevent the formation in the mind of that deliberate intent to kill which is of the essence of murder in the first degree. In other words, the defence was insanity instead of intoxication. Of the former, there was no evidence; of the latter, there was abundance. The points put by the prisoner's counsel referred to insanity, and the learned Judge charged elaborately upon this branch of the case. His rulings, whether correct or otherwise, had no application to the facts. The defence set up having utterly failed, I am not surprised that the jury convicted of the capital offence. Had the law, as applicable to intoxication, been properly submitted to them, it is possible they would have convicted the prisoner only of murder of the second degree. It is not necessary to elaborate. I concur cheerfully in the judgment.

July, '76, 56. **Matthews v. Long.** Feb. 2, 1877.

Bills of exchange and promissory notes—Acceptance—Fraud and misrepresentation, averment of in affidavit of defence—What particularity required.

In a suit by the holder against the acceptor of a bill of exchange an affidavit of defence is insufficient which contains merely a general allegation that the acceptance was procured out of the usual course of business and by means of false statements. The affidavit should state facts distinctly to show how the acceptance was procured and what false statements were made.

Error to the Common Pleas No. 1, for the County of Philadelphia.

Assumpsit by Long, Schweyer & Co., against Matthews upon the following bill of exchange:—

700\frac{00}{100}$ Pottsville, Dec. 28th, 1875.

Sixty days after date, Pay to the order of Messrs. Long, Schweyer & Co. Seven hundred Dollars, Value received, and charge the same to account of

JNO. A. SCHWEERS, Sec'y.
Mill Creek Iron Co.

To Charles W. Matthews, Esq.,
133 Walnut Street, Philadelphia.
Accepted, CHAS. W. MATTHEWS.

Defendant filed an affidavit of defence, setting forth as follows:—

The above action was brought upon an instrument of writing in nature of a bill of exchange, of which the Mill Creek Iron Company were the drawers, and the said Long, Schweyer and Company, plaintiffs herein, the drawees, and the said deponent, the acceptor. That the said deponent, neither at the time of the acceptance of the said instrument of writing, nor at any subsequent time, was in any manner indebted to either the drawers or drawees of said instrument, nor had he in his possession or control at said time of acceptance or at any subsequent period, any funds, merchandise, or property of any kind or nature, whatsoever, of either of them the said drawers or drawees, but that on the contrary the said drawers were then and still are largely indebted to the said deponent. And deponent further says, that the said acceptance was procured out of the usual course of business, and without any consideration

Digitized by Google

of any kind or nature, whatsoever, by and through the false statements and misrepresentations of one Zacus P. Boyer, who then was and still is, President of the said Mill Creek Iron Company, drawers of the said instrument. And deponent further says, that he has been informed, and believes and expects to be able to prove at the trial of this cause, that the said plaintiffs were well aware that the said acceptance was obtained out of the usual course of business, and that the same was without consideration of any kind or nature whatsoever, notwithstanding which full knowledge, they, the said plaintiffs received the said acceptance and instrument of writing, all of which deponent verily believes and expects to be able to prove on the trial of this cause.

The Court below entered judgment against defendant for want of a sufficient affidavit of defence, wherenpon he took this writ, assigning for error the entry of judgment.

B. P. Wilson, for plaintiff in error.

The affidavit was sufficient to put the plaintiff upon proof of his bona fides.

[SHARSWOOD, J. You carefully avoid saying that the plaintiff knew there was fraud. You only say it was irregular. Now what do you mean by irregular?]

Why, out of the usual course of business. In Losee *v.* Bissell (26 Sm. 459) your Honor said: "But to determine the character of the endorsee as a bona fide holder for value without notice, the point of time at which he parts with his money is an important fact. If the paper was then on its face irregular, out of the usual course of business, the effect of that knowledge on the endorsee would not be prevented by subsequently putting it in regular shape."

[SHARSWOOD, J. You ought to have set out the facts which made this irregular.]

We do not simply say that it was irregular, but say that the plaintiffs knew of the irregularity.

P. K. Erdman, contra.

To put the plaintiffs upon proof of bona fides, there must be distinct averments of fraud, or knowledge of irregularity in the negotiation communication to the plaintiffs at or before the time of the negotiation. The facts relied upon as constituting such fraud or irregularity must be distinctly and fully set out in order that the Court may judge of their legal effect.

Stett *v.* Garrett, 3 Whart. 281.

Feb. 12, 1877. THE COURT. The averment in the affidavit of defence, that the defendant's acceptance was procured out of the usual course of business, and without consideration and by false statements and misrepresentations, is too general. It ought to have stated facts distinctly to show how the acceptance was procured and what false statements were made.

PER CURIAM. Judgment affirmed.

Common Pleas—Equity.

C. P. No. 2. March, 1877.

Penn Mutual Ins. Co. v. Watson, Ex'r, et al.

Interpleader—Jurisdiction in equity notwithstanding the statutory remedy at law—Life-insurance policy payable to third person—Revocation by person whose life is insured.

Hearing on bill and answers.

The facts, as they appeared in the bill and answers, and substantially undisputed, were that John H. Jones in December, 1863, took out a policy, No. 5058, in the plaintiff company upon his own life, payable (by his direction in writing on the face of his application) at his death to his mother, Ann S. Jones, her executors, administrators, or assigns. Ann S. Jones died during the lifetime of her son, the insured. After her death, the insured brought the policy to complainants in January, 1865, and surrendered it; and they issued to him a new one, bearing the same date and number, and at the same rate of premium, payable to Edwin T. Chase, trustee of Robert S. Jones, the insured's nephew. In January, 1868, the insured brought this second policy to complainants, and they again cancelled it, and issued a third, bearing the same number and date, and at the same rate of premium, but payable to the executors, administrators, or assigns of the insured himself.

The bill then charged that all three of said policies were but one contract, and that was made with the said John H. Jones; that all the premiums were paid by said Jones himself, or with his money, and the said several policies were at all times in his possession; that the said Jones died in Sept. 1874, and his executors had brought suit on the last policy in the Court of Common Pleas No. 4, of Philadelphia.

The executors of the insured, John H. Jones, the administrators of Ann S. Jones, the mother, and Chase, trustee of Robert S. Jones, the nephew, were made defendants, and the bill prayed that the said parties be enjoined from prosecuting any suit at law, and be required to interplead and assert and have adjudicated their respective claims in this proceeding.

Huey, for complainants.

The remedy in equity remains, where the Interpleader Act cannot be satisfactorily applied. There being three claimants here, an issue cannot be tried by a jury.

J. Fletcher Budd, E. M. Hunt, and *Edwin T. Chase*, for defendants.

There is a personal liability asserted here, not a mere claim by different parties to the same sum of money. This is a case for trial at law.

Digitized by Google

Cracoshay *v.* Mornton, 2 M. & Cr. 15.
Story's Equity Pl. 807, 811, and 812.

The Court having expressed the opinion that the remedy in equity was the proper one (see 2 WEEKLY NOTES, 485), the parties then by agreement submitted their respective rights to adjudication in this bill, and it was argued by the same counsel and upon the same authorities as already reported (*supra*).

C. A. V.

March 10. Decree that the plaintiffs pay the amount of the policy No. 5058 to the executors of John H. Jones, deceased; and that, as to the claims of the other defendants, the plaintiffs be discharged and acquitted; and that the said defendants, the administrators of Ann S. Jones, and Chase, trustee, pay the costs.

Common Pleas—Law.

C. P. No. 1. March 8, 1877.

Cain et al. v. Shakespear.

Attachment of vessels—Act 13 June, 1836—Vessels released from attachment by giving bond not liable to be taken in execution after final judgment in attachment suit—Shares of co-owners in the vessels cannot be sold upon execution against the Master and part-owner who had given bond for the release of the vessel—The giving of a bond is an absolute release of the vessel.

Rule for a new trial and for judgment *non obstante veredicto* on point reserved.

Feigned issue under the sheriff's Interpleader Act, by Alexander H. Cain *et al.*, claimants of seven-eighths of the schooner "Maggie Cain" against William M. Shakespear, the plaintiff in an execution levied upon said vessel. The following facts were proved:—

In 1870 Shakespear filed a libel under the Act of 13 June, 1836 (Purd. Dig. 94), against said schooner and Wm. Fisher & Son, owners or reputed owners, and Andrew Scull, Master. Subsequently Andrew Scull, as Master and part-owner, intervening for himself and the present plaintiffs, who were his co-owners, claimed the vessel under a title prior to the attachment, and gave bond under said Act of 13 June, 1836, for the release of the vessel, which was then allowed to proceed on her voyage. The attachment suit resulted in a judgment for libellant. (See Scull *v.* Shakespear, 25 Sm. 297.) The vessel having returned to port, one of the sureties on the bond of Andrew Scull notified libellant of her return, and requested him to issue execution and seize her. Libellant accordingly caused a *fi. fa.* to be issued against William Fisher & Son, and Andrew Scull, and levied on the vessel. The present plaintiffs then claimed seven-eighths of her, and gave bond under the Interpleader Act.

(For a more extended report of the facts of this case, see Shakespear *v.* The Schr. Maggie Cain, *ante*, 167.)

The Court (ALLISON, P. J.) directed a verdict for plaintiffs, reserving the point whether the interests of the plaintiffs in the vessel were liable to be taken and sold under this execution.

Arthur M. Burton, for the rule.

The condition of the attachment bond in this case is similar in its terms and legal effect to that given by a claimant under the sheriff's Interpleader Act. In case of a decision against the claimant, execution first issues against the goods, and it is only in case they have been eloigned that a remedy is sought upon the bond.

Hill *v.* Robinson, 8 Wr. 382.
Hill *v.* Grant, 13 Wr. 200.

Both at common law and in admiralty bail have the right to surrender their principal.

Petersdorff on Bail, 405.
Cowles *v.* Brawley, 4 Watts, 358.
Lane *v.* Townsend, Ware, 286–308.

The bond for the release was a recognizance of special bail, and the notice from one of the sureties that the vessel had returned to port and should be levied on, was in effect a surrender of the principal. If the creditor had disregarded such notice, the sureties might have been discharged.

Newell *v.* Norton, 3 Wall. 266.
Erie Bank *v.* Gibson, 1 Watts, 146.

Scull, as Master, had the right to give bond for the release of the vessel from attachment, and judgment having been recovered against him, he has an equitable right to make the vessel answer for the debt.

Barker *v.* Highly, 15 C. B. U. S. 27.

The sale of the vessel under an execution against Scull would pass to the purchaser all the rights which Scull had in her at the time of execution.

Thomas *v.* Ashbrooke, 1 WEEKLY NOTES, 3.
Kneib *v.* Graves, 22 Smith, 104.

The Master of a vessel in cases of necessity acts *pro hac vice* as the owner of the vessel. He may give a bill of sale in his own name.

The Sch. Tilton, 5 Mason, 465.

It has been already shown that he may give bond for the release of the vessel. (Barker *v.* Highly, *supra.*) Having in this case given bond in his own name conditioned that the vessel should answer the libellant's demands, he was so far the owner that the vessel might be seized upon

Digitized by Google

an execution against him after a judgment in favor of libellant.

Under the Act of 13 June, 1836, this Court has power to pronounce the same decree and enforce the same by like writ *or other compulsory process* as a court of admiralty might do in like cases. The decisions of the U. S. Courts are clear and unequivocal in support of their jurisdiction over the *res*, even after it has been released on bail.

21st Rule of Practice in Admiralty.
Cooper *v.* Reynolds, 10 Wall. 316.
The Rio Grande, 23 Wall. 465.
Livingstone *v.* The Str. Jewess, 1 Ben. C. C. 19–21.
The Struggle, 1 Gallison, 476.
The Alligator, 1 Id. 145.
The Grand Para, 10 Wheaton, 497.
See also—
The Freedom Law Rep. 3 Adm. 495.

C. M. Husbands and *Henry Flanders* showed cause—

(1) The *fi. fa.* in this case was a process entirely *in personam.* It was to enforce satisfaction of the judgment out of the property of the defendants named in the writ and none other. The claimants not being named as defendants in the writ, their interests could not be levied on or sold.

(2) There could be no process *in rem* against the vessel after the bond of Scull had been entered and she had been discharged from the attachment. The remedy was solely upon the bond.

2 Troubat & Haly's Prac. 583–4.
Ship Portland *v.* Lewis, 2 S. & R. 206.
The Union, 4 Blatch. 90.
The White Squall, Id. 103.
The Kalamazoo, 9 Eng. L. & Eq. 557.
The Wild Ranger, 2 Lush. Adm. Rep. 84.
The Palmyra, 12 Wheat. 10.
Parsons' Shipping, vol. 2, 411.

The entering of the bond for the release of the vessel did not create a relationship of principal and surety as between her and the obligors. She was simply discharged from the attachment. Not being delivered into the custody of any one, she could not be surrendered up. After bail taken the *res* is released from the lien and cannot be re-arrested or surrendered by the sureties

Vide Coote's Adm. Practice, 23–24, 90.
Benedict's Adm. Practice, 293.

The condition of the bond was for the payment of money, while in a feigned issue the condition of the bond is for the production of the property. The two cases are therefore not analogous.

The fact that Scull intervened for the owners does not render them personally liable so that their interests in the vessel could be seized under this execution. An appearance by a defendant in a proceeding *in rem* is simply an appearance to protect his interest in the property, and there can be no proceeding against him *in personam* therein.

Williams & Bruce's Adm. 67, note b.
The Hope, 1 W. Rob. 155.
The Volante, Ib. 383.

C. A. V.

March 24. THE COURT. This was a feigned issue under the sheriff's Interpleader Act to try the right of property to seven-eighths interest in the schooner Maggie Cain.

It appeared upon the trial, that an attachment sur libel, under the Act of 13 June, 1836, entitled "An Act relating to the attachment of vessels," and its supplement, was issued on the 27th of January, 1870, at the suit of William M. Shakespear, and served upon the schooner Maggie Cain and William Fisher and James H. Fisher, the owners or reputed owners, and Andrew Scull, Master. On the 10th of February, 1870, Andrew Scull, as master and claimant of the schooner, in pursuance of the Act of Assembly, gave bond to the Commonwealth, and the vessel was thereupon discharged from the attachment. The proceeding in the libel went on, and the jury found a certain sum of money due the libellant. The Court upon this entered judgment in his favor, and decreed that the said William M. Shakespear "do recover of said respondent and of the said Andrew Scull and his sureties in the bond filed in this cause" the amount found to be due. Upon this judgment a writ of fieri facias issued, and the sheriff levied upon the schooner Maggie Cain as the property of the defendants named in the writ, to wit: William Fisher and James Fisher, trading, etc., and Andrew Scull. The claimants in this issue then gave notice to the sheriff of their claim to seven-eighths of the vessel.

It was not denied that the title and ownership of seven-eighths interest was in the claimants, but the plaintiffs contended that as the vessel is still owned by the same persons who were owners at the time Andrew Scull intervened and gave bond, their interests are legally subject to be sold under the execution upon the judgment in the attachment.

To reduce the question to its simplest form, it is whether, on the execution of the bond, it was substituted for the vessel or whether the lien upon the vessel still continued and it was primarily liable to be seized.

It is true that by an Act of 1836 the power is given "to pronounce the same interlocutory and final sentence or decree upon such libel and upon the petition of any other person concerned and enforce the same by the like writ or other compulsory process as a court of admiralty might in like cases," and it might perhaps be our duty, if the administration of the law required it, that we should avail ourselves of this power.

We prefer, however, to confine ourselves to our familiar common law and statutory reme-

Digitized by Google

dies where we think them sufficient to effect the purpose of the law.

We have in Pennsylvania two statutes, one to enforce the lien of mechanics or material men upon the buildings their work or labor has helped to erect, and one to enforce the same sort of claims upon vessels which their work or materials have helped to build. There would appear to be no good reason why these laws should be construed differently. When a bond is filed in the case of a house the lien on the house is at an end; when it is filed in the case of a vessel, why should it remain? The provisions relative to the bond are not identical; but do they vary so much as to require a distinction in their effects? The provisions of the Act relative to the effect of a bond in the case of a house were probably made more specific because the house, the *res*, being always present, there might be a doubt of its eventual liability, which would not arise in the case of a vessel. The provision that the vessel was to be discharged from the attachment and permitted to leave the jurisdiction of the Court, might well be considered as equivalent to saying that the bond was to be substituted in its place.

The 10th section of the Act of 1836 enacts "If the owner or master of any ship or vessel attached as aforesaid or his or their agent shall enter into a bond to the Commonwealth with sufficient sureties to answer all the demands aforesaid which shall be at the time filed against the same and fully to satisfy and pay all such of them as shall be proved and recovered, such ship or vessel shall be forthwith discharged from the attachment as aforesaid and be permitted to proceed on her voyage."

The vessel is to be discharged, and there is no stipulation that she is to be returned. The engagement is not to produce the property, but to pay the debt.

The levy under a *fieri facias* upon property which is admitted not to be the property of the parties against whom the judgment has been entered is certainly an anomaly. That the interest in the vessel of the defendants named in the writ can be sold like any other portion of their personal property—would seem to be as clear as that the interest of no one else except those mentioned in the writ could be so treated.

We think, then, in this proceeding, that the filing of the bond is an absolute release of the vessel the remedy being upon the bond of Scull and his sureties.

Entertaining these views we refuse a new trial and enter judgment on the verdict.

Opinion by BIDDLE, J.

C. P. No. 1. March 3, 1877.

Hogg v. Loughery et al.

Affidavit of defence law—Mortgage—Time—In the computation of the time within which an act is to be performed, the day from which the computation is made is excluded.

Rule for judgment for want of sufficient affidavit of defence.

Sci. fa. sur mortgage.

The affidavit set forth that the mortgage sued on bore date June 26th, 1871, and was payable at the expiration of ten years. The mortgage provided for the payment of interest half yearly, with taxes; it fixed no particular day for such payment, but, by general practice and consent, it was considered payable after the 27th day of June and December in each year; it further provided that, on non-payment of interest for thirty days after any half-yearly payment was due, the whole mortgage debt should, at the option of the mortgagee, become due and payable. That deponent, on the 26th day of January last, called upon plaintiff's agent to pay the interest then due, but acceptance of the same was refused, and payment of both principal and interest demanded.

Robinson, for the rule. The tender to pay the interest on January 26th was not within the thirty days allowed by the mortgage; hence the forfeiture.

Stover, contra. The mortgage being dated June 26th, 1871, and being made payable *at the expiration* of ten years, the debt would not be demandable until June 27th, 1881, and could not be sued out until June 28th, 1881; for excluding the first day, the ten years would terminate on the last moment of June 26th, 1881, but the mortgage is not payable until *the expiration* of that day, and hence demandable only on the first moment of the 27th, and the debtor has the whole of that day to pay.

Taylor *v.* Jacoby, 2 Barr, 497.

The interest follows the same law, for the reason that where a date is given from which to count it is always excluded.

Minard *v.* Beans, 14 Sm. 413.

Hence the first day of default was the 28th of December; if thirty days be added, it brings the time to January 26th, the whole of which day the debtor had to pay and save a forfeiture.

Taylor *v.* Jacoby, 2 Barr, 497.
Thomas *v.* Shoemaker, 6 W. & S. 179.
Price on Limitations, 362.

There being no day appointed for payment of interest, it was the plaintiff's duty, if he intended to stand upon so nice a point in time, to notify defendant.

Whitecar *v.* Worrell, 1 Phila. R. 44.
Walker *v.* Tracey, 1 Phila. R. 225.
McNeil *v.* Amey, 2 W. N. 65.
Hughes *v.* Snyder, Id. 65.

C. A. V.

Digitized by Google

March 24. THE COURT. The mortgage being dated June 26th, the half-yearly payment became due and payable on the 27th of December. Thirty days after that would be January 26th. As payment was tendered on that day, it was in time. In making the calculation, the date from which you compute is excluded.

Rule discharged.

Opinion by BIDDLE, J.

C. P. No. 2. March 12, 1877.

Rickard v. The North Pennsylvania Railroad Company.

Negligence—Liability of Railroad Company—Act of April 4, 1868—Injury to persons other than employés.

Rule for judgment on point reserved *non obstante veredicto.*

This was an action on the case to recover damages for injuries alleged to have been received by the negligence of the defendants. It appeared upon the trial that the railroad company, defendants, had shipped upon their road certain goods to the plaintiff, at Sellersville Station, Montgomery Co. The plaintiff called for the goods before they had been unloaded, and the agent of the company pointed out to him the car containing them, which stood upon a siding, unlocked. He entered the car and commenced handing them out to a companion. While he was thus occupied, a number of coal cars were shunted off upon the siding, striking the car in which he was, knocking him over and injuring his thumb. He brought this action against the company in consequence, and obtained a verdict for $1000; the Court (HARE, P. J.), however, reserving the point whether, under the Act of April 4, 1868, § 1 (P. L. 58), the plaintiff was entitled to recover.*

Wm. Rotch Wister, for the rule, argued that the plaintiff's case came under the Act, and that he was entitled to no damages, as an employé of the company could not have recovered under the same circumstances.

Kirby *v.* Penna. R. R. Co., 26 Sm. 506.
Del. Lack. and West. R. R. Co. *v.* Mulheim, 3 WEEKLY NOTES, 39.

McMurtrie, contra. The Act was clearly not intended to apply to such a contingency as this. It was passed to meet the case that arises where one railroad company makes use of the tracks, depots, or premises of another. "Engaged or employed," means "engaged or employed in or about the work of the roads as roads."

THE COURT entered judgment for defendants on point reserved.

* The Act provides that "when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any car therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé. Provided, that this section shall not apply to passengers."

C. P. No. 2. March 8, 1877.

Struthers v. Peacock.

Action by partners for tort—Death of one partner during the trial does not abate the suit.

Motion in arrest of judgment.

This was an action for libel brought by William Struthers, John Struthers, and William Struthers, Jr., trading as Struthers & Sons, against Gibson Peacock and others trading as Peacock, Featherston & Co. The case was tried in December, 1876, and lasted several weeks. Pending the trial William Struthers, one of the plaintiffs, died, and his death was suggested of record.

The Court (MITCHELL, J.) charged the jury, *inter alia*, as follows: "This is an action brought by the plaintiffs in their business capacity. It is a civil action for damages which they, the plaintiffs, allege have resulted from the injury occasioned to their business reputation. William Struthers, the senior plaintiff in the case, having died during the progress of the trial, you are discharged from all considerations as to him, as this is one of the class of cases which do not survive a deceased plaintiff. But as to the other plaintiffs, if their business reputation has been injured by the publication of these articles, and if under the principles of law which I have explained, you believe they are entitled to a verdict, you should give them such damages as shall be a substantial vindication, and the amount of the damages you may award them for the accomplishment of that purpose is a matter entirely within your discretion." (The charge is reported at length, *ante*, 215–219.)

The verdict was for the plaintiffs—damages one cent.

E. Spencer Miller, for the motion.

The death of William Struthers and the consequent dissolution of the firm of Struthers & Sons, abated the suit; the said death brought the plaintiffs' firm into liquidation, and the survivors could not recover anything which would not be assets of said firm in liquidation, and therefore could not recover in this suit.

There is nothing in the Act of Assembly to change the common law rule as to *actiones personales.*

Purd. Dig. p. 424, pl. 94.
Haythorn *v.* Lawson, 3 Carr. & Payne, 196.
Hanna *v.* Wray, 27 Sm. 27.

Digitized by Google

Upon the death of William Struthers the jury should have been resworn, and the cause retried.

George W. Biddle, contra.

These three individuals suing together make one entity, which is, for the purposes of this case, a quasi corporation. The partnership continues for many purposes, *e. g.*, to collect debts where the survivors sue, with which proceeding the administrators of the deceased member have nothing to do.

This right of action is firm assets.

Haythorn *v.* Lawson, ab.
Podds *v.* Bachelor, 3 Bos. & Pull. 150.
1 Wms. Saund. 117 a.

Where there is a common injury to an abstraction recognized by law, while any persons survive representing that abstraction, the cause of action survives for the benefit of that abstraction.

Motion dismissed.

C. P. No. 2. March 12, 1877.

De Coursey v. The Guarantee Trust and Safe Deposit Company et al.

Pleading—Special traverse—Former judgment in proceedings between landlord and tenant under Act of March 1, 1772, *no estoppel to action of trespass—Demurrer.*

Sur demurrer to replication and rejoinder.

Trespass by De Coursey against The Guarantee Trust and Safe Deposit Company, to recover damages for the plaintiff's expulsion from a certain portion of premises which had been demised to him by the defendant's grantor.

The facts of the case, as averred in the narr., are fully set forth in the report of former proceedings between the same parties under the Landlord and Tenant Act. See *ante*, 65.

The defendant pleaded (1) the general issue; (2) *liberum tenementum;* (3) the authority of the Building Inspectors, to whom complaint had been made that the building was insufficient and dangerous, and by whom it had been duly condemned, and the defendants ordered to take it down; and (4) the title of the defendants to the northernmost eleven feet of the lot, and that of the Carpenters' Company, as whose agents the defendants had acted, to the remainder.

The plaintiff, in his replication, tendered issue upon the first two pleas; to the third he replied with a special traverse, setting forth in the inducement, with the protestation that the building was not insufficient or dangerous except through the unlawful acts of the defendants, that upon his application to the Building Inspectors, previous to the demolition of the building, they had suspended their order of condemnation. This was followed by an *absque hoc*, denying in manner and form the allegations in the plea of the defendant; to the fourth plea he set up his unexpired lease.

The defendants demurred to the replication to their third plea as multifarious and argumentative, and to the fourth they rejoined by setting up, by way of estoppel, the previous proceedings as to the right of possession under the Act of March 1, 1772, which were finally determined by the Supreme Court against the claim of the plaintiff. (Reported *ante*, 65.)

To this rejoinder the defendants demurred, and the present argument was heard upon both demurrers.

Wharton and *E. S. Miller*, for the plaintiff.

The replication to the third plea is the regular form of a special traverse, and is here properly used to introduce new matter of defence. A traverse *de injuria* could not do this. The plaintiff is not estopped by the landlord and tenant proceedings. There is no analogy between the actions. Moreover, such proceedings are not final. The tenant may, nevertheless, maintain ejectment against his landlord. Nor is the landlord estopped from bringing another action for the possession.

Fisher *v.* Morris, 5 Wh. 358.
Galbraith *v.* Black, 4 S. & R. 207.

Pancoast and *C. Gilpin*, contra.

The right of possession having been already determined in the former proceedings, the plaintiff is concluded from the plea that his lease had not expired. The replication to the defendants' third plea is multifarious, as containing three several matters—the condition of the building, the right of possession, and the suspension of their order by the Building Inspectors. It is also argumentative, and allows no certain issue to be taken upon it.

Stevens *v.* Hughes, 7 C. 381.
Doe *v.* Inhabitants of Wick St. Lawrence, 5 B. & Ad. 526.
Lewis *v.* Harris, 11 Ad. & E. 723.
Stadhard *v.* Lee, 3 Q. B. 364.
Stephen on Pleading, 185.

THE COURT entered judgment for the plaintiff on both demurrers.

C. P. No. 4. March 24, 1877.

Chamberlain v. Samuel Sloan.

Affidavit of defence—Failure of consideration for note sued upon—Satisfaction of judgment—Where there is a specific agreement to satisfy judgments, the Act of 13 *April*, 1791, *is not a bar to, nor does it measure damages for breach of the agreement.*

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note, by holder against endorser.

Digitized by Google

The affidavit of defence set forth that the plaintiff received the note in consideration of the settlement and satisfaction of certain claims and judgments held by the plaintiff against the deponent and the maker of the note, including the claim now sued on, as appeared by an agreement or receipt annexed to the affidavit as follows:—

Rec'd, Phila., Nov. 18, 1874, of Howard L. Sloan, three notes . . . endorsed by Samuel Sloan, which notes are in settlement of . . . . All the above claims, suits, and judgments thereon to be satisfied and discontinued.

CHAMBERLAIN, FRICK, & Co.,
per M. CHAMBERLAIN.

That the plaintiff refused to have said claims and judgments marked settled and satisfied until February, 1877. That by reason of said delay the deponent was prevented from selling or mortgaging his property, which he was desirous of doing for the purpose of carrying on his business, and had suffered damage to the amount of $600, which he claimed as set-off.

Geo. Tucker Bispham (with whom was *Wayne McVeagh*), for the rule.

There are two faults in the affidavit: (1) The allegation of loss is not specified; it should be set out how the loss was sustained. (2) The penalty for refusing to satisfy a judgment is prescribed by the Act of 13 April, 1791, §14 (Purd. Dig. 824).

[THAYER, P. J. If there is a specific agreement, may not the defendant have damages for the breach other than those prescribed in the Act?]

We submit that the Act of Assembly measures the damages.

[THAYER, P. J. I doubt it, where there is a breach of an express agreement.]

The specific agreement cannot alter the legal obligations imposed by the Act; there should have been alleged a demand, tender of costs, and refusal to satisfy.

Kingston, contra, was not heard.

THE COURT. The Court are of opinion that the Act is not a bar to the action for special damages founded on a breach of an express agreement. We are also of opinion that the manner in which the loss was suffered is sufficiently set forth in the affidavit.

Oral opinion by THAYER, P. J.

Rule discharged.

Orphans' Court.

Evans's Estate. March 31, 1877.

Claim for services—Jurisdiction of Orphans' Court when suit pending in the Court of Common Pleas for the same cause.

Sur petition for citation, and answer.

The petition of Lewis B. Evans and Anne J., his wife, in her right, set forth that the petitioner is creditor of the estate of Jared Evans, deceased, for work done and service rendered for the decedent during his lifetime, at his instance and request; that letters of administration were granted to Oliver Evans more than a year ago; that the administrator had failed to file his account; and prayed for a citation to issue to him, to show cause why he should not file his account.

The answer of the administrator denied that the petitioner was a creditor of the estate, or in any way interested in it whatever; and averred, further, that the petitioner had instituted an action at law in the Court of Common Pleas No. 4, to June Term, 1876, No. 975, for a large sum of money for nursing and taking care of the decedent, which action is still pending and undetermined; and that the petitioner, having selected the Court of Common Pleas No. 4 as the forum in which to enforce her alleged claim, cannot, at the same time, pursue the administrator in this Court.

P. Archer, Jr., for the petitioner.

C. F. Corson, for the administrator.

C. A. V.

March 31. THE COURT ordered that the account be filed on or before April 20, 1877.

[See Hammett's Appeal, *ante*, 416.]

Greentree's Estate. Feb. 23, 1877.

Executors and administrators—Custody of evidences of indebtedness to estate by an indebted executor—Waste and mismanagement of estate—Insolvent executor—Grounds for removal of executors.

Sur petition for citation, and answer.

Emanuel J. Greentree died in 1876, and on August 31, 1876, letters testamentary were granted to Isaac P. Hunt and Jules A. Ephraim. In the inventory and appraisement of the personal estate, filed September 13, 1876, there were included two due bills and a promissory note, dated March 24, 1876, at twelve months, of the firm of J. A. Ephraim and Son, the whole indebtedness represented by these papers being $5200. There was also one due bill of Philip

Digitized by Google

Hunt and Son for $200. Subsequent to the filing of the appraisement the firm of J. A. Ephraim & Son failed. On December 23, 1876, Isaac P. Hunt presented his petition to the Court setting forth the above facts, and also that the papers of the estate, among which were the aforesaid promissory notes and due bills, were in the custody of the Fidelity Insurance, Trust and Safe Deposit Company, and though often requested by the petitioner, the said Jules A. Ephraim had refused to allow the said Hunt to receive the papers; and praying that a citation should issue to the said Ephraim to show cause why he should not hand over to the petitioner the papers and property of the estate in his possession. The prayer of the petition was granted and the citation issued January 6. On January 20 J. A. Ephraim filed his answer to the petition of Isaac P. Hunt, denying that he refused to deliver the papers of the estate to the said Hunt, but averring that he did refuse to permit the moneys of the estate on deposit and the due bill for $200 given to the decedent by the said Hunt, to be handed over to him, and further averring that the said Hunt had used considerable sums of money belonging to the estate in his own business. To this answer Isaac P. Hunt filed a replication.

On January 6, 1877, Rosa Greentree, the widow of the decedent, petitioned the Court, alleging that one of the aforesaid executors was wasting and mismanaging the estate and that the other was insolvent, and prayed that a citation might issue to both the aforesaid Isaac P. Hunt and Jules A. Ephraim to show cause why they should not be removed from their offices as executors.

Isaac P. Hunt made answer to this petition, denying that he was mismanaging the estate, and averring that the petitioner admitted to having known nothing hostile to his character, and that her petition was made at the instigation of Jules A. Ephraim.

Testimony was taken as to the facts alleged.

Alexander R. Cutler (with whom was *Aaron Thompson*), for the estate.

J. Daniel Ely, for the widow.

Walter J. Budd, for Jules A. Ephraim.

C. A. V.

March 31. THE COURT. A careful examination of the testimony taken in these proceedings, satisfies us that both of the executors should be removed. One is largely insolvent, and the acts of the other, as detailed by witnesses, are of a character so doubtful that we feel that the estate would be subject to risks at his hands, from which it should be relieved.

Being of the opinion that the matter is one of those which the Legislature had in view, when, by the Act of May 1, 1861, it authorized the Court to remove an executor if for any reason the interests of the estate or property are likely to be jeopardized by his continuance, it is considered and decreed, that the letters testamentary issued to Jules A. Ephraim and Isaac P. Hunt, be and are hereby vacated, and that new letters testamentary, with the will annexed, be and are hereby awarded to The Fidelity Insurance, Trust and Safe Deposit Company, to be granted to said company by the Register.

Opinion by DWIGHT, J.

March 19, 1877.

Philip M. Hanbest's Estate.

Claim by executor against administrators of deceased co-executor for moneys belonging to estate of testator—When to be presented—Practice.

Sur exception to adjudication.

Thomas P. Hanbest died August 7, 1873, leaving a will by which he appointed Isaac Norris executor. In the said will he directed that his brother, Philip M. Hanbest, should collect the rents of the real estate, and pay the same over to the executor. By a codicil to the said will, he appointed Philip M. Hanbest co-executor with Isaac Norris.

Philip M. Hanbest died August 28, 1875, and the Fidelity Insurance, Trust and Safe Deposit Company were appointed administrators of his estate. The Company having filed their account, at the audit Isaac Norris, surviving executor of the estate of Thomas P. Hanbest, deceased, made a claim on the balance in the hands of the said administrators for sundry sums of money collected by Philip M. Hanbest as agent and collector of the estate of T. P. Hanbest, deceased (being rents of houses forming part of the estate of the said T. P. Hanbest), and not paid over to the said Isaac Norris as was directed by the will of T. Passmore Hanbest.

The amounts so collected were proven by the accountant of P. M. Hanbest, and it was also proven that these moneys were deposited in the Fidelity Company to the credit of Philip M. Hanbest.

The auditing Judge disallowed the claim, and Isaac Norris excepted.

J Parker Norris (with whom was *F. Carroll Brewster*), for the exceptant.

C. A. V.

March 31. THE COURT. The claim should be presented when the account of Philip M. Hanbest, as executor of T. P. Hanbest, is filed by the Fidelity Insurance, Trust and Safe Deposit Company.

The exceptions are dismissed, and the adjudication is confirmed.

Per DWIGHT, J.

Digitized by Google

Weekly Notes of Cases.

VOL. III.] *THURSDAY, APRIL* 19, 1877. [No. 29.

Supreme Court.

Jan. 76, 260. Jan. 24, 1877.

Boyd et al. v. Wilson et al.

Vendor and vendee—Sale by sample—Warranty of quality—Custom of trade.

In the absence of fraud or representation as to quality, a sale by sample is not in itself a warranty of the quality of the go ds, but simply a guaranty that the goods shall be similar in kind and be merchantable.

A broker effected a sale for A. of 850 cases of "King's brand" of canned corn to B., who had first been furnished with three of the cans for trial and found them in perfect condition. No express warranty of the corn to be delivered was made, nor was fraud shown. Part of the lot proving bad, B. refused to accept the balance. In a suit by A. for the purchase-money of the whole: *Held*, that there was no warranty as to the quality, and that the plaintiff was therefore entitled to recover.

Error to the Common Pleas No. 4, of Philadelphia County.

Assumpsit by O. H. Wilson and James Stewart, Jr., trading as Wilson & Stewart, on a promissory note for $2720, drawn to their order by the defendants, Samuel, Daniel, and James Boyd, trading as Samuel Boyd & Co. The pleas were non-assumperunt, payment with leave, etc.

On the trial (before BRIGGS, J., February 25, 1876) it appeared that on December 24, 1874, H. F. Nieman, who was a merchandise broker, commissioned by the plaintiffs to sell 850 cases of "King's brand" of canned corn, called upon the defendants with a can of that brand which he opened and exhibited to them. The defendants proposing to take some of the corn home to try, he furnished them two more cans, which upon trial proved to contain "good sweet white corn sound in every respect." On the following day defendants made an offer for the lot, which was accepted, and on the 29th they gave their note at three months in payment. By agreement with the plaintiffs, the delivery was made in small lots during January and February following until 768 cases in all had been received. During February the customers of the defendants began to return numbers of the cans with complaints of the quality, and were refunded the purchase money for the cans returned. The corn contained in them was sour and greasy, and some of it unfit for food. At about the same time the defendants complained to the plaintiffs and offered to send back the corn not yet sold, which plaintiffs declined receiving. Defendants' note was protested, and on March 30th plaintiffs sent to them the balance of the lot yet undelivered, amounting to 82 cases, which defendants refused to receive. It was in evidence that "King's brand" corn did not rank so high as some other brands, that the only test of the soundness of canned corn, without opening the cans, is the swelling or bursting of the heads of the cans from fermentation, but that in this case there was no swelling of the cans which contained the defective corn. One of the defendants testified, "The broker said all the bad corn was to be taken back and the money refunded." The broker, however, testified, "I did not say to defendants all the bad corn was to be taken back and the money refunded. There were no representations or guarantee as to the corn. I told defendants if there were any swelled cans they could be made good; aside from that I made no statement or representation." There was no other evidence of any express warranty, and none of fraud. The defendants produced evidence of a custom in the trade to refund for all defective cans sold, which was contradicted by some of plaintiffs' witnesses.

The Court charged the jury, *inter alia*, as follows: ["I do not see, gentlemen, in the case anywhere any evidence of warranty as to quality, or any evidence as to fraud on the part of the plaintiffs. I say I do not perceive any evidence anywhere in the case that would justify me in submitting those propositions, viz., of warranty or fraud, to you.] . . . . I do not discover any evidence of warranty or any evidence of fraud unless the proposition as contended for by Mr. White be correct, that the goods being sold by sample amounts in itself to a warranty. With regard to that, in order that the case may be put squarely and fairly, so as to protect the rights of both parties—and I have got to meet the question emphatically on one side or the other—[I say to you that sale by sample is not a warranty.] Now, I cannot put it more squarely or more fairly than that. If I have made a mistake, it is so squarely put that the Supreme Court will be sure to reverse me; if I have not, the Supreme Court will be certain to sustain me . . . I will give you the reason that has led me to the conclusion that I have just enunciated. There are eight hundred and more cases of corn sealed beyond the power of human vision to determine the quality of the contents of the cans, except the heads be bulged by fermentation of gas, or burst by swelling. A broker approaches a dealer and announces the fact that he has these eight hundred cases of corn for sale. The dealer says, give me a can. It is bought; it is opened; it proves to be good. The dealer says, send me two others, one that I may take home to my family,

Digitized by Google

and the other that I may give to my brother. The broker does so, and the dealer takes them home and the quality proves satisfactory. Now, this I understand was all that was done in this case. Now, gentlemen, that is what is called a sample.

"Was there any fraud in the selection of these three cans? Were they taken from the 800 cases, not selected expressly with a view to the fair presentment that would be exhibited to the eye when opened, but selected hap-hazard—selected by chance? No studied effort to get these three—picked indiscriminately out of the cases—the 800 cases? If they were thus selected, then, gentlemen, there was no fraud in the selection. It was fair, and because there was no fraud and because it was fair, the transaction of the parties is legal. How did the broker know? How did the parties who desired the broker to sell know, if the heads were not bulged, that the corn was not good? There is no fraud, gentlemen, where the purchaser has the same means of ascertaining the contents of a thing that the seller has, and both stand exactly upon the same level, upon the same equality. And why should one man, gentlemen, in view of such circumstances, or one party to a transaction, have an advantage over another in the transaction? This is the reason, gentlemen, that leads me to the legal proposition that I have already enunciated, and hence I will say to you that this sale by sample is not in itself a warranty. If, to illustrate, there were two lots of this corn of the same brand, or bearing the trade-mark or impress of the same maker, one was inferior to the other, or, if you please, of the same grade—I don't care if they were of different lots—the broker was bound, and the principal whom he represented was bound, to send, in filling the order of purchase, the balance of the cans from which the samples were taken. He would not be justified, gentlemen, in going into the other lot. Suppose that one lot was inferior to the other, and was known to be such: the selection of a can for a sample from the good lot, and then to fill the contract from the bad, would be fraud, and that would create a liability in such a contingency. I have used this, gentlemen, as a mere figure for illustration. There is no evidence in the case that there were two lots. I have used it simply for the purpose of illustrating a case where fraud might come in. There is no evidence in the case, that I perceive, of warranty or fraud . . . .

"Well, it is said, gentlemen, that there is a custom prevailing among dealers in canned fruits that, if the fruit proves defective or of inferior quality, then the purchaser by force of that custom is not bound to pay for it. It may be returned, and the money refunded or a sound commodity substituted in its place . . . [Now, this is the definition of a good custom that you are to apply to the evidence in this case: If it is positive, certain, continuous, known to all the trade, uncontradicted, then it is a good custom, and the defence to this extent would prevail. If it does not come up to this standard, then it fails, and would not amount to a defence. Whether there is a custom, in view of this testimony, you have got to work out yourselves.] . . . . . [Gentlemen, if you find, as I said before, the custom to be a good custom, in view of what I have said, the defendant would be entitled to get a rebate or a deduction to the extent of the value of the bad cans, and he must show the extent of the defect. As he undertakes to show they are bad, the evidence somewhere in the case must give you a standard of calculation by which you can reach the result or aggregate in dollars and cents.]"

In answer to one of the plaintiffs' points the Court also charged as follows: "There are two witnesses who testify one against the other. A witness for the plaintiff said, at the time the broker sold these goods, he stated he would take back the defective cans. The broker himself takes the witness stand, and he testifies that he made no such representation. If he did, then, independent of the question of warranty, the plaintiff would be bound to take them back, because it would be an element running right into the contract itself. If you find that he did so agree to take them back, he would be bound to take them back. If he did not, then he is not bound to take them back, except for the consideration that I have alluded to; that is, the custom."

Verdict for plaintiffs for $2874.32, and judgment thereon. The defendants took a writ of error, assigning for error, *inter alia*, those portions of the charge inclosed in brackets.

R. P. White, for plaintiffs in error.

An analysis of the cases will show that the true doctrine here, as in other States and in England, is that a sale by sample is an engagement upon the part of the vendor to furnish goods corresponding in kind and *in quality* with the sample shown. The Pennsylvania cases relied on to sustain the contrary principle are Fraley *v* Bispham (10 Barr, 320), and Carson *v.* Baillee (7 H. 375), but in Fraley *v.* Bispham the *real* question was whether certain words in a bill of parcel constituted a warranty of quality, and it was held not to be so, but only of kind.

[SHARSWOOD, J. There was no warranty; it was tried to prove it, but the witness was incompetent.]

In Carson *v.* Baillie, it was only decided that after a purchase *on inspection* there was no implied warranty in the bill of parcels.

Against the supposed weight of these cases, which it is shown have no bearing, there is a current of authority resting on the whole course of commercial usage, and on the broad principle that what a man sells, that he must deliver. See—

Digitized by Google

2 Story on Contracts, 1073 (5th ed.).
Bradford v. Manley, 13 Mass. 138.
Boorman v. Jenkins, 12 Wend. 566.
Leonard v. Fowler, 44 N. Y. 289.
Merriman v. Chapman, 32 Conn. 146.
Brantley v. Thomas, 22 Tex. 270.
Barnard v. Kellogg, 10 Wall. 383.

This doctrine has been recognized in Pennsylvania in—

Dailey v. Green, 3 H. 125.
Maute v. Gross, 6 Sm. 250.

What the interest of the parties to such a transaction as this was, is a question which ought to be left to the jury. The fact that no questions were asked and no allegations made; only goes to show that both parties perfectly understood that they were dealing on the basis of a usage of trade known in every commercial community.

Beirne v. Dord, 1 Seldon, 95.
Hargou v. Stone, Id. 73.
Note to Chandler v. Lopus, 1 Sm. L. C. 308.

Where there is contradictory evidence of the existence of a custom, the credibility of the witnesses should be weighed by the jury.

F. C. Brewster (with whom were *Francis E. Brewster* and *F. C. Brewster, Jr.*).

In Pennsylvania the principles of the common law have been adhered to, and in the absence of an express warranty, no implied warranty will be presumed.

McFarland v. Newman, 9 W. 56.
Wetherill v. Neilson, 8 H. 448.
3 Rawle, 23, 168.
Sands v. Taylor, 5 John. 395.
Hart v. Wright, 17 Wend. 267.
1 Sm. L. Cases, 294.

Upon a sale by sample there is an implied warranty that the article delivered shall correspond in specie with the commodity sold; but all gradations in quality are at the hazard of the buyer, and the question of the existence of such a usage in this case was for the jury.

Fraley v. Bispham, 10 B. 320.
McKnight v. Baillie, 7 H. 375.
Whitaker v. Eastwick, 25 Sm. 229.

Custom is usage so long known and so well established as to have acquired the force of law.

Note to Chandler v. Lopos, 1 Sm. L. C. 301 (Am. ed.).
Adams v. Pitts. Ins. Co., 26 Sm. 411.

Feb. 5. THE COURT. If we trace the law of this State through the following cases, we shall find that a sale of chattels by the production of a sample, but without fraud, or circumstances to fix the character of the sample as a standard of quality, is not attended by any implied warranty of the quality. The sample, under such circumstances, pure and simple, becomes a guaranty only that the articles to be delivered shall follow its kind, and be simply merchantable. These are the cases referred to: (Borrekins v. Bevan, 3 Rawle, 23; Jennings v. Gratz, Ibid. 168; Kirk v. Nice, 2 Watts, 367; McFarland v. Newman, 9 Watts, 55; Fraley v. Bispham, 10 Barr, 320; Carson *et al.* v. Baillie, 7 Harris, 375; Wetherill v. Neilson, 8 Harris, 448; Eager v. Call, 10 Casey, 236; Weimer v. Clement, 1 Wright, 147; Whitaker v. Eastwick, 25 P. F. Smith, 229.) Such precisely was the state of this case. The broker going on a business round produced a can of the corn and exhibited it to the defendants, and they afterwards asked to see others, which they opened and examined, and proved by looking for themselves. On the following day they made an offer for the lot, which was accepted. There was no fraud and no warranty of the quality, and no circumstances to show that the parties dealt upon the basis of a quality to be precisely such as the cans exhibited contained. The evidence also showed that such cans are hermetically sealed to preserve the corn, and are thus bought and sold, and that the only true indication of their being spoiled is the bulging of the cans produced by fermentation and the consequent evolution of gases, which swell out the head. It is also shown that these cans were not bulged. The Court charged, if there were fraud in the selection of the cans as a means of imposition, or they were of a particular lot and the seller delivered from a different lot, it would be evidence of fraud. But the Court saw no evidence in the case of either fraud or warranty, and under these circumstances charged that a sale by sample was not in itself a warranty of the quality of the corn. This language is too broad for all cases, but under these facts it seems to us there was no error in the instruction. It was said of a general sale, without circumstances. The seller did not agree or say that the remainder should be of the same quality as the sample, and the purchaser did not order the corn to be delivered to be of the same quality as the sample; nothing was said or done on either side to give character to the sample cans as a standard of the quality. This being the nature of the sale, the sample became a standard only of the kind, and that the goods were simply merchantable. So long as the commodity is salable, its different degrees of quality from good to bad are not the subject of an implied warranty; if it be wholly unmarketable, such as cannot be considered merchantable, probably a different conclusion would be reached, because an unmarketable article is substantially different in kind from one that is salable in the market. In such a case it is not the name merely which governs, but the fact that it is without market value, and cannot reasonably be pronounced of the same kind as the sample. In Jennings v. Gratz (*supra*) it was held that a moderate degree of adulteration often did not destroy the merchantable character of an article of sale; but the Court said: "Adulteration may

Digitized by Google

be carried so far as to destroy the distinctive character of the thing altogether, and in doubtful cases there is, perhaps, no practical test but that of its being merchantable under the denomination affixed to it by the seller." Judgment affirmed.

PER CURIAM. WILLIAMS, J., absent. SHARSWOOD, J., dissents.

Plaintiffs in error presented a petition for a re-argument of the case, setting forth (1) that the limited time assigned for argument (the case having been heard upon the hour list) prevented a proper presentation of the case; (2) that the decision was contrary to what had theretofore been understood by the bar and by the business community to be the law governing sales by sample; (3) that a large portion of the heaviest transactions of commerce were conducted through the medium of sales by sample, and this decision would hamper and injure the business interests of the State; and (4) that the evidence in the case was direct that a portion of the corn was unfit for food and unmarketable, and the Court below had given a binding instruction that defendant was obliged to keep and pay for all the cans.

Feb. 19, 1877. THE COURT. We announced in this case the result of a long line of decisions. The motion for a re-argument is simply a demand for a change in the law—for judicial legislation. The law of this State has long been thoroughly settled by its courts, that a sale of chattels without fraud or misrepresentation creates no liability for quality, and that the production of a part of the goods, when not made by the acts or agreements of the parties a standard of the quality, carries with it no implication of a contract of warranty of the quality. Much of the confusion of thought in these cases is engendered by the use of the word "sample;" the mind implying from the *word*, and not the facts of the sale, an intention to make the sample a criterion of the quality. When in fact the sample is made the standard of quality—as, if the buyer orders goods of the same quality, or the seller engages to deliver them of the same quality—an implication arises. Hence it is always in the power of the buyer to command an article of the same quality. But in the absence of an undertaking for the quality, or of those facts from which it can be assumed, the law leaves the parties just as they were.

It never has been the law of this State that a sound price requires a sound article, for the reason that if the quality of an article be the criterion, instead of the bargain or specific intent of both parties, there would be no end to ruinous litigation. Parties are, therefore, left to their own judgment and diligence, unless there be fraud or deceit practised by the seller.

Peace and good order are thereby promoted, and the parties prompted to proper care and diligence, and to make their bargains so that neither will misunderstand his rights.

Take this case as an example. Here is an article inclosed in an air-tight can, the quality of which is unknown to both buyer and seller, and can be ascertained only by opening the can, which is destruction. The article is bought and sold in this condition by wholesale and by retail.

If the buyer will not risk the contents, he must require a warranty. But then the seller will demand a higher price to compensate him for the entire risk. Now if the buyer have made no bargain for quality, on what principle of fair dealing shall he have the advantage of both *price* and quality. Had he said to the seller, you must deliver to me corn of the same quality as in this exhibited can, the latter would have said, I will do so, but I must be compensated for this risk, and I require so much more to be added to the price.

It is evident, therefore, that the only just rule, in the absence of fraud or deceit, is to suffer the parties to bargain for themselves as to quality; otherwise, so long as the article is merchantable, the buyer cannot complain of his own remissness. The real secret of these attempts to raise a warranty by implication is that buyers wish to buy as cheaply as they can, and it is only when they find that they have made bad bargains that they complain. If they get a superior article for a low price, they will stoutly insist on standing on their bargains, and pay no more, even if the article be worth double the price paid. The truth is, the argument upon the sample is a *petitio principii*. It assumes a bargain when none is intended. It takes the mere word "sample," and refuses to look at the evidence which discloses no intent to warrant the quality, and leaves the buyer to his own judgment and diligence in making his bargain.

It is said that in the present state of the commercial world, much of the business is done by travelling agents, and through mere samples. True, the business of the world has changed greatly; but this is an argument to be addressed to the legislature, not to us. We declare the law, but do not make it. If the law as we find it does not suit the times, let it be changed by those who possess legislative power. If the law of England, or other States, differs from ours, to them let petition be made to assimilate them. When sifted, the whole argument addressed to us is a petition in favor of change, not declaration of the law.

It is alleged as reason for re-argument, that some of the cans were proved to be bad, unfit for food. But the plaintiffs in error know full well no such point was taken in the Court below. They fought the case on the ground of an implied

Digitized by Google

warranty of the whole, because of a sale by sample. No instruction was asked for a verdict for so much as was proved to be not merchantable.

It was a battle for all or for nothing. The learned counsel who urges this reason knows well that a court of error does not reverse upon issues not made in the Court below. Re-argument refused.

PER CURIAM. WILLIAMS, J., absent. SHARSWOOD, J., dissents.

July, '75, 58. Jan. 2, 1877.

Warren v. Philadelphia Coal Company.

Contract for sale of chattels—Warranty—Stipulation as to quality.

Although an ordinary contract for the sale of chattels carries wi h it no warranty of the quality of the articles sold, there is no principle of law which prevents a stipulation being made by the vendor as to the quality which will have the effect of a warranty.

C. having previously sold coal to W. offered him a lot at a certain price, accompanying the offer with a statement that it was of the same quality as that previously furnished. W. agreed to take it if it was good coal, but said if it was not he did not want it. The coal having been delivered, C. brought an action for the price:

Held, that evidence was admissible on behalf of defendant to show that the coal furnished under this contract was not as good as that previously furnished.

Error to the Court of Common Pleas No. 3, of Philadelphia County.

Assumpsit by the Philadelphia Coal Company against Warren on a book account for the price of a cargo of coal sold and delivered by the plaintiffs to the defendant. Upon the trial, proof having been given of the sale and delivery of the coal, the defendants offered to show that the coal was of an inferior quality, by reason whereof the defendants were injured, hindered, and delayed in the prosecution of their business. Objected to; objection sustained. (Third assignment of error.) Defendants offered to show that the coal was bought for the purpose of generating steam in a paper-mill, and that the plaintiffs had knowledge of its intended use. Objected to; objection sustained. (Fourth assignment of error.)

One of the defendants, being called as a witness, testified that the plaintiff's agent, who had previously sold him coal, came to him and asked him to take a cargo which was then afloat. The defendant inquired particularly of the quality of this coal. The plaintiff's agent assured him that it was of the same quality as that previously furnished. The defendant then said it might be put on the wharf at $4.00 a ton, but if it was not good coal he would not have it.

The defendants then offered to show that the cargo of coal furnished under this contract was not as good as that previously furnished by plaintiffs to defendant. Objected to; objection sustained. (Fifth assignment of error.)

The defendant also offered to ask the plaintiff's agent whether the defendant had not previously repeatedly told him that if good coal was not sent, he, the defendant, would not pay for it, and it must be taken away. O jected to; objection sustained. (Seventh assignment of error.)

The defendant also offered in evidence the deposition of one Montgomery to show that the coal furnished the defendant was of a very inferior quality. Objected to; objection sustained.

There was a verdict for the plaintiffs for the full amount of their claim and judgment thereon. The defendant took this writ, assigning for error the rejection of his offers of evidence.

Harvey C. Warren, for the plaintiffs in error.

The defendant in this case, having shown that the plaintiff agreed to furnish good coal of the same quality as that previously furnished, offered, as appears by the 5th and 7th assignments of error, to show that the coal was of a very inferior quality. The defence is not rested upon an implied warranty. It is based upon the absolute and unmistakable terms of the contract of sale. The defendant did not agree to take any coal which might be furnished, but expressly said that he would only take good coal, and the plaintiffs expressly agreed to furnish good coal; unless now they comply with the self-imposed terms of their contract of sale, they cannot recover from us the price of an article furnished, but which we never agreed to take.

G. M. Dallas, contra.

The defendant endeavored to establish an implied warranty, with the object of claiming to set off the damages for its alleged breach. But a warranty must be proved before it can be relied on to sustain such a defence. In this case it could not be implied from the fact that the coal was to be used in generating steam, of which intended use the vendor had knowledge.

Whitaker v. Eastwick, 25 Sm. 229.

To constitute a warranty that a thing sold is fit for a special purpose, it must have been ordered of the manufacturer and supplied and sold for that purpose. Where a special thing is ordered even for a special purpose, no warranty arises.

1 Parsons on Contracts, 587.
Weimer v. Clement, 1 Wr. 149.

March 30, 1877. THE COURT. No rule is more firmly imbedded in our jurisprudence than that which governs the rights of vendors and purchasers in an ordinary contract of sale of personal property. In such a contract the vendor is subject to no implication of a warranty of the quality of the article sold. The doctrine of the common law, as it was settled in Chandelor v.

Digitized by Google

Lopus (Cro. Jac. 4), has been constantly and uniformly applied, in the language of Mr. Justice DUNCAN in Jackson *v.* Wetherill (7 S. & R. 480), "with regard to the goodness of wares purchased. The vendor is not bound to answer unless he expressly warrant them to be sound and good, or there has been a fraudulent representation, an affirmation of the quality known to the vendor to be false."

Chief Justice GIBSON and Mr. Justice KENNEDY dissented even from the judgment in Borrekins *v.* Bevan (3 Rawle, 23), which decided that in all sales of goods a warranty was to be implied that the article delivered should correspond in specie with the commodity sold. That case introduced a distinction between quality and essential character which was a novelty at the time, but has since been generally maintained. In the dissenting opinion the Chief Justice said, "I prefer the rule of the common law to modern approximations towards that of the civil law; not only because it is the rule of the common law, but because it seems to be more convenient and just.". . .

The object of the rule is to encourage trade by preventing actions against all in turn through whose hands the article has passed in a course of dealing. The doctrine of Borrekins *v.* Bevan has never been extended. The common law rule has been enforced so lately as in the reported case of Whitaker *v.* Eastwick (25 P. F. Smith, 229), and in the case of Boyd *v.* Wilson, decided at the present term [reported *ante*, p. 521].

On the grounds thus stated, the Court below was justified in rejecting the offers of the defendants specified in the third and fourth assignments of error. The purpose was to show, first, that the character of the coal shipped to them injured their business; and, secondly, that it was defective, and not adapted for the use to which it was designed to be applied. The evidence was offered not in view of the special circumstances of the case as they were alleged to exist, but upon the assumption of a legal implication of a warranty arising from the single fact of the sale itself. Coal had been previously received from the plaintiffs. Under a general contract for a fresh supply, the defendant would be required to accept from the plaintiffs the current product of their mines, and for that product the plaintiffs, acting in good faith and in the accustomed course of their business, would be entitled to be paid.

But there is more in this case than the question raised by the third and fourth assignments. Nothing in the common law rule on this subject stands in the way of a contract stipulation as to quality between a vendor and a purchaser. And it was insisted on the trial that such a stipulation had been entered into by these parties. When the offers specified in the fifth and seventh assignments were made, Parker H. Warren had testified that Spafford, the agent of the plaintiffs, had asked him to take the cargo of coal, the price of which is the subject of this controversy; "I inquired particularly," the witness had said, "of the quality of this coal. He assured me it was of the same quality I had been buying. I told him if so to put it on the wharf at $4 00 per ton, but if it was not good coal I would not have it." In view of this testimony the defendant proposed "to show that this cargo of coal was placed on a large pile of coal, a great portion of which was Philadelphia Coal Company's coal, sold to the defendant by the agent of the plaintiffs, and this cargo was not as good. It was proposed also to ask Mr. Spafford on cross-examination this question, "Had not Mr. Warren, on several occasions and repeatedly, told you that if you did not send him good coal he would not pay for it, and you must take it away?" Both these offers of testimony were rejected. They ought to have been received. The defendant alleged the existence of a contract that defined their rights, and there was evidence from which the jury might have inferred an agreement on the part of the plaintiffs to be answerable for the quality of the coal they were to deliver. To constitute an express warranty no special form of words is requisite. The word warrant, though it is the one generally used, is not so technical that it may not be supplied by others. It is enough if the words used are not dubious or equivocal, and if it appears from the whole evidence that the affirmant intended to warrant, and did not express a mere matter of judgment or opinion. (Jackson *v.* Wetherill, *supra.*) A contract to deliver goods of a quality as well as of a species defined and fixed is as capable of enforcement as any other contract.

So much of Mr. Montgomery's deposition as contained a description founded on his personal knowledge of the coal delivered to the defendants should have been admitted. The evidence that his own coal had been received from the plaintiffs was scarcely distinct enough to warrant a characterization of that of the defendants by a comparison of his with theirs. It does not appear clearly from the record how the transcript from the books of the agents of the plaintiffs became part of the evidence in the cause after the books themselves had been excluded. It was legitimately before the jury if, as the plaintiffs assert, it was produced and offered by the defendant.

If there was error, it can be avoided in a future trial. The second assignment was withdrawn on the argument. The eighth assignment refers to a matter of mere detail, which for any purpose to be served hereafter it would be unprofitable to discuss.

Judgment reversed and *venire facias de novo* awarded.

Opinion by WOODWARD, J.

Digitized by Google

Jan. '77, 213. March 16, 1877.

Leonard v. The Lebanon Mutual Insurance Company.

Mutual Fire Insurance Company—Breach of condition—Non-payment of assessment—Evidence of waiver—Principal and agent—Authority to waive an essential requisite.

L. insured her property in the Mutual Insurance Company defendant, the policy containing a condition that if such assessments as were laid by the Company should not be paid within thirty days after notice thereof, the policy should be invalid so long as the assessment remained unpaid. In June, 1872, an assessment was made, and notice given to L., who, however, neglected to pay it. In May, 1873, another assessment was laid on policies in force on January 1, 1873, and an agent of the Company sent a notice of both assessments to L. The property was destroyed by fire, and L. tendered payment of the two assessments within thirty days of receipt of her second notice. The tender was refused, and suit was brought by L:

Held, that the act of the agent in sending the second notice of assessment was not in itself a waiver of the suspension of the policy, there being no sufficient evidence that the Company had authorized the sending of the notice, or had laid the second assessment upon this policy.

Error to the Common Pleas of Schuylkill County.

Covenant on a policy of insurance by Mary Ann Leonard against the Lebanon Mutual Insurance Company. Pleas, covenants performed, *absque hoc*, etc.

At the trial (before PERSHING, P. J.) the following facts appeared. The policy sued on was dated May 10, 1870, and the property described was a frame stable. The policy contained, *inter alia*, the following clause:—

"The policies of all persons insured in this company who shall neglect to pay their assessments for thirty days after publication or notice of the same, then and thereafte , so long as the same may remain unpaid, will be void and of no force or effect."

On June 20, 1872, the directors of the corporation defendant laid an assessment of $5 on every $1000 insured, on all policies in force on September 1, 1871. This was assessment No. 8, and included the policy sued on. Notice of this assessment was given to the plaintiff, but she neglected to pay it. On May 10, 1873, the said directors laid an assessment (No. 9) of $4 on every $1000 insured, on all policies in force on June 1, 1873. On June 9, 1873, Sutermeister, an agent of the Insurance Company, mailed a notice of assessment No. 9 to the plaintiff, and inclosed a bill in the following form:—

Amount due on assessment No 8 . . .	$27 50
" " " No. 9 . . .	22 00
	$49 50

Sutermeister was aware that the plaintiff had received notice of assessment No. 8. On June 20, 1873, the property insured was destroyed by fire. On June 24 the above notice and bill, having miscarried, reached the plaintiff through the post-office. On June 26 the plaintiff tendered the above amount of $49.50 to Sutermeister, who refused it.

Sutermeister testified, for the plaintiff, that it was the practice of the Company to collect all unpaid assessments when the succeeding assessment was levied, and to so let assessments lie over as long as two years; but, on cross-examination, testified that as agent of the Company he was merely authorized to collect such assessments as were levied by the Company, and not to determine what policies were in force. He also testified that he got facts upon which his notice was based from the office of the Company.

The plaintiff presented, *inter alia*, the following point: "If the jury believe that the plaintiff received the within notice and demand of assessments Nos. 8 and 9, on June 24, 1873, and on June 26 following called on Sutermeister, the agent of the Company, who had sent the notice and demand through the post-office, and tendered him the amount of the two assessments within thirty days from receipt of such notice and demand of payment, this act of the Company in making out the said bill for both assessments, and demand of payment of both, coupled with such tender by the plaintiff, amounted to an implied waiver by the Company of the non-payment of assessment No. 8 within thirty days, and the plaintiff is entitled to recover." *Answer.* "We refuse to charge as requested. There is nothing shown here which would authorize Mr. Sutermeister to waive the forfeiture existing." The Court also charged, *inter alia*, as follows: "That this assessment (No. 8) was not paid was not disputed. . . . . Another assessment (No. 9) was made a year or more after that . . . which also remained unpaid at the time of the fire; . . . we therefore give peremptory instructions to find for the defendant."

Verdict and judgment for the defendant. The plaintiff took out this writ, assigning for error, *inter alia*, the refusal of her point as above, and the portion of the charge quoted.

Jacob A. Hazen (with him *B. W. Cumming*), for the plaintiff in error.

Where the insurer, with knowledge of facts which would constitute a defence against a suit on a policy, so bears himself as to lead the insured to believe that he recognizes the policy as still valid, the matter of defence is waived.

May on Insurance, § 508.
Ins. Co. v. Slockbower, 2 C. 199.

Here the knowledge of the Company defendant is proved by the testimony of Sutermeister that

Digitized by Google

the facts upon which his notice was based were received from the Company's officer. An insurer cannot treat a policy as subsisting for his own purposes, but void as to the purposes of the insured. He may couple an old and delinquent assessment with a new one, but he does so at his own risk. He cannot fall back on a waived condition, and plead it in defence.

Ins. Co. *v.* Sennett, 5 Wr. 161.
Carroll *v.* Ins. Co., 38 Barbour, 402.

The Court assumed that the plaintiff failed to pay assessment No. 9 as well as No. 8 within the thirty days prescribed, after notice. The effect of this part of the charge was to mislead the jury. The plaintiff had no knowledge of assessment No. 9 until after the fire, and she tendered payment within the days of grace.

Mason Weidman (with whom was *C. P. Miller*), contra.

An insurance company may waive a forfeiture, but the waiver must be intentional.

Beatty *v.* Ins. Co., 16 Sm. 17.
Diehl *v.* Ins. Co., 8 Sm. 452.
Desilver *v.* Ins. Co., 2 Wr. 130.

Through non-payment of assessment No. 8 the policy ceased to be valid before January 1, 1873. The agent disclaimed any authority to determine whether a policy was in force or not. If it were true that the plaintiff's policy was made subject to assessment by the company, this would not be evidence of a waiver.

Coles *v.* Ins. Co., 18 Iowa, 425.
Nash *v.* Ins. Co., 43 Mo. 343.

But there is no evidence that the company assessed this policy. It directed assessments to be made on policies *in force*. The burden of proof of an agent's authority to waive forfeiture lies upon the insured.

Trask *v.* Ins. Co., 5 C. 198.

In mutual companies the acts and declarations of an agent, to bind the company, must be proved to be within the scope of his authority.

Hackney *v.* Ins. Co., 4 B. 185.
Mitchell *v.* Ins. Co., 1 Sm. 402.
Ins. Co. *v.* Taylor, 23 Sm. 342.

March 26. THE COURT. It is very clear that under the policy in question the protection of the policy was suspended by non-payment of the assessment No. 8 until after the fire had occurred, causing the loss claimed under the policy. Then it was too late to tender assessment No. 8, unless it was shown that the company had treated the policy as in force and not suspended. But of this fact there was no sufficient evidence. The act of Sutermeister, the agent, in serving the notice, was not a waiver, for several reasons. He had no power as an agent to waive the essential conditions of the policy; and nothing can be more essential than payment of the assessment, which is the very consideration of the insurance. A waiver should not be inferred from a mere reminder in the notice that assessment No. 8 remained unpaid. The nature of the business done by this company proves that it is both the wish and the interest of the company to retain its members. But this will not enable us to draw the conclusion that it intended to waive the only effectual means of compelling its members to pay their assessments, and thereby to make their membership useful and valuable. Members who refuse to pay their dues cannot be considered desirable. Lastly, there was no sufficient evidence that the company had laid assessment No. 9 on this policy as existing on the first day of January, 1873, and that Sutermeister was authorized by any act of the company to give the notice that assessment No. 9 was laid on this policy. The testimony of Sutermeister on this point is very indefinite and too vague to be proper evidence that the company had acted in this matter.

Upon the whole, we discover no substantial error in this record.

PER CURIAM. Judgment affirmed.

[*Cf.* Mut. Ins. Co. *v.* Rosenberger, *ante*, 17.]

Jan. '77, 50. Feb. 7, 1877.

American Steamship Co. v. Bryan.

Negligence — Bailment — Common carriers — Ocean steamship company — Liability of, for theft of a passenger's personal effects from his state-room.

A passenger upon an ocean steamship occupied alone a state-room on an alcove leading into the main saloon. During the night before reaching port, two valises which he had retained in his state-room containing clothing, jewelry, and other personal effects were stolen by some unknown person; at the same time property was stolen from other state-rooms, two of which were situated on the opposite side of the saloon. The passenger had not been furnished with a key to his state-room, although he could have obtained one by application to the steward. One light remained burning all night in the saloon, and a watch was kept there by a saloon steward specially deputed for the purpose, whose duty it was, under the rules of the company, to report every hour to the officer on deck. On the night in question the watchman reported to the officer and then stopped to drink some coffee at the galley. Suspicion subsequently pointed to a fellow passenger, occupying the state-room on the opposite side of the alcove. In an action against the steamship company to recover the value of the valises and their contents:

Held (AGNEW, C. J., and PAXSON, J., dissenting), that the above facts constituted sufficient evidence of negligence to take the case to the jury.

Error to the Common Pleas No. 3 of Philadelphia County.

Case by Walter H. Bryan against the American Steamship Company, as common carriers, to recover the value of certain personal effects taken

Digitized by Google

from the state-room occupied by him on one of the company's steamships, and also for the negligence of the company in not sufficiently guarding the state-room, by reason whereof the plaintiff's baggage was stolen.

On the trial the following facts appeared:—The plaintiff was a passenger upon the defendants' steamship "Illinois," from Liverpool to Philadelphia, in April, 1875. He occupied alone a state-room opening upon an alcove or passage-way leading into the main saloon. Upon coming on board at Liverpool the employés of the defendant, according to the usual custom, and at the request of the plaintiff, placed his trunks and larger boxes in the baggage-room, and deposited in the state-room two valises containing wearing apparel to be used on the voyage, jewelry, and other personal effects. During the night before the arrival of the steamship at the Delaware Breakwater, some one entered the plaintiff's room and stole therefrom the valises and property, to recover the value of which this action was brought. At the same time property was stolen from other state-rooms, two of which were situated on the opposite side of the saloon. As is customary on ocean steamships, the plaintiff's room was unlocked and open for ventilation, although keys for the room could have been procured from the chief steward if desired. One light was always left burning all night in the saloon, and a guard was kept there at night by one of the saloon stewards, who took turns in performing this duty.

Under the rules of the company it was the duty of the steward on guard to report every hour to the officer on deck. It was proved that the officers of the ship often went into the saloon to see if the stewards were on watch. On the night of the theft it was in evidence that the watchman reported to the officer, and then stopped to drink a cup of coffee at the galley. The baggage-room of the steamer was always accessible to passengers in the daytime, and a safe was provided by the company for the reception of valuables.

The servants of the steamship company were not charged with the theft, but suspicion pointed to one Sprungli, a passenger occupying the state-room on the other side of the alcove from the plaintiff's, as the perpetrator of the crime. He was arrested in Philadelphia, but discharged for want of evidence.

The company defendant presented the following points to the Court: (1) That no liability as carriers exists on the part of the defendants for baggage of a passenger not delivered into the custody of the defendants. (2) As to articles of baggage retained by the passenger in his own custody and under his control, no liability exists for their loss or theft, without wilful negligence on the part of the carrier. (3) That under the laws of the United States no liability exists on the part of the ship owners for the loss of any jewelry, watches, precious stones, or money, laden on board a vessel as freight or baggage, unless a written notice of the true character and value thereof is given at the time of such lading, and the same is entered in a bill of lading therefor, and that, the plaintiff having failed to give such notice, the plaintiff cannot recover. (4) That, where the company provides a proper place of security for the baggage and valuables of passengers, of which they have notice, and the passengers fail or neglect to place the same in such place of security, such failure and neglect constitute negligence in respect to a loss, and a passenger cannot recover the loss of such valuables.

The Court (Lynd, J.) refused all the above points, and charged the jury as follows:—

The question involved in this case is not a very well settled one, *i. e.* whether a passenger on a steamship, as to such wearing apparel as he needs for the voyage, and takes with him into his own state-room, is entitled to any protection from the company against loss by theft, or whether he takes the entire risk on his own shoulders. In Pennsylvania, we have no case on the subject. The authorities in England and in other States are conflicting.

I instruct you, that, as to ordinary wearing apparel and ornaments of dress required for daily use, and which the passenger takes into his own state-room, the company does owe the duty of protection to the extent of ordinary care against loss by theft. The plaintiff contends that the thief was one who had access to the saloon, and that if it had been lit and guarded properly, it could not have happened. The defendant contends, that it was done by a passenger named Sprungli, who had the room on the opposite side of the passage-way to the plaintiff. You must ascertain how this theft was perpetrated, for on this depends the question of negligence. A different rule of caution would be required according to the person who occupied it. The negligence set up by the plaintiff was, that ordinary care and caution were not used in lighting and guarding the saloon, and that from the fact that state-rooms upon opposite sides of the saloon were robbed, the theft must have been committed by some one who was allowed to roam at will in the saloon. The duty was that of ordinary care and caution. If the lighting and watching of the saloon were such as an ordinarily prudent person would have adopted, then there was no negligence. If you find, however, that the robbery was committed by this man Sprungli, who had only to step out of his own door across the alcove into the room opposite, you may then find that no care or caution on the part of the Steamship Company could have prevented it. If Sprungli stole it, and it could not have

Digitized by Google

been prevented by any ordinary care on the part of the defendants, then your verdict should be for the defendants. If you find for the plaintiff, his right to recover is limited to what you shall find to be the ordinary apparel and ornaments required for such a voyage.

The Judge reserved the question whether there was any evidence to charge the defendants with negligence.

Verdict for the plaintiff for $586.71.

The Court *in banc* (LYND, J., having died since the trial) entered judgment for the plaintiff on the point reserved.

The company defendant took this writ, assigning for error the refusal of their points, and the entry of judgment on the point reserved.

M. P. Henry, for the plaintiffs in error.

There is no liability in a steamship company as common carriers for such effects as were stolen from the plaintiff below. The measure for liability was stated in Coggs *v.* Bernard, cited in Searle *v.* Savinck (9 L. R., Q. B., 122), and the weight of the American decisions is in accordance with the definition there given, although some cases are conflicting.

Cohen *v.* Frost, 2 Duer (N. Y.), 335.
Pullman Car Co. *v.* Smith, Am. Law Reg., Feb. 1876, p. 91.
Steamboat Crystal Palace *v.* Vanderpool, 16 B. Monroe (Ky.), p. 362.
Jones *v.* Railroad, 7 Hill, 67.

On the question of negligence, a mere scintilla of evidence is not sufficient to charge fraud or negligence; clear proof of a want of ordinary care must be shown.

Adams Express Co. *v.* Sharpless, 27 Sm. 516
Goldey *v.* Railroad, 6 Casey, 242.

In the absence of any lack of discipline or disorder, negligence cannot be presumed from the act of an expert thief perpetrated without noise or violence. The burden is on the other side to prove negligence.

Wharton on Neg., sec. 421.
Parrot *v.* Wells, 15 Wall. 524.
Patterson *v.* Clyde, 17 Sm. 500.

The only *scintilla* in this case is to be found in the partial extinguishment of the lights, and the reporting to the officer on deck, both of which were precautions for the passengers' safety and convenience.

R. P. White, contra.

The steamship, being entirely under the authority and control of the owners, should at least be looked upon as a hotel, and the company should be held to the same responsibility as innkeepers.

Merrill *v.* Grinnell, 30 N. Y. 594.
Hannibal R. R. *v.* Swift, 12 Wall. 262.
Machlin *v.* Steamboat Co., 9 Am. L. Reg. 239.

There was sufficient evidence of negligence for the jury to pass upon.

March 5. THE COURT. The learned Judge below substantially affirmed the points made by the plaintiffs in error, that they were not responsible as common carriers or innkeepers, but that they must answer for negligence as other bailees for hire. To this ruling certainly the plaintiffs could take no just exception. He left the case to the jury, reserving the question whether there was any evidence of negligence. The jury found that there was negligence, and the Court in banc, after the death of the learned Judge before whom the cause has been tried, entered judgment upon the verdict.

Were there any facts in evidence tending to show want of ordinary care, which in the judgment of any reasonable person might be so considered? The question is not whether the Court considers the facts to amount to negligence, what they would have decided sitting as jurymen, for that would entirely usurp the province of the jury. Whether there is any evidence is for the Court, whether and to what extent the witnesses are to be believed, and whether the circumstances are sufficient to satisfy the mind in finding the fact in issue, is for the jury.

The jury in this case might very well conclude that the theft had been perpetrated by an employé of the company. Valises are not articles which can easily be secreted by a passenger or thrown overboard after they have been rifled, without observation. It may very easily be accomplished by a servant on board acquainted with all the holes and corners of the vessel. The baggage of the passengers is taken on to the wharf immediately on arrival, and is open and subject to inspection. The servants remain on board and can watch their opportunity to slip such things ashore, or throw them overboard. One of the passengers on this occasion was suspected, arrested, and detained a considerable time, and then discharged, as no evidence could be produced against him.

A watch was kept during the night in the saloon, but was it of such a character as to amount to the ordinary diligence which the company owed to their passengers? This surely was a question for the jury. It was not a watchman, who by taking his natural rest during the day might be expected to be wakeful at night. The stewards or waiters on board took their turns at this duty. As the means of securing their vigilance, they were required to report every hour to the officer on deck, and of course for this purpose had to leave their post.

They might be expected to take some time to do this—to loiter on their way—to stop and have a few words with the officer about the weather and the speed of the vessel, and on the morning the larceny was committed, it appeared that the steward or waiter had stopped on his

Digitized by Google

way at the cook-galley and drunk a cup of coffee. There was ample time in the intervals, as the fact showed, for some one to enter the state-rooms of the defendant and other passengers and carry off several valises. Was this ordinary and proper diligence? Could not some other mode have been adopted of watching the watchman than this which might leave the saloon entirely unguarded at considerable intervals? In many of our public institutions a very simple electrical machine registers the rounds of the watchman during the night at the appointed times. We do not say that every passenger ship should have and use such a register, but we do say it was for the jury to determine whether this apparent deficiency in the mode of watching the saloon might not have been remedied. Even as a precaution against fire, they might well argue the continuity of the watch was essential. A fire might begin from accident or carelessness in one of the state-rooms and make such headway in five minutes before discovery that the ship would be imperilled.

On the whole, we are of opinion that there was evidence to go to the jury, and that the Court committed no error in entering judgment in favor of the plaintiff below on the reserved point.

Judgment affirmed.

Opinion by SHARSWOOD, J.

Dissenting opinion by PAXSON, J.

The defendant in error was a passenger on board the steamship Illinois from Liverpool to Philadelphia in April, 1875. On the night before the arrival of the vessel at the Delaware Breakwater, some person entered his state-room and stole the effects for which this action was brought. Upon the trial in the Court below the principal contention was whether the plaintiffs in error were guilty of negligence in not having the passenger saloon properly lighted and watched. Their duty in this respect was thus defined by the learned Judge: "The duty was that of ordinary care and caution. If the lighting and watching of the saloon were such as an ordinary prudent person would have adopted, then there was no negligence." There was no objection to this ruling, and it is, therefore, the test by which this case should be decided. The Court reserved the question whether there was any evidence to charge the company with negligence. The jury found for the plaintiff, and the Court subsequently entered judgment in his favor upon the reserved point. The only question for our determination is whether there was sufficient evidence of negligence to justify the judgment upon the point reserved. The facts as disclosed by the evidence are substantially as follows: The defendant in error occupied a state-room opening into an alcove or passageway between that and the adjoining state-room. This alcove opened into the passenger saloon. The state-room doors were kept open at night for the purpose of ventilation. Defendant in error was not furnished with a key to his state-room door, but could have had one upon application. It is not usual on this line, nor on the Cunard line, to furnish keys unless applied for on account of possible accidents. The saloon was lighted during the evening. After twelve o'clock at night the lights were all extinguished except one, a chandelier, which was a short distance from defendant in error's state-room. One of the stewards remained up all night as watchman. It was his duty to report every hour to the officer on the bridge. On the night in question he stopped on his way from the bridge and got a cup of coffee. The officers of the steamship often go into the saloon to see if the stewards are on watch. This is all that is deemed material upon this question. Does it establish a want of ordinary care and caution? It may not show the highest degree of vigilance. But that is not the question here. Was there an exercise of ordinary care? A light was kept burning in the saloon all night and a watchman was in attendance. What more was necessary on the part of the company? No negligence was shown on the part of the watchman. It was not proved that he allowed the light to go out, or that he slept like an unfaithful sentinel upon his post. That he reported hourly to the officer on the bridge surely was not evidence of gross negligence on the part of the company. He did so in obedience to their rules, which were manifestly for the protection of passengers. It is true he stopped once on his way back from the bridge to get a cup of coffee. This would necessarily occupy but a few moments, and there was no evidence that he loitered by the way. In my judgment the evidence disclosed a very slight degree of negligence, if in fact it showed negligence at all; of gross negligence under the rule laid down by the learned Judge of the Court below, I think there was absolutely no evidence. I therefore dissent.

I concur in this opinion. D. AGNEW.

July, '76, 139. Feb. 9, 1877.

Sands et al. v. Fritz.

Landlord and tenant—Replevin—Debt on replevin bond—Return of goods to landlord—Acceptance by landlord of goods of greater value in place of articles missing—Affidavit of defence law—Whether a replevin bond is an instrument within the Act.

In an action of debt upon a replevin bond, defendant filed an affidavit of defence, setting forth that, upon the determination of the replevin suit in favor of plaintiff,

Digitized by Google

most of the articles replevied were surrendered to him; that, in place of those articles which were missing, there were delivered to him other articles of the same description, and of greater value; that all of the articles thus delivered were accepted by plaintiff, who sold part of them and retained the rest.

Held (reversing the judgment of the Court below), that the affidavit was sufficient.

Quære, whether a replevin bond is an instrument upon which judgment can be entered for want of an affidavit of defence.

Per WOODWARD, J. The practice of requiring affidavits of defence in such cases as this, if such a practice prevails, would seem capable of producing mischief and injustice.

Error to Common Pleas No. 3, of Philadelphia County.

Debt upon a replevin bond. Plaintiff filed a copy of the bond, and an averment that the replevin suit resulted in a judgment in his favor, that the rent ascertained to be due was $746.50, and the value of the property distrained $850, and that the sheriff's return to the writ of *retorno habendo* was "eloigned."

William L. Sands, one of the defendants, filed the following affidavit of defence: "That on the 9th day of June, 1875, the plaintiff, Fritz, by his bailiff, Joseph C. Sass, distrained upon a stock of goods in a marble yard, situate on the south side of Race Street, east of Seventh Street, in the city of Philadelphia, for rent claimed to be due. That Joseph R. Sands, one of the defendants named in the warrant of distress, replevied the property distrained upon." [Here is inserted a full list of the articles.] "That deponent, with one Edward Pepper, became the sureties in the replevin bond, upon which bond this suit is brought. That one of the conditions of said bond was that if the property so replevied should not be delivered up, if the plaintiff in said replevin suit did not prosecute his suit with effect, then that said sureties should be responsible for the amount of the rent due at that time. That the plaintiff (in said replevin) did not prosecute his suit with effect, and after judgment had been entered in said suit in favor of the above-named plaintiff (Fritz), deponent, acting under advice, sent for said Joseph C. Sass, bailiff of said landlord, and delivered up to him the possession of the said marble yard. That at the time of the said delivery there was found by said bailiff, upon said premises, the following articles;" [Here is inserted a full list, comprising most of the articles included in the first-mentioned list, and several others not so included.] "as appears by the appraisement made by said bailiff, and said goods and chattels were appraised at the sum of $451. Deponent is informed and believes, and expects to be able to prove, that the property so delivered up to the said Joseph C. Sass, bailiff, was of more value that that originally distrained upon; that most of the articles distrained upon were included in that delivery, and that upon some of them additional work had been expended between the time of the original distraint and the delivery up by deponent as aforesaid, and that a number of articles, which were not upon the premises when the original distraint was made, were there at the time of the delivery aforesaid, and were included in said delivery, and were sold by said bailiff for the said rent. Deponent is advised, and believes, and expects to be able to prove, that on or about the 4th day of February last said bailiff sold a large number of the articles so distrained upon, under the said landlord's warrant, for the sum of $216.92, and that said plaintiff removed from the said place, and now has either in his actual possession, or under his control, quite a number of articles which he claimed to be his individual property, or which were sold, and the buyer failed to come and pay for, which were included in said distraint and delivery."

The Court below entered judgment for want of a sufficient affidavit of defence. Defendant took this writ, assigning for error the entry of the said judgment.

J. Alexander Simpson, for plaintiffs in error.

The affidavit alleges a substantial compliance with the condition of the bond. The case should have gone to a jury.

E. B. Watson and *Henry B. Freeman*, for defendant in error.

Plaintiff in the replevin suit did not prosecute his suit with effect, which fixes his sureties.

Gibbs *v.* Bartlett, 2 W. & S. 33.
Morris on Replevin, 252.

The delivery of any other goods than those distrained upon would not be a fulfilment of the condition of the bond.

Feb. 19. THE COURT. On the 9th of June, 1875, Peter Fritz, the plaintiff below in this suit, by his bailiff, John C. Sass, seized a stock of goods in the marble yard of Joseph R. Sands, one of the defendants, under a distress for rent. Sands issued a replevin, and gave bond conditioned for the return of the property if his suit should fail. The replevin resulted in judgment for Fritz, who brought this action of debt against Sands and his sureties on the replevin bond. An affidavit of defence was made by William S. Sands, a surety and one of the defendants, setting forth that, after the judgment he sent for Sass, the plaintiff's bailiff, and surrendered to him the possession of the marble yard, with all the property it contained. A schedule of the goods delivered was embodied in his affidavit, which embraced also a schedule of the goods previously distrained. The goods described in the two schedules were in large part identical, and it was averred that the articles specified in the first, which were not returned, were replaced by others of greater value

Digitized by Google

when the final surrender was made, and the final schedule was drawn up. The affidavit alleged that the property delivered was appraised at the sum of $451; that part of it was sold by the bailiff for the sum of $216.92, for the rent due the plaintiff, and that the plaintiff removed from the yard, and retained in his possession, or under his control, a number of the surrendered articles which he claimed to be his individual property, and other articles which had been sold, and for which the purchasers had not paid.

Admittedly the proceeding was out of the usual course of practice under a judgment for a defendant in replevin. But Judge GIBSON said in Kimmel *v.* Kint (2 Watts, 431): "We do not say that a writ *de retorno habendo* must be issued. There may possibly be a valid tender without it; but the right of the surety to exonerate himself must be saved to him through the medium of the common law judgments, or the rule prescribed by the eleventh section of the Act of 1772." The parties here were competent to convert their legal into contract relations, and to agree that the literal condition of the bond should [not] be carried into effect.

Taking the affidavit as verity, such an agreement was made. A portion of the goods distrained, and other articles of the same general description, and of greater value than those which had been originally seized and were missing, were accepted, appraised, and sold in part by him. It is indifferent whether the arrangement was known at the outset to the plaintiff or not. He is alleged to have acquiesced. The sale was made to pay his rent. And the articles unsold were transferred to his possession.

By the agreement substantially the same end was reached that a writ *de retorno habendo* would have produced. To some extent, certainly, the affidavit disclosed a defence. What the extent would be, a trial before a jury alone could show.

The legal rights of the plaintiff have been modified by the new contract, and if the amount of his claim has been paid by Joseph R. Sands's property or its proceeds, he cannot recover it again from the defendants in a suit on a replevin bond.

The point is not one which it is now necessary to decide, but there is room for grave doubts whether this action can properly be brought within the operation of any of the statutes authorizing the entry of judgment for want of an affidavit of defence. The eleventh section of the Act of 21 March, 1772, directs that a replevin bond shall be "conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods and chattels distrained in case a return shall be awarded." In no natural sense can this condition be regarded as an agreement for the payment of money under the Act of 28 March, 1835. Nor is it embraced in the second section of the Act of 12 March, 1842, requiring affidavits in actions on bonds and recognizances of bail in error, on bonds of sureties for stay of execution, on bonds or recognizances of special bail, and on bonds given by insolvent debtors, and their sureties, under the sixth section of the Act of 16 June, 1836. The record in many instances could not furnish means of liquidating the judgment that would be both just and safe. The defendant's remedy is on the replevin bond, where there can be no recovery beyond the value of the goods, and where it may be less than the value, for the rent may be inferior in value to the goods, because by paying the rent the debt would be satisfied. (Weidel *v.* Roseberry, 13 S. & R. 178.) The practice of requiring affidavits of defence in such cases as this, if such a practice prevails, would seem capable of producing mischief and injustice.

Judgment reversed and *procedendo* awarded.

Opinion by WOODWARD, J.

Jan. '75, 171. **Coyle's Appeal.** Jan. 8, 1877.
Smith v. Coyle.

Vendor and purchaser—Specific performance—Marketable and sufficient title—Definite failure of issue—Fee inferrible from the charge of a perpetual annuity—Substitutionary devise.

Real estate was devised to B. for life, and from and after her decease, then to the issue of her body who should be living at the time of her death, equally to be divided between them as tenants in common, and not as joint tenants, subject to certain annuities, one of which was perpetual, and in case B. should die without issue, then to J. in fee, subject to the annuities.

Held (affirming the decree of the Court below), that the issue of B. who were living at her death took an estate in fee simple in the premises.

Certiorari and appeal from the Common Pleas No. 3, of Philadelphia County.

Bill in equity, filed March 31, 1875, by Walter B. Smith against Samuel A. Coyle, to enforce the specific performance of a contract of sale of real estate. The bill set forth that the defendant, on the 23d of Oct. 1874, entered into an agreement to purchase from plaintiff the premises No. 608 Commerce Street, in the city of Philadelphia, for $14,000; that the plaintiff was ready to execute a good deed of conveyance therefor, but the defendant refused to perform his agreement and pay the purchase-money, averring that the plaintiff's title was not marketable; that the plaintiff's title was derived through Deborah Morris, who died seized in fee of the premises in controversy,

Digitized by Google

and who, by her will, dated March 16, 1793, devised all her lands to her executors, in trust for the payment of certain legacies, and then for the use of her devisees thereinafter named. She then devised the premises in question as follows:—

Item.—I devise to Elizabeth Shoemaker, for and during her natural life, all my present mansion or dwelling-house and half the garden lot contiguous thereto, with the westernmost frame-house in Farmer's Alley, the adjoining tenement now in the tenure of Jacob Foster, and my chair house and stables, subject to the payment of £20 per annum to my niece Mary Jones, during the natural life of the said Mary, and also subject to the ground-rent of 50 shillings per annum now payable thereout; and from and after the decease of the said Elizabeth Shoemaker, I devise the same to Sarah Powell Buckley, daughter of my niece Sarah Buckley, during her natural life, subject to the payment of the said annuity to Mary Jones, and also subject to the payment of £12 per annum to her mother Sarah Buckley, during the natural life of the said Sarah Buckley. And from and after the decease of the said Sarah Powell Buckley, then I devise the same to the lawful issue of the body of the said Sarah Powell Buckley begotten, who shall be living at the time of her death, equally to be divided between them as tenants in common and not as joint tenants, subject, however, to the payment of the aforesaid annuities and ground-rent, and also subject, from the expiration of said annuities, to an annuity of £12 per annum. payable thereout annually forever to the overseers of the Public School, founded by charter, in the town and county of Philadelphia. . . . And, if the said Sarah Powell Buckley shall die without issue, then I devise the same to my nephew Jonathan Jones, his heirs and assigns forever, subject to the aforesaid annuities and ground-rent."

The bill further set forth that Elizabeth Shoemaker, and the annuitants Mary Jones and Sarah Buckley, had long since died; that in the issue of Sarah Powell Buckley, living at the time of her death, who were eleven in number, a remainder in fee in the said premises was created by the terms of the will of Deborah Morris, which by sundry mesne conveyances had become vested in the plaintiff; that the ground-rent of 50 shillings and the perpetual annuity of £12 had been long extinguished, so that the plaintiff's title was clear of all encumbrances; that a doubt having been suggested whether it was not the true construction of the will of Deborah Morris that an estate for life only was vested in the issue of Sarah Powell Buckley, with remainder in tail to the said Sarah Powell Buckley, with remainder over in fee to Jonathan Jones, the plaintiff procured a deed to be made to bar the entail and to confirm the premises to him in fee, which was executed by the heirs of Sarah Powell Buckley and duly recorded; but that the defendant claimed that the issue of Sarah Powell Buckley had vested in them no estate of inheritance, either in fee or in tail, but an estate for their lives only, and that consequently the plaintiff had no marketable title.

The bill prayed (1) that the plaintiff's title might be decreed to be marketable; (2) for specific performance. The defendant demurred.

The Court below (LYND, J., delivering the opinion) overruled the demurrer, and entered a decree, that plaintiff's title was good and marketable, and that the defendant should perform his agreement of purchase. (Reported 1 WEEKLY NOTES, 370.) The defendant took this appeal, assigning for error the said decree.

Eli K. Price, for the appellant.

The devise contains no words to vest a fee in Sarah Powell Buckley or in her issue. The devise is to issue living at her death, that is, within a definite time, which precludes the vesting of an estate tail in Sarah Powell Buckley.

Middlesworth *v.* Blackmore, 24 P. F. Sm. 414.
Taylor *v.* Taylor, 13 Ib. 481.
Abbott *v.* Jenkins, 10 S. & R. 296.

The issue are to take as tenants in common; they therefore take not by descent as tenants in tail from Sarah Powell Buckley, but as purchasers.

Physick's Appeal, 14 Wr. 123.
Findlay *v.* Riddle, 3 Binn. 139.

The limitation over being to issue as purchasers, the rule in Shelley's case does not give Sarah Powell Buckley a fee or fee tail.

Smith's Ex., Int. § 484.
Taylor *v.* Taylor, 13 P. F. Sm. 484.

The issue of Sarah Powell Buckley took but a life's estate, because no words are used that import a fee.

Ashley *v.* Ashley, 6 Sim. 358.
Steele *v.* Thompson, 14 S. & R. 84.
Clayton *v.* Clayton, 3 Binn. 476.

The devise over to Jonathan Jones, if said Sarah Powell Buckley shall die without issue, contemplated a definite failure of issue, that is, of issue living at the death of the first taker. The limitation over does not enlarge the devise into a fee tail by implication.

Smith's Ex., Int. § 584.
Barnfield *v.* Wetton, 2 B. & P. 324.
Plunket *v.* Holmes, 1 Lex. 11.
Eby *v.* Eby, 5 Barr, 461.
Ellis *v.* Selby, 7 Sim. 350.

The issue of Sarah Powell Buckley do not take a fee by implication from the devise to Jonathan Jones upon default of issue.

Frogmorton *v.* Holyday, 3 Burr, 1618.
Wright *v.* Cundall, 9 East, 400.

A Court of equity, on a bill to compel specific performance, will not force a purchaser to accept a title which is in the least degree doubtful.

Doebler's Appeal, 14 P. F. Sm. 17.

E. Coppée Mitchell, for the appellee.

The true construction of the will of Deborah Morris vests a fee in the issue of Sarah Powell Buckley, because (1) The intention of the testatrix is to dispose of her whole estate. She gives it all to the executors, the survivor or survivors of them, and the heirs and assigns of such survivor, for the use of her devisees. Intentional intestacy is negatived by this fee-simple trust.

Digitized by Google

Challenger *v.* Sheppard, 8 Term Rep. 597.

(2) Technical words are used by the testator in creating the other devises of life estates, and in their absence the implication is that the testatrix intended to create larger estates.

Baddeley *v.* Leppingwell, 3 Burr, 1533.

(3) The annuities charged upon the land are inconsistent with a less estate than that of a fee, a fee being inferrible from the £12 annuity which was to be payable forever.

Andrews *v.* Southouse, 5 T. R. 292.
Coane *v.* Parmentier, 10 Barr, 72.

The remainder to Jonathan Jones is an alternative contingent remainder to take effect as a substitute for the remainder to the issue of Sarah Powell Buckley, in case of default of issue at her death.

Loddington *v.* Kime, 1 Salk. 224.
Robinson *v.* Gray, 9 East, 1.
Hockley *v.* Mawbe, 1 Ves. Jr. 142.
Davy *v.* Barnsall, 6 Term. R. 30.
Hansell *v.* Hubbell, 12 Harris, 244.

Assuming that the issue of Sarah Powell Buckley took but a life estate, and supposing the limitation to them to be omitted, the devise would be to Sarah for life, and if she shall die without issue, to Jonathan Jones in fee. That creates an estate-tail in Sarah with remainder over.

Taylor *v.* Taylor, 13 P. F. Sm. 481.

The words "die without issue," "in default," "for want of," "on failure of issue," import an indefinite failure of issue, and give an estate-tail to the first taker.

Parr *v.* Swindells, 4 Russ. 283.
Bean *v.* Halley, 8 T. R. 5.

The remainder in tail to Sarah after the life-estate to her unborn issue would not be a perpetuity, because it vested in her at the death of the testatrix.

Routledge *v.* Dorril, 2 Ves. 357.
Findlay *v.* Riddle, 3 Binn. 139.

The main purpose of the will is to provide for Sarah Powell Buckley and her issue, and the Court will adopt the construction which will effect that intent.

Earp's Appeal, 1 Pars. Eq. 453.

Jan 15. THE COURT. The failure of issue of Sarah Powell Buckley was definite, and therefore her issue living at her death took as purchasers and as tenants in common, under the will of Deborah Morris. There being such issue there was no failure, and the estate actually vested in them subject to the payment of certain legacies, one of which was perpetual, and therefore discloses the intention of the testatrix to give them a fee.

The devise to Jonathan Jones was evidently substitutionary, and not contingent on a general or indefinite failure of issue. He was to take only in event of Sarah P. Buckley's death without issue, evidently meaning the failure just before recited, which was to admit the living issue to the estate—in other words, he was to take, in the event of a definite failure of issue; this of course was the substitution of one estate for another, founded upon the same contingency. If there were issue living at Mrs. Buckley's death, they were to take; if none, then Jonathan Jones was to take. Evidently the testatrix considered the estate, once vested in the issue, a fixed and permanent one, or she would not have provided for the payment of a perpetual legacy. Taking all parts of the item together, we think there is no doubt a fee vested in the issue living at the death of Mrs. Buckley. Decree affirmed with costs to be paid by the appellant, and the appeal is dismissed.

PER CURIAM.

Jan. '77, 99. **Zerbe v. Zerbe.** March 16, 1877.

Will—Construction of—Striking out superfluous words—Transposition of words.

Under the following provisions in a will: "I give and bequeath unto my son Edward and Peter and my daughter Catherine and Mary my daughters children . . . . they shal stand in equal shares that is to say Mary's children shal have the share of their mother. Item, my son Daniel and Jarrett . . . . they shal have nothing of my estate they have more now than their shairs would come to:"

Held, that all of the testator's real and personal estate passed to Edward and those mentioned in the first clause, the word "estate" belonging to the first clause as well as to the second.

Error to the Common Pleas of Schuylkill County.

Ejectment by Daniel Zerbe *et al.* against Edward Zerbe *et al.* for a portion of a tract of land late belonging to Daniel Zerbe, deceased. Plea, not guilty.

At the trial (before WALKER, J.) the plaintiffs showed that they were among the heirs-at-law of Daniel Zerbe, deceased. The defendants claimed title under an instrument which had been admitted to probate as the will of Daniel Zerbe, deceased. The alleged will was put in evidence, and read as follows: "I, Daniel Zerbe, do make and publish this my last will and testament in manner and form following, that is to say: First, I give and bequeath unto my son Edward and Peter, and my daughter Catherine and Mary, my daughter's children, Daniel, John, Elizabeth, and Emma Mull; they shal stand in equal shares, that is to say, Mary's children shal have the share of their mother. Item, my son Daniel and Jarrett, and my daughter Sarah and Louisa's child Edward Hummel, they shal have nothing of my estate, they have more now than their shairs

Digitized by Google

would come to. Last and also I appoint my son Edward and John Zimmerman, farmer, as my executors of this my last will and testament, and they shall have a right to sell the property and make it into money when they think fit to do so, or when it will bring the most money."

The above instrument was dated, was signed by Daniel Zerbe, and by him declared to be his last will and testament in the presence of two subscribing witnesses.

The testator died possessed of personal property, as shown by an inventory filed in the Register's office.

The Judge charged the jury as follows: The plaintiffs claim as heirs, and would be entitled to have part of the estate in the absence of any will. The defendants allege that the testator made the will, which has been offered in evidence, and that the words are sufficiently comprehensive to vest in his executors all his real estate for the purpose of sale. The plaintiffs deny this, and contend that as to the real estate the testator died intestate.

[The view we take of it is, that when the testator, after speaking of his estate, uses the word "property," he meant all his real and personal property, and thereby empowered his executors to sell his real estate for the purpose expressed in his will.

We therefore direct you to find in favor of the defendants.]

Verdict and judgment for the defendants.

The plaintiffs took out this writ, assigning for error that portion of the charge inclosed in brackets, and the failure of the Court to direct the jury to find a verdict for the plaintiffs.

Hughes and *Farquhar*, for the plaintiffs in error

That portion of the will which purports to be a gift or devise, gives nothing to the parties named, and there is nothing to show whether the testator's intention was to dispose of all or part of his real estate, or all or part of his personal property. A will with no intelligible devise is void for uncertainty.

Kelly *v.* Kelly, 1 C. 460.
Wallize *v.* Wallize, 5 Sm. 242.

If anything passes by the will, it must be by implication in the second clause, viz., "my son Daniel and Jarrett, and my daughter Sarah and Louisa's child Edward Hummel they shall have nothing of my estate." But these words do not impart a testamentary disposition, and therefore cannot be construed into a devise.

Houser *v.* Moore, 7 C. 347.
Duffield *v.* Morris, 8 W. & S. 348.
Burford *v.* Burford, 5 C. 241.

The only way to defeat the operation of the intestate laws is to dispose of the property otherwise.

Hitchcock *v.* Hitchcock, 11 C. 393.
McIntyre *v.* Ramsey, 11 H. 317.
Rupp *v.* Eberly, 2 WEEKLY NOTES, 376.

As to the power of sale: by "the property" we should naturally understand personal property, which alone, without other words of description, passes to the executors; the authority to sell "when they shall think fit to do so, or when it will bring the most money," enlarges the discretion of the executors, who would otherwise be obliged to sell the personal property at the end of the year. If the testator intended to devise all his real property to the defendants, why should he have directed it to be sold by his executors without any direction as to how they should apply the proceeds?

J. W. Ryon and *F. W. Bechtel*, contra.

The testator evidently intended his descendants to be equally provided for. The plaintiffs were cut off because "they have more now than their shairs would come to," "they shall have nothing of my estate." It is evident that the defendants were to receive that which the plaintiffs were not, so the words "my estate" can be supplied in the gift and bequest to the defendants. Evident omissions can be supplied.

1 Redfield on Wills, 454.
Covenhoven *v.* Shulen, 2 Paige, 122.
McKeehan *v.* Wilson, 3 Sm. 76.

The words "estate" and "property" in a will may carry every kind of property.

Turbett *v.* Turbett, 3 Y. 187.
Foster *v.* Stewart, 6 H. 23.

It is not denied that the intestate laws must prevail unless there is an express gift or a necessary implication. Here the implication is necessary.

The fact that the testator gave to his executors the right to sell shows that he contemplated a conversion of his property, real and personal, into money. The amount to be realized therefrom being unknown, he speaks of it as "my estate," and declares that the devisees shall have "equal shares." The right to sell was certainly not given to enable his executors to sell personal property only, since they had that power by virtue of their office.

March 26. THE COURT. We are all of opinion that, judged *ex visceribus*, this will contains a sufficient devise and bequest of all the estate of the testator, to carry his real and personal property to the persons named in the will as his devisees and legatees. That Daniel Zerbe made what he himself terms his last will and testament, appears by the written paper duly signed, sealed, and witnessed, and by the witnesses attested as such. That he intended to will his property to the persons named to take under the will, is not denied, but it is insisted that, in fact, he made no devise and bequest of his property. We do not agree to this statement. We have only to read

Digitized by Google

the will in its own order, striking out the superfluous words which obscure the sense, and we have a sufficient and consistent disposition of his property. Thus "I give and bequeath unto my sons, Edward and Peter, and my daughter Catherine and Mary's children in equal shares; but to my sons Daniel and Jarrett, and my daughter Sarah and Louisa's child, *nothing* of my *estate*, they (viz., the last-named) having more than their shares would come to." Now it is clear that the word "estate" belongs to the first clause of the sentence as much as it does to the last clause; and that the word "shares," in the first clause, corresponds to the same word in the last clause, and both refer to the same estate. This is further strengthened by the fact that the second clause excludes the children named in it from the estate, and thus, by an irresistible conclusion, refers the estate therein named to the persons named in the first, to whom, by express words, the testator declares he gives and bequeaths. Then if anything were wanting, the power given to the executors immediately following, to sell the "property" makes the subject of the devise more manifest.

We think the Court below gave a proper interpretation to the will, and therefore the judgment is affirmed.

PER CURIAM.

Jan. '76, 201. March 2, 1877.

Seipel v. International Life Ins. and Trust Co.

Contract—Rescission of—Act of either party making performance impossible—Effect of such act—Life insurance—Foreign corporations.

A., a resident of Pennsylvania, contracted with a life insurance and trust company, chartered by the New Jersey Legislature, and licensed to do business in Pennsylvania, to procure life risks for it, advancing $2500 to the company, for the repayment of which he was to retain the first premiums on the life risks he secured. About a year from the date of the contract, the company withdrew from the life insurance branch of its business, and discontinued its Pennsylvania agencies, reserving, however, the right to issue policies to fulfil contracts made prior to the time of such withdrawal:

Held, that this action of the company was such a change of the necessary conditions of the contract as justified A. in rescinding it, and demanding the repayment of the balance of his money in the hands of the company not covered by life risks already procured.

Error to the Common Pleas of Lehigh County.

Assumpsit, by Martin A. Seipel against the International Life Insurance and Trust Company, to recover money paid on a contract. Plea, non-assumpsit with leave, etc.

The facts of the case are briefly as follows: The International Life Insurance and Trust Co. was incorporated by an Act of the New Jersey Legislature of April 22, 1868. On January 1, 1872, they took out a license to do business in Pennsylvania, as required by the laws of the State. On November 25, 1871, Seipel sold the company a mortgage for $7000, receiving its check for the whole amount of the purchase-money, which check was duly paid. On the same day, Seipel gave the company $2500, and entered into the following agreement:—

"The International Life Insurance and Trust Company of Jersey City hereby acknowledges that it has this day had and received of and from Martin A. Seipel, of the city of Allentown, county of Lehigh, and State of Pennsylvania, the sum of two thousand five hundred dollars, being the first premiums upon acceptable life risks, which, for certain good causes and considerations, the said Martin A. Seipel hereby agrees and covenants to procure and place and insure in the said company, within the period of two years from the date hereof. The said The International Life Insurance and Trust Company hereby agrees to furnish policies for the said life risks, the first premiums amounting in the aggregate to two thousand five hundred dollars, whenever the said Seipel shall provide and place the said acceptable risks, within the aforesaid period of two years from the date hereof. Witness our hands this 25th day of November, A. D. 1871."

Under this agreement, Seipel procured for the company life risks, the first premiums of which amounted to $466.93.

On October 15, 1872, the company withdrew from the life insurance business on account of the large expenditures, competition, etc., transferring that branch of its business to the U. S. Life Ins. Co. of New York. All its agencies, including the one at Allentown, were discontinued; its policy-holders were requested to return their policies and accept new ones in the U. S. Ins. Co.; and Seipel and the general public were notified that thereafter it would attend to the trust and banking business "exclusively." The company reserved the right to issue policies of its own to fulfil contracts made prior to the transfer, and did issue four or five policies after that date. Seipel made one subsequent application to the company, who issued a policy, which he refused to accept. He then rescinded the contract, and brought suit to recover the balance of his money in the hands of the company. The case was submitted to E. G. Schwartz as referee, under the Act of May 14, 1874.

At the trial before the referee, the plaintiff offered the following points:—

(1st) If the referee finds that the mortgage was sold by the plaintiff to the defendant for the

Digitized by Google

sum of $7000, and that the plaintiff deposited with the defendant $2500 as first premiums upon insurance, to be thereafter issued, as application should be made from time to time, and within the dates specified in the agreement marked "A;" and that the defendant, after the date of the agreement, to wit, on October 15, 1872, discontinued its business as an insurance company; transferred its risks, etc., to the United States Insurance Company; notified its policy-holders to return their policies and accept new ones in said company; discontinued its agencies, and especially the one at Allentown; notified the plaintiff, as well as the general public, that after said date of October 15, 1872, the said defendant would thereafter attend to the trust and banking business "exclusively," then the said defendant has done acts inconsistent with the agreement of date Nov. 25, 1871, and the plaintiff was thereby relieved of the performance of his part of the agreement, and was entitled to rescind the same. It follows, therefore, that the plaintiff must recover the amount of his claim with interest. *Refused.*

(2d) It is an implied covenant, running with the agreement of date Nov. 25, 1871, that the defendant will continue in the life insurance business; and before the expiration of the time therein specified, the said defendant discontinued the life insurance business and became a trust and banking company. The plaintiff was in law entitled to rescind the contract and recover the amount which was paid in part execution of it. *Refused.*

(3d) As a matter of law, the contract of date Nov. 25, 1871, was on the part of the corporation defendant *ultra vires*, and therefore illegal; and as this suit was commenced while the contract was executory, and before the expiration of the time specified in the agreement for the performance of the covenants, the plaintiff is entitled to recover the amount held by the defendant under said contract. *Refused.*

(4th) The plaintiff is entitled to an award upon the evidence. *Refused.*

The referee was of opinion that, although the plaintiff was placed in a worse position by the act of the defendant as to the performance of the contract, this was not sufficient ground for him to claim its rescission; that, to justify him in so doing, performance must have been rendered entirely impossible; but that the defendant had provided against this impossibility by reserving the right to issue policies of its own to fulfil contracts made prior to its discontinuance of the life insurance business. He likewise held that the contract was not *ultra vires* on the part of the defendant, and that, even if it were, the plaintiff was estopped from so alleging, for the purchase of the $7000 mortgage and this contract were parts of the same transaction, and the plaintiff could not claim a rescission of the executory part thereof without tendering back the purchase-money of the mortgage. On these grounds, he found in favor of the defendant.

The plaintiff thereupon took this writ, assigning for error the answers to points and the decision of the referee.

C. J. Erdman (with him *E. Harvey*), for the plaintiff in error.

When a party enters into an agreement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he will not do anything to put an end to that state of circumstances. Under this rule the defendant's withdrawal from the life insurance business entitled the plaintiff to rescind the contract.

2 Parsons on Contracts, 676.
Broom's Legal Maxims, 214.
1 Chitty on Contracts, 89.
Sterling *v.* Maitland, 117 E. C. L. R. 840.
Tasker *v.* Shepherd, 6 H. & N. 581.
Inchbald *v.* C. T. & C. Co., 17 C. B., N. S. 733.
Kugler *v.* Wiseman, 20 Ohio, 361.
Crossgrove *v.* Himmelrich, 54 Penna. 203.
1 Addison on Contracts, 476.
Du Bois *v.* Canal Co., 4 Wend. 285.
Planche *v.* Colburn, 8 Bing. 14.
McIntire *v.* Belcher, 14 C. B., N. S. 654.
Robson *v.* Drummond, 2 B. & Ad. 303.

The contract was invalid from its inception, for the charter neither directly nor impliedly empowered the company to enter into such an agreement.

Earl of Shrewsbury *v.* U. S. R. Co., L. J. Ch. 156.
Railroad Co. *v.* Croswell, 5 Hill, 240.
Angell & Ames on Corporations, § 111.
Beaty *v.* Knowler, 4 Pet. 162.
Railroad Co. *v.* Canal Co., 9 H. 9.
Com'th *v.* Railroad Co., 3 C. 339.
Railroad Co. *v.* Allegheny, 13 Sm. 126.
Fowler *v.* Scully, 22 Id. 456.
Bank *v.* Earle, 13 Pet. 587.
Pine *v.* Railroad Co., 6 Am. L. Reg. 409
2 Kent's Com. 298.
Heed *v.* Ins. Co., 2 Cranch, 167.
Preston *v.* L. M. & R., 5 H. L. C. 605.
Bateman *v.* Railroad, L. R., 1 C. P. 509.
Green's Brice's Ultra Vires, 278.

Besides, on November 25, 1871, the date of this agreement, the company had no power to contract at all in Pennsylvania, for its license to do business in the State was not taken out until January 1, 1872.

R. E. Wright & Son, contra.

Where one party to a contract has done acts tending to prevent performance, the other party cannot demand a rescission without showing his readiness to perform his part of the agreement. But the plaintiff has shown no such readiness to fulfil his agreement to furnish life risks; on the contrary he refused to accept the last policy which the plaintiffs issued to him.

Digitized by Google

Warren *v.* Wheeler, 21 Maine, 484.
Haslack *v.* Mayers, 26 N. J. L. 284.
Norris *v.* Johnston, 5 Barr, 287.

Mere increased difficulty in the performance of a contract, even if a result of the acts of one of the parties, does not release the other party; it must be shown that performance has become absolutely impossible.

Chitty on Contracts, 1069, 1075, 1084.
Gilpins *v.* Consequa, 3 W. C. C. R. 184.
Youqua *v.* Nixon, 1 P. C. C. 221.
Tuffnell *v.* Constable, 7 A. & E. 798.
Huling *v.* Craig, Addison, 342.
Shaw *v.* Turnpike Co., 2 Penna. 454.
Martin *v.* Schoenberger, 8 W. & S. 368.
Alexander *v.* Hoffman, 5 Id. 382.
Hall *v.* Rupley, 10 Barr, 231.

March 12. THE COURT. But a single question presents itself for consideration in this case; that question is, did the company defendant by its own act render the performance of the contract with Martin A. Seipel impossible, or, if not wholly impossible, were such new circumstances and conditions thrown around and imposed upon its execution, by the company, as warranted him in treating it as rescinded? A statement of the facts will resolve this matter. The defendant was a New Jersey corporation; it had complied with the laws of Pennsylvania, and established an agency at Allentown; and it had, therefore, the power to solicit and take risks in this commonwealth. Seipel was a citizen of Allentown; he paid to the company twenty-five hundred dollars, which it agreed should be treated as first premiums, paid in advance, on life risks of an acceptable character, to that amount, and which Seipel was empowered to present within two years from the date of the contract, and which the company was bound to accept. The plaintiff was thus constituted an agent of this corporation; for it was only by virtue of such power that he could comply with the terms of the contract; and, on the other hand, the defendant could only accept the risks, offered by the plaintiff, by virtue of the power it acquired, by a compliance with the statutes of this State. When, therefore, it expressed its determination to abandon the business of life insurance, and, at the same time, withdrew its agencies from Pennsylvania, it thereby not only disqualified itself for receiving risks, but also rendered it impossible for Seipel to solicit or procure them. For in order to act even as a subordinate agent, he must have an appointment from the general agent for the State, duly certified by the auditor-general. Now what signified the fact that the defendant reserved the right to issue policies to fulfil contracts made previously to the time of the abandonment of its general insurance business? It had, by its own act, put an end to the plaintiff's power to procure risks within his own State, the place of the contract, and hence its reservation did him no good. True, he might have gone into New Jersey, and canvassed that State for risks; but, in the first place, it would be inequitable to compel him to accept a contract which had been mutilated by the cutting out of his own State—the place where both he and the company had intended he should procure the necessary risks to pay him back the money which he had advanced; and, in the second place, it would be rowing against tide to attempt to procure risks, even in New Jersey, for a company which had forestalled such attempt, by announcement to the world that it had abandoned the insurance business. A more effectual method for blocking the way to the performance of a contract, than that presented in the case in hand, can scarcely be conceived, and we are not willing to agree that the party causing such obstruction should be permitted to profit thereby. It was also a mistake to suppose that a tender of the money, paid to the plaintiff, for the mortgage sold by him to it, was a condition precedent to the plaintiff's right of action. That transaction does not in any way enter into the contract before us; the defendant, for reasons of its own, took especial care to make these transactions separate and distinct; apart, however, from this, the default in performance, as we have shown, results from the act of the defendant, and it is upon this default, which amounts to a rescission, that the plaintiff's action is founded; he has, therefore, no precedent conditions to perform.

And now, March 12, 1877, the judgment upon the award is reversed and set aside, and judgment is now entered for the plaintiff, Martin A. Seipel, and against the defendant, The International Life Insurance and Trust Co. of New Jersey, in the sum of two thousand four hundred and thirty-four dollars $\frac{58}{100}$ (2434\frac{58}{100}$), with costs of suit. And it is ordered that the record be transmitted to the Court of Common Pleas of Lehigh County for execution.

Statement:—

Amount contract November 25, 1871,		
" " 1873,	$2500	
Less payment	466	93
	$2033	07
	401	51
	$2434	58

Opinion by GORDON, J.

Digitized by Google

Quarter Sessions.

Q. S. of Tioga Co. March, 1877.

Commonwealth v. Faulkner.

Insolvent laws—Effect of discharge, upon sentence for fornication and bastardy—Defendant's liability to pay weekly allowance for support of bastard child, accruing subsequent to discharge—Whether also liable to pay fine, etc., imposed before discharge.

The insolvent laws may relieve a defendant, confined under sentence for fornication and bastardy, from his *imprisonment* but not from the *sentence*.

Nothing but pardon, or fulfilment of the terms of the sentence, can extinguish the defendant's liability under it.

The sentence remaining in full force, the process of the Court may be used to reach earnings or after-acquired property in satisfaction of the sentence.

Quare. Does the distinction taken in Com'th v. Miller (3 WEEKLY NOTES, 301) exist? Do not all parts of the sentence stand together, and may not an attachment issue, on a proper showing, to enforce the payment of fine and costs as well as of subsequently accruing instalments of allowance?

Motion for rule to show why an attachment shall not issue, etc.

The defendant was convicted of fornication and bastardy at the November Session, 1875. On Dec. 5, 1875, he was sentenced to pay a fine of $25 and the costs; to pay $95 for the lying-in expenses and maintenance to date of sentence; to pay $1 50 per week to the overseers of the poor for the support of the child, payable quarterly, until the child should reach the age of seven years; to give bond with security for the payment of the said weekly allowance, and stand committed until the sentence should be complied with.

The defendant paid nothing, and after three months' confinement in the county jail applied for and obtained his discharge as an insolvent debtor. Since his discharge the accruing allowance has reached the sum of $99, no part of which has been paid.

The overseers of the poor, to whom this allowance was payable, presented this application, based upon an affidavit of non-payment of the allowance.

J. B. Niles, for the motion.

H. Sherwood and *M. F. Elliott*, contra.

March 20, 1877. THE COURT (after stating the facts). The question raised by this motion is upon the effect of defendant's discharge.

For the motion it is urged, upon the authority of Com'th v. Miller (3 WEEKLY NOTES, 301), that the defendant cannot avail himself of his discharge for any purpose whatever, because the sum stated in the affidavit has fallen due under the terms of the sentence since the discharge.

On the other hand, it is urged that instalments of a debt falling due after a discharge have always been regarded as affected by it; and the case of George v. Hoover (3 S. & R. 559), among others, is cited as authority for the position.

There is, however, no real conflict between these cases. In George v. Hoover, notwithstanding the discharge of the person of the defendant from imprisonment, the debt was not paid. The plaintiff had a right of execution against the after-acquired property of the defendant, and could levy and sell the same in same manner and with same effect as though no proceedings had ever been had under the insolvent law.

Really, nothing more than this was decided in Newhouse v. The Com'th (5 Wh. 82). The defendant had been discharged from imprisonment under a sentence of the Court of Quarter Sessions, but the sentence remained. Nothing but compliance with its terms, or a pardon from the executive, could discharge the defendant from it. The proceedings under the insolvent law had opened the door of his prison, but had not paid the sentence or taken away any other remedy for its recovery.

The after-acquired property of a defendant so situated is liable and the process of the Court may be invoked by the proper person for the purpose of reaching it. An attachment is process for compelling compliance with the order of the Court, but it is not issued as of course. It issues only under direction of the Court. For what purpose ought it to issue in a case like the present? Simply for the purpose of reaching after-acquired property or earnings of the defendant and compelling their appropriation in accordance with the sentence.

It would seem reasonable, therefore, as a matter of practice, that the application for the writ should state not only that the sentence remained unperformed, but that the defendant had property, or had been, or is, engaged in some business, or receiving wages or income, by means whereof the sentence or some part thereof may be discharged.

The question is perhaps not raised by this motion, but it is very clearly suggested—Whether the writ may not issue to enforce the payment of so much of the sentence as was demandable at the time of defendant's discharge, as well as of that part of it which has accrued subsequently? Whether, in other words, the right to the writ depends on the time when any particular payment falls due under the sentence, or upon the fact that the sentence remains unperformed? The case of Com'th v. Miller seems to hold that it

Digitized by Google

depends upon the time when the payment falls due; and the Judge delivering the opinion says that the payments could "not be capitalized" at the date of the discharge, and were, therefore, wholly unaffected by it. If so, what hinders the commitment of the defendant for non-payment, and his being compelled after three months more in jail to apply again for his discharge as an insolvent?

Why might not this process be again repeated upon the falling due of another instalment, and *toties quoties?* If the discharge had no effect as to the parts of the allowance not then demandable, it is not easy to see what should prevent imprisonment upon them; and so it might happen that a really insolvent defendant might be in prison during most of the seven years covered by the allowance, notwithstanding that the case of a sentence for fornication and bastardy is expressly named in the statute as one in which relief from imprisonment may be had under the insolvent law.

It would seem more reasonable to hold that the right to the writ depends upon the fact of the non-performance of the sentence, and the right of the Court to enforce it against the earnings and property of the defendant. In this case, however, the petition for the writ is made to rest on the subsequently accruing payments so that the decision of the question suggested does not become necessary at present, but when the defendant is brought in it may be so raised as to compel its determination.

For the present motion we think an averment of the existence of after-acquired property, wages, etc., should be filed, and upon the filing of such averment the rule is granted.

Opinion by H. W. WILLIAMS, P. J. 4th Dist.

Common Pleas—Equity.

C. P. No. 2. March 10.

Siegert et al. v. Meinhard et al.

Trademark—Infringement—Injunction to restrain issuing of award by Centennial Commission to an infringer of plaintiffs' trademark—Privilege of consul from jurisdiction of civil court.

Motion for preliminary injunction.

The bill, filed by Siegert *et al.* against Theodoro Meinhard, Leon de la Cova, and the United States Centennial Commission, set forth that, in the year 1830 Dr. J. G. B. Siegert discovered the secret of the composition of a certain bitters or cordial, for whose manufacture he established works in the town of Angostura, in the republic of Venezuela. He gave this compound the name of "Angostura Bitters," and inclosed the bottles containing it in a peculiar paper wrapper, on which was printed a description of its properties in several languages. This name and wrapper have been continuously used since that time by him and his successors in business. In 1846 the name of the town of Angostura was changed to Cuidad Bolivar, and there has since been no town or city called Angostura. In 1871, Dr. Siegert died, and all interest in the manufacture of the bitters passed to complainants. But in the same year the defendant, Meinhard, a resident of Cuidad Bolivar, began the manufacture of an article, which he inclosed in wrappers similar to those of complainants, and which he called by the same name of "Angostura Bitters." From this infringement upon complainants' trademark he has already been enjoined by courts of equity in various countries. The bill further averred that the respondent, Leon de la Cova, had received from Meinhard a quantity of these goods, which he exhibited for Meinhard at the Centennial Exhibition, and had obtained from the judges the recommendation of a diploma and medal.

The bill prayed an injunction restraining Meinhard and De la Cova, their employés, vendees, and agents, from manufacturing or selling any article under the name of "Angostura Bitters," or bearing a colorable imitation of the label or wrapper of the complainants; and also restraining the United States Centennial Commission from issuing to Meinhard any award, diploma, or medal for "Angostura Bitters."

Montgomery and *Wagner*, for the motion.

The defendants failed to appear.

THE COURT granted a temporary injunction against Meinhard and the Centennial Commission.

De la Cova being the Venezuelan consul at Philadelphia, the Court dismissed the bill as to him for want of jurisdiction.

Common Pleas—Law.

C. P. No. 1.

Singerly's Administrator v. Johnson, Treasurer, etc., and the Philadelphia Board of Brokers.

Arbitration—Agreement for, in constitution of unincorporated association—Not revoked by death of member—Seat in Board of Brokers—Priority of debt due to fellow member on proceeds of sale of deceased member's seat—Conclusiveness of finding of arbitration committee as to claims due members of the Board. Note.—Leech v. Leech, old District Court, reported.

Sur exceptions to adjudication of law and facts by Judge sitting without a jury.

Assumpsit, brought originally in the District

Digitized by Google

Court, in 1872, by the administrator of Jos. M. Singerly against Johnson, Treasurer of the Board of Brokers, *et al.*, to recover the proceeds arising from a sale by the Board of Singerly's seat as a member of that body.

The parties, by agreement, dispensed with a jury, and submitted the case to ALLISON, P. J., under the Act of April 22, 1874 (P. L. 109), and the case then proceeded to trial by proofs and arguments of counsel.

The facts, as found by the Judge, were substantially as follows:—

Singerly, at the time of his death, was a member of the Board of Brokers, an unincorporated association. After his death his "seat" (*i. e.*, the collective privileges which are incident to a membership in said body) was sold by the secretary under the provisions of the constitution of said association (recited below), for $1275.

One D'Invilliers, a member of the Board, presented a claim against said proceeds for $1085, being a balance alleged to be due him arising out of stock transactions previously had in the decedent's lifetime, between the decedent and the claimant as members of the Board. This claim was investigated, and in June, 1874, was allowed by the "Arbitration Committee" of the Board.

The provisions of the constitution pertinent to the case are as follows:—

"Sec. 9. . . . There shall be elected a standing Arbitration Committee, . . . whose duty it shall be to investigate and decide all claims and matters of difference arising between members of the Board . . . *the decision of this committee shall be final*" (except in certain contingencies not arising here).

"Sec. 12. . . . . When a member dies, his seat may be sold by the secretary, and *after satisfying the claims of the members of the Board, the balance shall be paid to his legal representatives.*"

In accordance with the rule and custom of the Association, Singerly, on becoming a member, had signed an agreement to abide by its constitution and by-laws.

On the above state of facts, ALLISON, P. J., held: (1) That the decision of the Arbitration Committee was final and conclusive both as to the existence, validity, and amount of D'Invilliers' claim, and that a court of law had no jurisdiction to go behind or inquire into the finding of said committee. (2) That the agreement to abide by the arbitration clause, etc., in the constitution, entered into by Singerly, or implied by his membership, was not revoked by his death. (3) That the plaintiff, as the legal representative of the decedent, was only entitled to recover the balance, if any, after the payment of D'Invilliers' claim, with interest; and that such limitation of his right was not affected by the fact that the decision of the Arbitration Committee was made after the commencement of this suit.

The Judge accordingly entered a verdict for plaintiff for $135.75, being the amount only of such balance, to which the plaintiff filed exceptions.

E. Spencer Miller, for exceptant.

Geo. Tucker Bispham, and *A. Sydney Biddle*, contra.

(The arguments of counsel presented the same points and authorities as were submitted in a former proceeding in the same case, reported 1 WEEKLY NOTES, 122. See also S. C., 1 WEEKLY NOTES, II. Defendant's counsel also referred to Leech *v.* Leech, District Court, 1874, reported in note.*)

Feb. 17. THE COURT. The exceptions to the finding of the Court are dismissed, and judgment is entered for the plaintiff, in accordance with said finding, in the sum of $163.21.

Note.—The case was not taken to the Supreme Court. The verdict for plaintiff upon this trial, being for a less amount than that found on the previous trial (1 WEEKLY NOTES, II.), the plaintiff lost his costs, under the provisions of the Act of March 21, 1806, § 34; Smith's Laws, 327; Purd. Dig. 1170, pl. 39, and note *b*.

---

* District Court of Philadelphia County, June T. 1874.

Leech v. Leech, Defendant, and **The Board of Brokers**, Garnishees.

Case stated: Attachment sur judgment by the plaintiff against the Board of Brokers. The writ issued to September Term, 1872, on a judgment previously obtained against the defendant, who was then a member of the Board of Brokers. The defendant's seat was sold in 1874, as stated in the opinion, *infra*, and the proceeds were insufficient to pay the debts due by the defendant to his fellow members in the Board.

Hanson and *Dougherty*, for the plaintiff.

A. Sydney Biddle, for the garnishee.

June 27, 1874. THE COURT. We are spared the necessity of deciding whether the seat of a member of the Philadelphia Board of Brokers is a mere personal privilege or personal property; whether, when such seat has been sold, in consequence of the insolvency of such member, he (or his creditors) can, in any event, claim any part of the proceeds of such sale.

Under the articles of association of said Board, "the seat of a member who fails to settle with his creditors within a year from the time of his suspension, shall be sold by the secretary, and the proceeds shall be paid *pro rata* to his creditors in the Board." The seat in question was regularly sold in pursuance of this provision, and the proceeds are insufficient to discharge the claims of defendant's creditors in the Board.

Surely the effect of the provision just quoted was to place the seat (without regard to its technical designation or classification) in the hands of the secretary, in pledge to pay the claims his fellow members might have upon him in the event of his suspension and of his failure to settle with his creditors within one year from the date thereof. Upon this condition he became possessed of his seat. Can he now repudiate the condition? Have his outside creditors any higher rights?

When he, or they, shall have paid off the claims of

Digitized by Google

his fellow brokers upon this fund, there will be room for the discussion of the question presented on behalf of the plaintiff, at the argument of this case stated. Judgment for the garnishees.

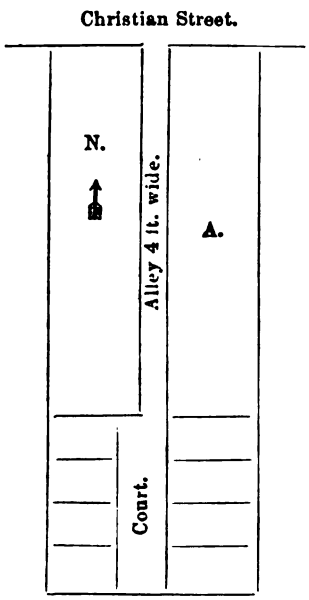
Opinion by LYND, J.

C. P. No. 2. **Peters v. Maxwell.** March 6, 1877.

Easement—Will—Devise of lot adjoining alley—Use of alley by devisee—Good and marketable title.

Motion to take off non-suit.

Covenant on articles for the sale of real estate, by which the defendant agreed to convey to the plaintiff a "good and marketable title" to the lot marked A in the following plan, "together with the use and privilege of an alley four feet wide, which leads northward to Christian Street along the west side of said lot of ground."



On the trial the plaintiff proved that the lot in question had formed part of the estate of defendant's father, who had devised it to defendant by the following clause in his will:—

"Andrew Robinson Maxwell to have the lot . . . . *leaving an open passage or alley, for the back houses, of four feet wide.*"

The latter small houses, which fronted on a court in the rear to which the alley was the only access, were devised to other parties.

The breach averred was that defendant could not convey a good and marketable title to the use and privilege of the alley.

HARE, P. J., entered a non-suit, on the ground that by the will a good and marketable title to the use and privilege of the alley was vested in the defendant.

Leach, for the motion.

Motion refused.

C. P. No. 2. **Adams v. Levy.** March 31, 1877.

Married woman doing business under Act of 1872—Husband not liable for debts incurred by her in such business.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit for goods sold. The affidavit of defendant set forth that the goods were not purchased by him nor by his authority, but by his wife for use in her business, which she carried on under a decree of the Court of Common Pleas No. 1, allowing her the benefits of the Act of April 3, 1872; that said business and the earnings and profits were entirely the property of the wife, and defendant had no interest or control over it whatever.

Evans and *Ashhurst*, for the rule.

The Act of 1872 does not make the wife a feme sole trader, and we cannot sue her for these goods.

Hartz *v.* Clawson, 34 Legal Int. 5.

The Act of 1872 does not release the husband from liability for his wife's debts, and therefore his obligations remain as at common law.

Geo. P. Rich, contra.

Under the Act of 1848 the separate property of the wife is not liable to the husband's creditors.

The Act of 1872 adds her separate earnings as a part of her separate estate, and such earnings are not liable to the creditors of the husband. Conversely the husband should not be liable for her debts contracted in her separate business.

Murray *v.* Keyes, 11 Casey, 384.
Lippincott *v.* Hopkins, 7 Sm. 328.

At common law the husband was only liable on the ground that the goods or profits became his.

Mackinley *v.* McGregor, 3 Wharton, 393.
Jacobs *v.* Featherstone, 6 W. & S. 346.

In equity the husband was always relieved from liability for the wife's debts when he was not entitled to the profits.

2 Roper on Husband and Wife, 174, 175.
2 Story on Equity, § 1387.

This precise point has been decided in C. P. No. 3.

Manfg. Co. *v.* Blair, 3 WEEKLY NOTES, 170.

C. A. V.

April 7. THE COURT. At common law the husband was liable for goods sold to his wife on the ground that they became his property, and it was presumed they were bought with his consent, and upon his credit by her as his agent. Where the circumstances showed that this presumption was wanting, as where the parties were not living together, or where he expressly dissented, or even where the goods were sold upon the wife's credit only, the husband was not liable. (Bently *v.* Griffin, 5 Taunton, 356; Jacobs *v.* Featherstone, 6 W. & S. 346.)

The Act of 1872 seems to take away, so far as

Digitized by Google

regards the wife's debts arising from her separate business, all the grounds of the husband's liability at common law. The goods purchased do not become his, nor has he any legal control which would enable him to regulate the amounts or kinds or prices of goods purchased, or the debts incurred in carrying the business on. His consent to the incurring of such debts is not necessary, and it cannot be presumed in the absence of his authority over the matter.

It would, moreover, be a great hardship on the husband, and a great wrong to his creditors, if he could be held liable, and his property be subjected to execution for debts incurred in carrying on a business in whose capital and profits he had no part or interest.

It may be that the Act of 1872 does not make the wife a feme sole trader, nor render her personally liable for her debts or contracts even it her separate business. It will be time enough to decide that question when it arises necessarily in the case; but I may observe that even in that case the law would be no different from what in is in England, and has always been in Pennsylvania, where a married woman, even if living apart from her husband under articles of separation under circumstances which relieve the husband from liability, is not herself liable. (Marshall *v.* Rutton, 8 Term, 545; Jacobs *v.* Featherstone, 6 W. & S. 346.) In such case the person who sells goods or loans money to the wife, is without legal remedy, and considering the opportunity for fraud which would be opened if the husband should, under real or assumed compulsion, bear the burdens of a business, while the wife pocketed the profits, it may be a conclusion, desirable in point of public policy as well as necessary under the principles of law, that persons dealing with a married woman, not trading as a feme sole, but doing a separate business under the Act of 1872, must deal for cash or trust to her personal integrity without recourse to law.

Rule discharged.

Opinion by MITCHELL, J.

C. P. No. 2. March 8, 1877.

Ketcham v. Singerly.

Mechanic's lien—Failure to get judgment on sci. fa. within five years—Sci. fa. to revive lien.

Demurrer to special pleas.

Plaintiff filed a claim under the Mechanic's Lien Act, in June, 1867, against defendant as owner and contractor, and on January 18, 1868, issued a *scire facias* thereon, which was duly served and put at issue, but has not been proceeded in to judgment. April 20, 1872, plaintiff issued a *scire facias* to revive and continue the lien of his said claim, to which, March 20, 1876, defendant filed special pleas (which raise the present question), averring that more than five years have elapsed since the filing of the said claim, and since the filing of the said or any *scire facias* to ascertain the amount thereof and obtain judgment and execution thereon, and no judgment has been entered; concluding with a verification by the record. Demurrer, on the ground that the defence set up is insufficient in law.

John G. Johnson (with him *George W. Thorn* and *William S. Price*), for the plaintiff.

The *scire facias* to revive was issued while the *scire facias* to collect was pending; this was rendered necessary by the prospect of the five years of the *scire facias* to collect expiring before judgment thereon could be obtained. It is a question to be decided by the letter of the statute. *Cf.* Act of 16 June, 1836, § 24 (Purd. Dig., page 1036, pl. 57).

R. C. McMurtrie and *E. S. Miller*, contra, for the defendant.

The statutory lien has been lost; the lapse of five years pending litigation to try the merits and validity in form is fatal.

The statute intended to give five years, and no more, after suit begun, in which to determine the question.

Hunter *v.* Lansing, 26 Sm. 25.
Hershey *v.* Shunk, 8 Sm. 384.
Meeson's Estate, 4 W. 344.
Cornelius *v.* Junior, 5 Phila. 171.

The lien of the debt must be ascertained before there can be a *scire facias* to revive, *i. e.*, it must have been prosecuted to judgment. A judgment of revival is a judgment *quod recuperet*, which cannot be had until there is an ascertained liability.

John G. Johnson, in reply.

The claim is a fixed fact for the purposes of the *scire facias* to revive; the judgment which we ask would be merely a judgment to keep alive for five years the lien of the claim, not a judgment *quod recuperet*, as in the revival of a judgment. The "debts" intended by the statute are "debts contracted for work done." (*Cf.* Act 1836, § 1.)

THE COURT entered judgment for plaintiff on the demurrer.

C. P. No. 2. April 7, 1877.

Matsinger v. Mullen, owner, etc., and Richardson, contractor.

Mechanic's lien—Substitution of security under Act of 1873—Owner not necessarily party to the bond.

Rule to show cause why bond should not be filed to release property from mechanic's lien.

The defendants offered a bond signed by Richardson, the contractor, and a surety, but not by Mullen, the defendant named as owner or reputed owner. To this the plaintiff objected, on the

Digitized by Google

ground that it should also be signed by Mullen. Defendants then took this rule.

J. B. Townsend, Jr., for plaintiff.

This bond is offered under the Act of March 6, 1873 (P. L. 215), which requires that it shall "be executed by the defendant or defendants in said claim, and by surety," etc.

Thorn, for defendants.

The owner's name on the bond is unimportant. He has no personal liability. If his property is released, that is a release of all the liability he ever had. The statute is purely remedial, and should not be construed to impose a personal liability where he had none before. He is not a defendant in any proper sense, as he has never been brought into Court by a writ properly so called. He is in Court only by his property, and the object of the Act was to effect a release of that. C. A. V.

April 10. THE COURT. The language of the Act is general, and no doubt as a rule the owner should be party to the bond. But to hold him a necessary party, under all circumstances, might be productive of great hardship. Thus in a case where the person named as owner or reputed owner is not now the owner, it would be inequitable to compel him to assume a personal obligation, when he had no interest in the controversy; yet it would be equally unjust to deprive the real owner of the benefits of the Act, because the plaintiff has named as owner a person who is not so in fact.

In the present case it is conceded that the owner has paid the contractor in full, and the present dispute is between the contractor and the claimants. The contractor does not ask to have the owner joined in the bond, and the purpose of the Act is attained if the plaintiff has real security for the forthcoming of the money when he proves his claim. Under these circumstances equity requires that this bond be approved.

Rule absolute.

Opinion by MITCHELL, J.

C. P. No. 3. March 21, 1877.

Robert Hilt, Executor, etc., v. Walton et ux.

Decedents' estates—Act of April 14, 1851—Widow's exemption—Widow may claim $300 after re-marriage—Misrepresentation.

Rule to take off non-suit.

This was an action brought by Robert Hilt, executor of Philip Hilt, deceased, against Josiah Walton and Elizabeth, his wife, to recover back the sum of $300, paid by him to said Elizabeth, which payment, plaintiff alleged, was induced by her fraudulent misrepresentations. At the trial the plaintiff proved that Philip Hilt died in May, 1870, leaving a widow, Elizabeth, surviving him; that she was married to Josiah Walton in 1873; that on August 2, 1875, she claimed and received from the plaintiff the said sum of $300, under the Act of April 14, 1851 (P. L. 613, Purd. 416, pl. 60), representing herself at the time of making the claim as Elizabeth Hilt, widow, and receipting in like manner for the sum paid her. It was also proved that within two days prior to making the claim, she had denied the fact of her marriage with Walton. Plaintiff then rested, and the Court entered a non-suit.

Samuel Wakeling, for the rule.

A woman subsequently married cannot claim the exemption benefit.

Burke *v.* Gleason, 10 Wr. 297.

[LUDLOW, P. J. The moment the husband dies, her status is fixed and her right is fixed. How can you take it away?]

The Act uses the word widow, and widow is defined by Webster to be "a woman who has lost her husband by death and has not taken another."

George F. Borie, contra, was not present at the argument.

C. A. V.

March 24, 1877. THE COURT. The principal question in this case is, whether the fact that the defendant had again married deprived her of the right to the three hundred dollars exemption under the Act of April 14, 1851 (*supra*), as the widow of Hilt. There was also evidence that she, in conversation with the plaintiff, denied her marriage. This denial seems immaterial, if her right to the exemption still existed. The payment was made voluntarily to the defendant by the plaintiff, who was the executor of her husband's will.

An extract from the opinion of the late Chief Justice THOMPSON, in Commonwealth *v.* Powell (1 P. F. S. 439), vindicates the non-suit; it is: "By the intestate laws of the State the interest of the widow is fixed the moment she becomes a widow, and is not divested by a subsequent marriage. So also is her right of election to take under the will of her husband or the intestate laws, although she may not elect until after the expiration of a year, and until after marriage. And for the same reason too, I presume it is, that the right to retain $300 out of the estate of her husband exists, although before doing so a second marriage may have taken place. Whenever a right by law has attached by reason of widowhood, there must be some law by which it is divested, or it will remain, and this is a sufficient answer to the argument that by the laws referred to a woman, though a second time married, has her rights awarded to her as a widow still." Of course in that case this point did not arise; but notwithstanding its lack of binding authority, the law of the extract seems unassailable.

Digitized by Google

Burke *v.* Gleason (10 Wright, 297), is cited by the plaintiff, but the following extract shows that the second marriage was not the only ground of the decision: "If any widow could be permitted to come in under the statute after a second marriage, the laches of this widow was gross enough to postpone." In that case proceedings in partition had been commenced, to which the widow was a party. She filed exceptions to the inquisition, withdrew them, and then her husband, taking out letters of administration upon the estate of her first husband, caused an appraisement of his real estate to be made for the benefit of the widow, which, without notice to the heirs, was approved a few days before the inquisition was confirmed. The laches was of the grossest character, and the conduct of the widow and her second husband was fraudulent. In Shumate *v.* McGarrity (Leg. Int. 1877, page 77), Justice GORDON doubts the authority of Burke *v.* Gleason on several grounds.

Philip Hilt died in 1870, and his widow received the $300 in 1875. No proof was given that she had not made a claim at an earlier period. Her counsel made a claim a few days before the payment. If no claim was made earlier the delay seems immaterial. No one was prejudiced by the delay, and after a voluntary payment it seems too late to allege it.

The Act of April 14, 1851 (*supra*), made the Orphans' Court the proper forum to pass upon the rights of the widow. The plaintiff saw fit to pass upon her claim without waiting for a decree of the Court. There does not seem to be any good reason in the evidence given by the plaintiff why he should now be permitted to go to a jury in an attempt to recover the money paid to the widow.

Rule discharged.

Opinion by YERKES, J.

C. P. No. 3. March 10, 1877.

Commonwealth ex rel. Drexel, Executor of Bouvier, v. Lane, Recorder, etc.

Entry of satisfaction of record of lost mortgage where a judgment for the mortgage debt had been paid—Act of April 3, 1860—Mandamus to recorder, when not issued.

Rule to show cause why a mandamus should not issue.

The petition of Francis A. Drexel, executor of Michael Bouvier, deceased, set forth that in 1834 the said Bouvier bought a lot of ground on Moyamensing Road, and gave to the vendor a purchase-money mortgage for $1000, which was duly recorded; that Bouvier afterwards sold the property, subject to the mortgage; that in 1838 proceedings were commenced upon the said mortgage, resulting in a sale by the sheriff, and Bouvier again became the purchaser; that "said sale satisfied said mortgage, as per certificate of prothonotary," but the mortgage has never been satisfied of record, and is therefore a cloud upon the title; that the original mortgage has been lost, and the recorder refuses to enter satisfaction of record without its production. The petitioner prayed for a mandamus to compel the recorder to enter satisfaction of record of the said mortgage.

George W. Reed, for the rule.

Under the Act of April 3, 1860 (Purd. Dig. 484, pl. 127), it is the duty of the recorder to mark the record of the mortgage satisfied on the production of a certificate from the prothonotary that the judgment obtained in the action on the mortgage has been satisfied.

J. L. Tull, contra.

The mortgage itself should be produced. Section 2 of the Act requires the recorder to mark it and not the record.

C. A. V.

March 17. THE COURT (after stating the facts). In seeking a proper interpretation of this Act, other questions arise, such as whether it is retrospective, and applies to the case in question; whether the second section does not depend upon the first section, and whether a certificate of the prothonotary stating that a *scire facias* had issued, should not be given to the recorder and noted upon the record of the mortgage, before it becomes his duty to mark the mortgage satisfied. We would have to decide that the record and not the mortgage was to be marked satisfied; that the Act is retrospective, notwithstanding that in the first section, in referring to suits on mortgages, it seems to be prospective; and that its sections are independent of each other, notwithstanding their apparent dependence, before we could grant this application.

But as there are other reasons fatal to the relator's case, we do not feel called upon to interpret the Act of 1860. A mandamus is never granted unless there is shown a specific legal right and the want of a specific legal remedy. (Comm. *v.* Rossiter, 2 Bin. 362; James *v.* Bucks Co., 1 Har. 72; Comm. *v.* Clark, 6 Phila. 498; Comm. *v.* Colley Tw'p, 5 Casey, 121.) In the case under consideration there is an ample statutory remedy.

Again, there is no merit in this application. The existence of the mortgage is no cloud, not even a shadow upon the title. The conveyancer upon whose searches the mortgage would come up, would find that the title of the relator was derived from a sale upon that very mortgage. Every man, layman as well as clerk, would know that thereby this mortgage was wiped out of existence. Besides this, the delay of forty years

Digitized by Google

should have some weight. We therefore refuse to allow the mandamus.

Opinion by YERKES, J.

U. S. Circuit Court—Bankruptcy.

March 27, 1877.

In re A. Benton & Bro.

Bankruptcy—Procurement by debtor of entry of judgment, and execution thereon—Act of bankruptcy.

Petition of creditors for adjudication of debtors as bankrupts.

The testimony disclosed the following facts:—

In June, 1876, the firm of A. Benton & Bro., becoming embarrassed, borrowed from certain creditors $11,000 for business purposes, giving therefor a judgment note, which was duly entered of record. The money was made payable in instalments. On July 15th, 1876, a joint judgment note for $20,000 was executed by the Benton Bros. to Judge Waller and Mrs. Elizabeth J. Benton, the wife of one of the parties, for money alleged to be due to them. This note was left by the firm in the hands of Col. Moyer, their counsel, and he being, at the same time, a friend of Judge Waller, the latter requested him to keep it in his fire-proof safe until wanted. On January 25th, 1877, the instalments on the $11,000 judgment not being paid, the plaintiffs therein called a meeting at the office of their attorney, Mr. Burton. At this meeting the Benton Brothers, Col. Moyer, the $11,000 judgment creditors, and their counsel were present. The meeting adjourned with the understanding that nothing should be done for forty-eight hours, when a statement of the Benton Brothers' real and personal estate would be furnished. After the meeting, Charles Benton repaired to Mrs. Benton's house and asked her to loan the firm some money. This, as she afterwards testified, alarmed her, and she not only refused the request but directed Charles Benton to go to Col. Moyer and tell him to enter up the judgment and issue execution. Charles Benton remonstrated, saying "it would ruin them." He, however, immediately went to Col. Moyer's office and communicated to him Mrs. Benton's message. Col. Moyer, after endorsing the judgment note for $20,000, handed it to another attorney to enter up. Execution was placed in the sheriff's hand at 2.38 P. M. Later on the same day, Col. Moyer called on Mrs. Benton, explained that as he could not act in the matter he had placed the note in the hands of another attorney, and suggested that Mrs. Benton write a letter to the other attorney, authorizing him to enter up the judgment note and issue execution thereon, which Mrs. Benton accordingly did. On the next day, the 26th of January, B. F. Fisher, Esq., received by telegram instructions from Judge Waller to proceed on his behalf on the same judgment note. On January 31st, 1877, a number of the unsecured creditors of A. Benton & Bro. filed this petition in bankruptcy.

Frank P. Prichard and *G. C. Purves*, for petitioning creditors, argued that the facts showed a procurement, by the alleged bankrupts, of the entry of judgment and the execution thereon.

J. M. Moyer, for bankrupts.

There was no intention on the part of the Benton Bros. to give preference. Charles Benton went to Mrs. Benton to get additional money and not to procure execution to be issued. The direction to enter judgment and issue execution came from her without any suggestion from the debtors, and in fact they remonstrated against it. That she was the wife of one of the parties is immaterial. She may be a creditor. The question of procurement is one of intention, and the evidence shows no intention on the part of the Benton Bro. to procure this execution to be issued.

March 27, 1877. THE COURT. To understand the question in this case, it is necessary to ascertain the relations of Mr. Moyer on the 25th of January, 1877. He was, in a general sense, the professional agent, counsel, or attorney of the alleged bankrupts. His peculiar relation to Judge Waller merely required him to hold the judgment note or bond of 15 July, 1876, until instructions from that gentleman. No instructions by Judge Waller to Mr. Moyer, or to any one else, were given until the next day, the 26th. The execution in question under the judgment upon that note or bond was delivered to the sheriff on the afternoon of the 25th. The question is whether the debtors, or either of them, procured, directly or indirectly, the entry of the judgment and issuing of the execution. The occurrences of the 25th were in three successive stages: first, the meeting at Burton's office; secondly, the communications with Mrs. Benton, and the consequent instructions from her to Mr. Moyer; thirdly, the subsequent acts of the parties. The occurrences at Mr. Burton's ought to have apprised Charles Benton, one of the alleged bankrupts, that their ruin was inevitable, and could not be postponed. With a knowledge, as he states, that trouble was coming, he repaired to Mrs. Benton's and asked her for more money. This naturally alarmed her; and according to

Digitized by Google

the evidence she thereupon sent a message by Charles Benton to Mr. Moyer, in form or substance directing him to proceed immediately to enter the judgment and issue execution. Charles Benton remonstrated earnestly, saying that it would ruin them, etc. Nevertheless he accepted the mission to Mr. Moyer, and communicated to him the lady's direction. Mr. Moyer substituted for himself another attorney for the purpose. By the latter gentleman the judgment was at once entered, and an execution thereon was placed in the sheriff's hands. A written direction to the substituted attorney was obtained from her, and Mr. Moyer explained to her his reasons for advising such a course of procedure. All this occurred in the afternoon of the 25th. The execution is inscribed by the sheriff as received in his office at 2.38 o'clock P.M. Mr. Moyer did not see her until a later hour. On the next day another gentleman of the bar received instructions from Judge Waller authorizing proceedings of a like character on his behalf under the same judgment note, or bond. He was from thenceforth a participant in them. Whether, until then, the sheriff could have levied more than Mrs. Benton's portion of the debt, is a question which it is unnecessary to consider now. The proceedings had been consummated so far as Mrs. Benton's demand was concerned on the previous day.

I am of opinion that the occurrences of that day involved a procurement, by Charles Benton, of the issuing of the execution. This was the tendency and effect of what he did; and beyond this we are not to inquire as to his intentions.

The debtors are adjudged bankrupts.

Opinion by CADWALADER, J.

U. S. Circuit Court—Law.

Prevost v. Gorrell. April 7, 1877.

Transfer of cause for trial—Convenience of party and witnesses—Insufficient grounds for removal.

Petition by defendant to remove cause from Pittsburgh, in the Western District of Pennsylvania, to Williamsport, in the same district.

The petition set forth that the suit was case for damages done to the plaintiff's colliery in Columbia County; that this suit was brought for the same cause of action as in the case of Prevost *v.* Gorrell, originally brought in Common Pleas No. 2, of Philadelphia County (reported in 2 WEEKLY NOTES, 440), the latter action having been held by the Supreme Court of Pennsylvania to have been a local action, and therefore wrongly brought in the Common Pleas of Philadelphia County (reported *ante*, 366); that the trial of said cause had occupied several weeks, and that this would probably occupy an equal time; that the witnesses resided in Columbia County, and that it would be burdensome to the defendant and to his witnesses to take them to Pittsburgh, when the cause might as readily be tried in Williamsport, which was more than a hundred miles nearer the residence of all the parties interested.

H. M. Shick, for the petition.

A. Sydney Biddle, contra.

THE COURT. Without the consent of both sides, I will not order a cause to be removed from where it had been brought unless for some extraordinary reason.

Petition refused.

Per MCKENNAN, J.

Orphans' Court.

Feb. 19, 1877.

Bardsley's Estate.

Practice—Re-opening of audit after adjudication—Claims upon balance of an apparently solvent estate in the hands of an administrator—Distribution of balance.

Sur exceptions to adjudication.

The administrator of the decedent having filed his account, it came before the Court for audit. During the audit all the claims presented and proved were allowed in full, and a balance was left to the credit of the estate. After the audit had closed, other claimants appeared, requesting that the audit be re-opened, and the entire account re-audited. The Judge opened the audit, but, the balance not proving sufficient to pay these claimants in full, only awarded to them a *pro rata* share of the balance, the creditors appearing at the first adjudication having been paid in full. To this distribution, exceptions were filed.

Wakeling (with whom was *H. M. Dechert*), for the exceptants.

J. M. Thomas, contra.

C. A. V.

March 10. THE COURT, after reciting the facts, said: "The only error of the Judge who audited the account was to re-open the audit, but as he did so, all the claimants should share equally.

"The exceptions are sustained, and the account is remitted for correction."

Digitized by Google

Weekly Notes of Cases.

VOL. III.] THURSDAY, APRIL 26, 1877. [No. 30.

Supreme Court.

Oct. & Nov. '76, 197. Oct. 31, 1876.

Hays et al. v. Commonwealth of Penna. ex rel. John C. McCutcheon.

Constitutional law — Corporations — Elections by stockholders—Art. XVI., § 4, of the new Constitution interpreted—Cumulative voting —Inapplicable to pre-existing corporations.

The charter of a railroad company, incorporated prior to the present Constitution of Pennsylvania, provided: "At all general meetings or elections by the stockholders, each share of stock shall entitle the holder thereof to one vote, and each ballot shall have endorsed thereon the number of shares thereby represented." The said company had not accepted the benefit of any new legislation since the adoption of the present Constitution.

Article XVI., Section 4, of the new Constitution provides: "In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer:

Held, that this provision of the Constitution does not apply to the above provision in said charter.

Per GORDON, J. "Charters of private corporations are left exactly as the new Constitution found them, and so they must remain until the companies holding them shall enter into a new contract with the State by accepting the benefit of some future legislation."

Error to the Common Pleas No. 1, of Allegheny County.

Quo warranto issued in the name of the Commonwealth *ex rel.* J. C. McCutcheon against W. D. Hays and others, commanding them to show by what authority they exercised the offices of President and Directors of the Pittsburgh and Castle Shannon Railroad Company, and excluded the said relator from the office of director.

The said railroad company was incorporated in 1871, its charter providing, *inter alia*, as follows:—

"At all general meetings or elections by the stockholders, each share of stock shall entitle the holder thereof to one vote, and each ballot shall have endorsed thereon the number of shares thereby represented."

At the regular election held in February, 1876, for President and Directors of the Pittsburgh and Castle Shannon Railroad Co. for the ensuing year, a number of the stockholders cast their votes on the cumulative system, claiming their right to do so on the authority of Sec. 4, Art XVI., of the new Constitution, which provides:—

"In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer."

The relator, J. C. McCutcheon, was among the number voted on for the position of director. The votes cast for him, counted in the usual way, were insufficient to elect; but, counted on the cumulative system, they gave him the second highest number of votes, and entitled him to a position on the board. The tellers, though they kept a memorandum of the votes cast on the cumulative system, refused to count such votes other than in accordance with the provision of the charter quoted above.

The relator, claiming to be duly elected by votes cast under and conformably to Sec. 4, Art. XVI., of the Constitution (*supra*), filed his suggestion for a quo warranto. The writ was issued accordingly, and to this respondents filed their answer, averring that said corporation has never in any way accepted the benefits of the new Constitution, and is not, therefore, within its restrictions and provisions, so far as Art. XVI. is concerned, but as to that is governed by the provisions of its charter.

On demurrer to this answer, the Court entered judgment for the Commonwealth, declaring that John C. McCutcheon was duly elected, and ousting James McQuiston, who had received the smallest number of votes of those whom the tellers had returned as elected. The respondents took this writ, assigning for error the above-mentioned action of the Court.

D. T. Watson, for plaintiffs in error.

The section of the Constitution invoked does not apply to corporations existing prior to the time of its adoption. The universal rule of construction in the application of a law is, that it is prospective only, unless by plain language it is shown to be retrospective.

Taylor *v.* Mitchell, 7 Sm. 209, and cases cited.

Nor does the context favor the view that it was intended to apply to corporations already in existence. By section 2: "The General Assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon condition that such corporation shall thereafter hold its charter subject to the provisions of the Constitution." Why, if by the mere adoption of the Constitution, it alone become the law which all corporations must submit to, was this section adopted? By section 10, Art. XVII.: "No railroad, canal, or other transportation company, in existence at the time of the adoption of this article, shall have the benefit of

Digitized by Google

any future legislation by general or special laws, except upon condition of complete acceptance of all the provisions of this article." Why, if the Constitution was meant, *ipso facto*, to apply to pre-existing corporations, is an inducement held out to them to come under its provisions?

Section 2 of the Schedule provides that "All laws in force in the Commonwealth at the adoption of this Constitution not inconsistent therewith, and all rights, actions, prosecutions, and contracts shall continue as if this Constitution had not been adopted." That the grant of the charter by the State to the Castle Shannon Company, for which the company paid a bonus and tax, is a *contract*, no one, since the Dartmouth College case, will attempt to deny.

Trustees of Dartmouth College *v.* Woodward, 4 Wheaton, 518.
Dugan *v.* The Bridge Co., 3 Casey, 303.
Iron City Bank *v.* Pittsburgh, 1 Wright, 340.

By a provision of the Constitution in force when the charter was granted to the Castle Shannon Company, the Legislature has the power to alter, revoke, or annul any charter, but only when in their opinion it is injurious to the citizens of the Commonwealth. This power of revocation can only be exercised by the Legislature, and then only in such shape as to do the corporators no injustice. But when every stockholder bought on the faith of one share of stock having one vote, and A. purchases more than one-half the stock to have the controlling interest, what right have the people, with no provisions for his indemnity, to give the minority power to change the result?

A. M. Brown, contra.

The debates on the new Constitution show that this section was intended and understood to embrace all charters, both new and old. It has long been settled that an Act of Assembly which operates merely upon the remedy, and not upon the right, is constitutional.

Schenley *v.* The Commonwealth, 12 Casey, 29.
Marshall *v.* Allegheny City, 9 Sm. 455.
Cooley on Constitutional Limitations, 361.

The provision under construction is a mere regulation of this right of suffrage, and intended for the protection of minorities. It deprives no one of a vested right, it gives the stockholders the right to vote just as many shares as they voted before, reserving the power to cumulate as is provided for in the section.

Jan. 2, 1877. THE COURT. But a single question is presented for our consideration. Does section 4, Article XVI., of our New Constitution, apply to the corporation known as the Pittsburgh and Castle Shannon Railroad Company? That section reads thus: "In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer." This section is understood to confer upon the individual stockholder the right to cast all the votes which his stock represents, multiplied by the number of directors or managers to be elected, for a single candidate, should he think proper so to do. Though from this section, as originally proposed, words nearly similar to those we have used were stricken out, yet we have no doubt we have, in our statement, embodied the intention of the convention. If indeed we do not in this manner reach the meaning of this part of the constitution, it has none; for it would be a vain thing to propose to confer a power upon members of a corporation which they already possess. Adopting this interpretation as the true one, we must concede that the intent was to work a radical change in the method of conducting corporate elections. The importance of this innovation is not to be underrated in the face of the very significant fact that it was thought worthy of a place in the supreme law of the State, and thus placed beyond the power of legislative interference.

Applying this rule to the Pittsburgh & Castle Shannon R. R. Co., let us observe its effect. This company was incorporated on the 21st of September, 1871, in accordance with the provisions of the Act of April 4th, 1868 (P. L. 62). Among other provisions of its charter is this one: "*At all general meetings or elections by the stockholders, each share of stock shall entitle the holder thereof to one vote.*" Of course this means one vote for each officer to be elected, as it means one vote on each resolution that may be proposed at any general meeting. Thus a stockholder owning one share, would have one vote for each of the ten directors. If, however, we annul this provision of the charter and substitute the Constitutional provision, above referred to, this shareholder will have ten votes for any one of the ten candidates for the office of manager whom he may choose to select, or five for each of any two he may so choose. Thus, those holding a minority of the shares of the stock of this corporation would be enabled to do what, under the charter, is impossible, to wit, to elect, in spite of the majority, one or more of the managing officers.

Now, whilst it cannot be said that this would not be an alteration in the terms of this charter, it is nevertheless urged that it is a mere regulation of the right of suffrage in corporations, but affects the vested rights of no one. But if it be not a vested right in those who own the major part of the stock of this corporation to elect, if they see proper, every member of the board of directors, then I would like to know what a vested right means. This was part of the contract un-

Digitized by Google

der which they entered into the company and for which they paid their money. The compact was, that they should have the power to select those who should have the management and control of the funds which they adventured in this enterprise. If, indeed, it be admitted that the minority in a board of directors amounts to nothing, the above stated proposition would be admissible; but we cannot seriously entertain such an idea, for it was just because such a minority does amount to something, and because it often can control or modify the acts of a majority, that the introduction of the constitutional provision under discussion was thought necessary.

The framers of this part of our constitution were no neophytes in legal science, but masters and teachers who well knew what they were about, and that they intended to introduce a radical change in the law governing corporations, is not doubtful.

But when we have come to this conclusion we have reached the turning point of this case; for, if the charter method of voting be a material part of the organic law of the company, it follows, that the Constitutional Convention, even had it so intended, could not alter that method. In the case of the Iron City Bank *v.* Pittsburgh (1 Wr. 340), this matter is carefully considered in an elaborate opinion by Justice WOODWARD, in which, after citing the case of the Trustees of Dartmouth College (4 Wheat. 518), wherein it was held, that the royal charter granted to the trustees of that college before the revolution was a contract within the meaning of the constitution of the United States, and that an Act of the Legislature of New Hampshire, altering the charter without the consent of the corporation, was an Act impairing the obligation of a contract and therefore unconstitutional and void, he says, that this decision, though often questioned, has been generally followed, and that the doctrine therein stated may now be regarded as the settled rule of law of every State in the Union. This authority is supported by the cases of the Bank of Pennsylvania *v.* The Commonwealth (7 Har. 144); and the Commonwealth *v.* The Pittsburgh and Connellsville Railroad Co. (8 Sm. 26). So we may take it as settled, that the charter of a company is such a contract as cannot be impeached by State authority except for proper cause shown.

It is said, however, that, by the amendment of 1857, the Legislature has the power to alter or revoke the charter of this corporation. Be it so; it may be an answer to say, that a constitutional convention is not the legislature in the meaning of that amendment. If, however, it were such, it could only make such alteration or revocation, when it was made to appear that the charter in the part proposed to be revoked or altered, was "*injurious to the citizens of the Commonwealth;*" for the Legislature cannot act arbitrarily in a matter of this kind and impose its own will as the *ultimate ratio.* In the case last above cited, Mr. Justice SHARSWOOD sets it down as a rule settled not only by judicial but legislative authority, that the Legislature is not the final judge of whether the *casus fœderis* upon which the authority to repeal is based, has occurred. As there is in this case no allegation of a breach of any condition, under which the Pittsburgh and Castle Shannon Railroad Co. accepted its charter, or that that charter is, in any particular, obnoxious to the welfare of the citizens of this Commonwealth, it cannot be successfully urged that it may be revised or abrogated by any State authority whatever. But the Constitutional Convention claimed for itself no such power; on the other hand it has expressly set down (Art. 2 of the Schedule) that all rights, actions, prosecutions and contracts shall continue as if the constitution had not been adopted; and by the 2d section of the 16th Article, it is manifest that the convention did not intend to subject any private corporation to any of the provisions of the constitution, which might in any degree change the charter thereof. If otherwise, why say, "The General Assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall *thereafter* hold its charter subject to the provisions of this constitution."

This section is so comprehensive and clear that nothing is left for surmise or doubt. Charters of private corporations are left exactly as the new Constitution found them, and so they must remain until the companies holding them shall enter into a new contract with the State, by accepting the benefit of some future legislation.

It is only on the theory that the manner of voting is not material, that the cumulative system is sought to be saddled on this corporation; but if this company does not hold its charter *subject to the provisions of the present constitution,* how can it be made subject to any one of such provisions, material or immaterial? It is indeed manifest that such an argument is foreign to the question in hand. It might apply to a legislative enactment attempting to alter this charter, but it cannot apply to this case, arising as it does, directly on the constitution itself, for it is excluded by the very terms of that instrument.

The judgment is reversed.

Opinion by GORDON, J. WOODWARD, J., dissents.

Digitized by Google

July, '75, 111. Jan. 25, 1877.

Philadelphia Hydraulic Works Company v. Orr et ux.

Negligence—Trespasser—Infant.

A., the owner of a private alley abutting on a public highway, had constructed in it a movable platform twenty-four feet back from the street. At the entrance of the alley were gates, with the words thereon "Private" and "No admittance." The platform weighed eight or nine hundred pounds, and worked upon a hinge projecting from the wall. When it was raised it rested against the wall, and was counterpoised simply by its own weight. On one occasion, the gates being open, B., a child of six years, went into the alley and pulled over the platform, thereby receiving injuries from which he died. In an action against A. by the parents of B.:

Held (PAXSON, J., dissenting), that the question of defendants' negligence was properly submitted to the jury to determine under all the circumstances of the case.

Error to Common Pleas No. 1, of Philadelphia County.

This was an action on the case by Orr and wife against the Philadelphia Hydraulic Works Company, to recover damages for the death of their son, caused, as alleged, by the defendants' negligence. The narr. averred that the corporation defendant was the possessor of a building on Evelina Street, in the city of Philadelphia, and of an alley-way running alongide of the same, over which alley-way was constructed a broad platform, and that through the defendants' negligent use of said alley and platform, the plaintiffs' son, an infant of six years. was killed Plea, "not guilty."

The evidence for the plaintiffs on the trial was that the defendants leased a large building on Evelina Street, the lower stories of which they used for manufacturing purposes. Between this factory and the adjoining property on the west, an alley, part of the property leased by the defendants, ran, under a hoist, back from Evelina Street the entire length of the building. This alley, or rather cartway, which was ten feet wide, was used by the defendants and the other tenants to carry goods into and from the factory, and at its entrance on Evelina Street was fitted with gates, so that it could be closed when not in use. At this entrance the words "Private" and "No admittance" were posted. As the first floor of the factory was more than a foot above the ground, the defendants, for the purpose of running out heavy machines, had constructed a heavy movable platform, working on a hinge, in the west wall, and extending, when down, across the alley. When not in use, or when carts were passing, this platform was thrown up against the west wall, where it rested (as its hinges projected some thirteen inches), held up by its own weight alone. The platform, weighing six or seven hundred pounds, so thrown back, rested very insecurely, and was liable to fall whenever run against or struck. A former platform in the same place had been secured by tackle let down from the hoist above, but no fastening for the present one had been put up.

On December 17, 1873, the plaintiffs' son, a boy of six years, was playing with several other children in Evelina Street. The entrance to the alley being open, they went in, and playing under the platform pulled it over on them. The plaintiffs' son died shortly after from the injuries thereby received.

The plaintiffs also gave evidence that Evelina Street was a much-travelled thoroughfare, and that, although the defendants' employés were instructed to keep the alley-gates closed, these were more frequently open than shut.

The defendants proved that they had given orders to their employés to keep the gates closed, and that on this occasion the gates had been left open through no default of their own, but by a carter who had delivered goods to their sublessees, tenants of one of the upper stories.

The defendants requested the Court (BIDDLE, J.) to charge (1) that the plaintiffs' son was a mere trespasser, and (2) that there was no public or private duty on the part of the defendants that their premises should be in a different condition from that in which they were. The Court declined to so charge, but instructed the jury that a child could not be treated as a trespasser or wrong-doer, and left it to the jury to find, upon all the evidence, whether the defendants had been guilty of negligence in the condition and character of the platform, and whether they were bound to keep the gates fronting on Evelina Street closed.

Verdict for the plaintiffs ($1625), and judgment thereon, to which the defendants took this writ of error, assigning for error the refusal of the Court to charge as requested.

Samuel Dickson (with him *John C. Bullitt*), for the plaintiffs in error.

The only question is, whether the defendants owed the plaintiffs any duty to keep their property in different condition; for negligence, in the legal sense, means a falling short in some duty towards the plaintiffs.

The numerous cases against railroad companies in which they have been held liable for injuries to persons on the tracks, all rest on the fact that they had reason to expect that the track might be used as a thoroughfare. So, when persons have been injured on the premises of another, there has been the express or implied license to enter. It is obvious, therefore, that these two classes of cases do not apply in the present instance. See—

Digitized by Google

Hargraves *v.* Deacon, 25 Mich. 6.
Zoebisch *v.* Tarbell, 10 Allen, 385.

To make the owner of a lot adjacent to a highway liable to one falling into a pit or hole on his premises, it must abut on the highway so as to interfere with its lawful use.

Barnes *v.* Ward, 67 E. C. L. R. 392
Hounsell *v.* Smyth, 97 Id. 731.
Gautret *v.* Egerton, L. R. 2 C. P. 371.

The platform in question was twenty-four feet back from the street, in the private yard of the defendant. It did not abut on the highway, nor did it interfere with the use thereof. It was perfectly private, and, when undisturbed, safe and harmless, and the owner had the right to presume that no one would trespass or meddle.

Abbott *v.* Macfie, 2 H. & C. 744.
Mangan *v.* Atterton, L. R. 1 Ex. 239.

John Cochran (with whom was *R. E. Pattison*), contra.

It was for the jury to pass upon the question of negligence under all the circumstances.

McCully *v.* Clark, 4 Wr. 406.
Turnpike Co. *v.* R. R. Co., 4 Smith, 274.
Kay *v.* R. R. Co., 15 Id. 274.
Penna. R. R. Co. *v.* Lewis, 1 Weekly Notes, 550.

Feb. 5. The Court. It is true that where no duty is owed no liability arises. If, therefore, one leaves a stick of timber standing upright against his wall, or an open pit in his private yard, to which others have not access, and a person strays in without invitation, or comes in without right, and pulls down the timber upon himself or falls into the pit, he can have no action against the owner of the yard for the alleged negligence; he had no business there, and the owner owed him no duty. But it has been often said duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property, and its openness to accident, the rule will vary. The question then becomes one for a jury, to be determined upon all its facts, of the probability of danger and the grossness of the act of imputed negligence. Such was the nature of this case. This building was a factory, in which several kinds of business were carried on in different stories, requiring the use of a hoisting apparatus above and an inclined plane below for the easy carriage of heavy articles, machinery, etc., into and out of the factory. These appliances were approached by means of a private opening or cartway, shut in by a gate, which their use required to be often opened for the ingress of wagons and hands engaged in the business. The gate and passage-way opened out upon a public and much-frequented street, where persons were passing and children playing. Unlike an ordinary private alley, this passage was often open, and therefore liable to the incursion of children and even grown persons from thoughtlessness, accident, or curiosity. Now the inclined way which did the injury was a dangerous trap. It was a heavy platform weighing eight or nine hundred pounds, attached by hinges within eighteen or twenty inches of the wall, and when lowered it fell across the cartway; when not lowered it stood upright against the wall, leaning so little beyond the centre of gravity that a jar or a slight pull would cause it to fall forward. Its fall in this instance caught four children beneath it; one had his back broken, another his hands mashed, and two escaped under the cavity. It was held up by no hook or other fastening, but merely rested by its own slight weight beyond the equipoise, ready, therefore, to catch children, like mice beneath a dead-fall. When wagons passed, it was often held up by hands, and a witness saw it fall against the wheels. Now can it be righteously said that the owner of such a dangerous trap, held by no fastening, so liable to drop, so near a public thoroughfare, so often open and exposed to the entry of persons on business, by accident, or from curiosity, owes no duty to those who will be probably there? The common feeling of mankind, as well as the maxim *sic utere tuo ut alienum non lædas*, must say this cannot be true; that this spot is not so private and secluded as that a man may keep dangerous pits or dead-falls there without a breach of duty to society. On the contrary, the mind, impelled by the instincts of the heart, sees at once that in such a place, and under these circumstances, he had good reason to expect that one day or other some one, probably a thoughtless boy, in the buoyancy of play, would be led there, and injury would follow, especially, too, when prompted by knowledge that a fastening was needed. Perhaps the best monitor in such a case is the conscience of one who feels in his dreadful recollection the crushing sense that he had left such an engine of ill to take the life of an innocent child. Such, too, is the humanity of the law that one may not justifiably or even excusably place a dangerous pit-fall, a wolf-trap, or a spring-gun purposely to catch and injure even wilful trespassers poaching upon his grounds. The common feeling of mankind, guided by the second branch of the great law of love and the common sense of jurors, must be left, in such a case, to pronounce upon the facts.

We see no error, therefore, in submitting this case on its facts to the verdict of a jury. The verdict, when approved by the Court, must be permitted to stand; for we take it no Judge who sees manifest injustice done by the verdict will permit it to stand.

An upright Judge does his duty quite as well when he strikes down a false and unjust verdict as when he approves of that which he cannot condemn.

Digitized by Google

Judgment affirmed.

Opinion by AGNEW, C. J.

"PAXSON, J., dissents, upon the ground that the child was a trespasser, and the defendant owed no duty to him."

Jan. '76, 171. Feb. 8, 1877.

Leeds, Sheriff, et al. v. Commonwealth, to use of Peet.

Evidence—Assignment for benefit of creditors—Delivery of—Execution of, in fraud of creditors—Evidence of subsequent fraudulent acts of assignee—When and for what purpose admissible.

In an action against a sheriff for not levying an execution, he pleaded that the debtor had made a prior assignment for the benefit of creditors. Plaintiff replied that the assignment was not delivered before the execution was placed in the sheriff's hands, and that it was intended to defraud creditors, and therefore void. Conflicting evidence was given as to the time of delivery and the fraud or *bona fides* of the assignment, and, *inter alia*, evidence of a fraudulent sale of the debtor's goods by the assignee after the recording of the assignment.

Held (affirming on this point the opinion of the Court below), that the latter evidence was admissible on the question of the fraudulent intent in the execution of the deed of assignment; but,

Held (reversing the judgment of the Court below), that it had no bearing on the question of the actual delivery of the deed.

Error to the Court of Common Pleas No. 3, of Philadelphia County.

Scire facias at the suit of the Commonwealth, to use of William E. Peet against the sheriff of Philadelphia, and his sureties, upon their official recognizance.

The narr. set forth that on Sept. 23, 1871, Peet, having recovered judgment against Lauferty & Son, caused an execution to be issued and placed in the sheriff's hands; that although there were goods of Lauferty & Son within his bailiwick, the sheriff refused to levy thereon, and made return of *nulla bona*, to the damage of plaintiff, etc. Defendants pleaded that on the day before the execution, Lauferty & Son had made an assignment for the benefit of creditors; also, that after the execution, a petition in bankruptcy had been filed, upon which Lauferty & Son had been adjudicated bankrupts. Plaintiff replied that the deed of assignment had not been delivered, nor any transfer of the goods made to the assignee before the execution was left with the sheriff; and that the alleged assignment had been executed with the intention to defraud creditors, and was therefore void. Upon this replication defendants joined issue.

Upon the trial (before LUDLOW, P. J.), defendants' witnesses testified that the assignment had been executed and acknowledged, and an acceptance thereon had been signed by the assignee on September 22, 1871, the day before the execution issued, and that it had been duly recorded on October 17, 1871, and that the assignee had taken possession of the goods, and sold them on November 1, 1871. Defendants also proved that on December 1, 1871, a petition in bankruptcy was filed against Lauferty & Son, one of the acts of bankruptcy alleged being the making of the assignment, and that they were afterwards adjudicated bankrupts.

In rebuttal, plaintiff's witnesses testified that several days after September 23, 1871, the deed of assignment had been seen still in the hands of the assignor's counsel, with the acceptance not yet signed by the assignee, and that afterwards at different times, and to various persons, the assignee had declared that he had not yet decided to accept the deed. Plaintiff then offered evidence to show that at the assignee's sale the goods were sold at one-third their value to a son of one of the assignors, and formerly in their employ. Objected to. Objection overruled, and evidence admitted. Exception.

As to the bankruptcy proceedings the Judge instructed the jury as follows: "The proceedings in bankruptcy, as in evidence, can in no way affect the present case. I instruct you, therefore, as a matter of law, that the adjudication of bankruptcy relating back for any purpose, to whatever day you please, can have no effect upon the responsibility of the sheriff in this case; so that you will discharge the matter of bankruptcy proceedings in the United States Court altogether from your mind."

The Judge then submitted to the jury the question of the time of the delivery of the assignment, and reviewed the evidence of the circumstances immediately attending its execution. As to the subsequent sale by the assignee he charged as follows:—

"Well, then, the plaintiff goes a step further, and introduces other evidence of the transactions attending the sale itself as bearing upon the question in fact, and the whole transaction generally. It is contended that the sale was a mere fraudulent sale; that there were few bidders; that prices were small; that the goods sold in a lump; and that they were bought in by a man named Sawyer, for Emanuel Lauferty, the son. This evidence, again, is rebutted by the testimony for the sheriff of Mr. Freeman, as to the *bona fides* of the sale; as to there being a proper offer made of the goods, and that the sale had been previously advertised by handbills and otherwise; proving that it was well attended, and a fair one.

"Mark, especially, that that testimony will bear upon this case on the question of the execution

Digitized by Google

and delivery of this assignment, or a delivery purporting to have been made."

Verdict and judgment for the Commonwealth, $80,000, and for William E. Peet, $2433 94. Defendants took this writ, assigning for error the admission of the evidence objected to, and the portions of the charge above quoted.

George Junkin and *Charles Gilpin*, for plaintiffs in error.

The assignment in this case, being for the benefit of all creditors, and having been executed, delivered, and recorded, could work no fraud against a creditor, even if a fraudulent intent had existed in the minds of the parties at the time of its execution, and the acts of the assignee at a sale six weeks after the execution of the assignment, were too remote to be admissible in evidence upon the question of such fraudulent intent.

The assignment being an act of bankruptcy, the title of the assignee in bankruptcy related back to the date of its execution, viz., the day before the *fi. fa.* was placed in the sheriff's hands.

The character of the assignee's sale clearly had no bearing upon the question of the actual delivery of the assignment. The previous acknowledgment and recording of the deed were conclusive.

Kille *v.* Ege, 29 Sm. 15; S. C., 1 Weekly Notes, 500.

Heeter *v.* Glasgow, 29 Sm. 79; S. C., 2 Weekly Notes, 1.

And the jury were misled by the remark of the Judge that they were to *mark especially* that the testimony in reference to the sale bore upon the question of delivery.

Richard P. White (with whom was *Frank P. Prichard*), contra.

The issue raised being as to the *bona fides* of the assignment, it was competent for plaintiff to give evidence of all the acts of the assignee, at whatever time done, which tended to prove fraud.

Helfrich *v.* Stern, 5 H. 143.

Stafford *v.* Henry, 1 Sm. 514.

Thompson *v.* Franks, 1 Wr. 327.

Rodgers *v.* Stophel, 8 C. 111.

The title of the assignee in bankruptcy related back only to the commencement of the bankruptcy proceedings, and would not have affected the prior lien of the execution.

Maris *v.* Duron, 1 Brews. 428.

The question of the delivery of a deed is always one of intention, and in the present case was directly dependent upon the proof of the *bona fides* or *mala fides* of the parties to it. In Powers *v.* Russell (13 Pick. 69) evidence of subsequent fraudulent acts of the parties to a mortgage was held admissible as bearing upon the question of delivery, and in Dayton *v.* Newman (7 Harris, 194) evidence of subsequent acts of the parties to a deed was admitted for the same purpose.

The Court below were right, therefore, in submitting to the jury the evidence of all the acts of the parties as bearing upon the question of the delivery of the assignment.

Feb. 19. The Court. There were substantially only two issues of fact before the jury—first, whether the general assignment by the Laufertys to Gans, dated Sept. 22, 1871, was delivered on that day; and second, whether it was intended to hinder, delay, and defraud Peet, a creditor of the Laufertys. No point was made below, nor has any assignment of error been filed which raises the question whether there was sufficient evidence of actual fraud to submit to the jury. We must assume that there was. If so we see no error in the admission by the learned Judge as to the manner in which the sale by the assignee was conducted, the prices brought, and that the goods were bid in for a son of one of the assignors. It certainly had a direct bearing on the question of fraud, though it might be insufficient of itself to prove it. If no subsequent or further evidence was given on the point, the learned Judge should have been asked so to charge. No man can be required to prove his case *uno flatu*. He must proceed by steps, and especially is this true in questions of fraud. Whether he begins at one end or the other, or jumps at once in *medias res*, is a mere question of order, on which we never reverse. If, therefore, the evidence offered had any bearing on the question of fraud, it would have been error to have excluded it. The Court could not be called upon to say at that stage of the trial whether, standing by itself without any further evidence, it was sufficient to go to the jury. Nor do we find any error in that part of the charge complained of in the second specification. The subsequent proceedings in bankruptcy had no relevancy to the issue before the jury. They neither tended to prove that the deed was delivered on the day of its date, nor that it was not in fraud of creditors. But in that part of the charge which forms the subject of the third specification, we think there was material error. The fraudulent sale by the assignee had no bearing upon the bare question of the delivery of the assignment. The sale went to show that it had been delivered at some time, which, however, was not denied, but that it had not been delivered before Peet's execution was placed in the hands of the sheriff.

Surely the fraud or irregularities in conducting the sale threw no light whatever properly upon that question, yet the learned Judge instructed the jury to "mark especially" that it did so bear, though he did not explain how or why. We think this instruction was calculated to mislead the jury, and the third assignment of error is therefore sustained.

Digitized by Google

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by SHARSWOOD, J. WILLIAMS, J., absent.

Oct. & Nov. '76, 310. Nov. 13, 1876.

Halloway's Appeal.
Estate of Nathan Wood, Deceased.

Executor—Removal of, by decree of Orphans' Court—What are sufficient grounds for removal.

Appeal from the Orphans' Court of Fayette County.

This was a proceeding brought in the Court below by a petition of T. L. Wood, one of the legatees under the will of Nathan Wood, deceased, to remove Nathan Halloway, one of the executors of the said will.

Nathan Wood, of Menallen township, Fayette Co., died in December, 1873, having made his will disposing of his estate, amounting to over $20,000 in value, whereby he appointed his nephew, Nathan Halloway, and Mr. Hiram Miller executors.

The petition averred that the said Halloway was mismanaging the estate under his charge, retarding the settlement thereof, that the interests of the estate were likely to be jeoparded by his continuing to act as executor, and that he had stood in opposition to the will and was not a proper person to execute it. A citation having been awarded, and an answer filed, denying the allegations in the petition, depositions were taken. According to the testimony on behalf of the petitioner, it appeared that Halloway had said he was opposed to the will; had expressed an intention to break it if he could, and that if the heirs (legatees) did get anything it would be in small quantities and far apart and would not do them much good. He employed an attorney, who presented a *caveat* against the probate of the will, but which the Register took no notice of, on the ground that it was filed too late. By the terms of the will the use and profits of a large amount of property were given to Halloway during the life of his aunt, the testator's sister, whom Halloway was to take care of, and at her death the property was to be equally divided among the testator's nephews and nieces. A considerable portion of this property thus bequeathed to him for the life of his aunt, he claimed as his own, given to him by the testator in his lifetime, and had the property set aside as his own, but failed to prove that any such gift had been made. He refused to give his co-executor a receipt for the property thus taken, or to sign any bond as security for the proper management of said personal property. He objected to the sale of the residue of the property, which by the terms of the will was to be divided immediately, and in sundry ways obstructed the settlement of the estate.

Nathan Halloway in his own behalf denied having any hostility to the will or any disposition to break it, and testified that he had been trying to carry out its provisions as executor, and had not mismanaged or wasted the estate. Three other witnesses testified in behalf of respondent as to several acts properly done by him in the capacity of executor.

The Court (per WILSON, P. J.) made the following decree. "And now, to wit, March 15th, 1875, it appearing to the Court from the testimony presented that the interests of the estate of said Nathan Wood are likely to be jeopardized by the continuance of Nathan Halloway as one of the executors thereof, it is ordered and decreed, that the letters testamentary on the estate of Nathan Wood, deceased, heretofore granted to said Nathan Halloway, be, and the same are hereby vacated, and that the said Nathan Halloway be and is hereby removed from the said executorship."

The respondent took this writ, assigning for error the above decree of the Court.

Edward Campbell, for the appellant, argued that such of the charges as were sufficient cause for the removal of appellant were not proved; that he was entitled to a specific detail of the finding of the Court upon the charges against him together with the facts which moved the discretion of the Court to dismiss him, otherwise he could not obtain the hearing, trial, and determination upon the merits of his cause as provided for in the Act of June 16th, 1836 (Purd. Dig. 1110, sec. 52).

The discretion of the Court, under the Act of May 1, 1861 (P. L. 680), authorizing the Orphans' Court to remove an executor, is not unlimited or undefined, but, on the contrary, it is to be governed by the rules of law and equity, and is reviewable on appeal to the Supreme Court.

Witman *v.* Ely, 4 S. & R. 265.

Young *v.* Commonwealth, 6 Binn. 88.

The executor, being himself a legatee of a life interest, was not bound to give bond under the Act of April 17, 1869, to secure those in remainder, his refusal to do which was one of the grounds of his removal.

Lawrence Keene's Appeal, 2 WEEKLY NOTES, 419.

Wm. H. Playford (with whom was *G. W. K. Minor*), contra, presented no paper-book, but relied on the testimony to show that there were ample grounds for the decree of the Court below.

Nov. 24. THE COURT. We think the evidence was sufficient to justify the decree of the Orphans' Court in removing the appellant from his office as executor of the will of Nathan Wood, dec'd.

Digitized by Google

There are many facts which show that he was actuated by his own selfish interests instead of the interests of the estate. They have been set forth at length in the evidence before the Court below.

Decree affirmed at the costs of the appellant, and his appeal dismissed.

PER CURIAM. MERCUR and WILLIAMS, JJ., absent.

Common Pleas—Equity.

C. P. No. 4. March 14, 1877.

The Times Publishing Co. v. Ladomus.

Roads and highways—Width of Chestnut Street—New line thereof, as provided by Act of April 28, 1870—Encroachment—Right of private individual to equitable relief—Special damage.

Sur demurrer to bill.

In this suit an injunction had been granted by this Court to restrain the erection by defendant of a new front wall of certain premises, on the south side of Chestnut Street, otherwise than upon the new line authorized by the Act of April 28, 1870 (P. L. 1291). This decree was, upon appeal to the Supreme Court, reversed, the injunction dissolved, and the record remitted to the Court below for final hearing. Thereupon complainants amended their bill. The bill, as amended, set forth that the plaintiffs, being the owners in fee of premises on the southwest corner of Eighth and Chestnut Streets, had commenced the demolition of the old buildings and contracted for the erection of a four-story stone and brick tenement thereon. That the defendant was the owner of a lot of ground adjoining the complainants' premises on the west, on which was erected a three-story brick building, the front wall of which had been taken down, and since complainants had filed their original bill the defendant had erected a front wall, all of which was a new erection not on the line of the old wall, nor on the line established by the Act of April 28, 1870, establishing the south line of Chestnut Street, but encroaching on the street about five feet. This, the plaintiffs alleged, injured them specially in their use of their premises, and hence prayed that defendant might be ordered to remove so much of said building as encroached upon Chestnut Street.

The defendant demurred, because the plaintiffs showed no equity for relief, the defendant's acts were not contrary to law, and no special injury was shown to be done to the plaintiffs.

Geo. Junkin, for the demurrer.

Unless special damages are shown, the plaintiffs have no standing in Court; the allegations of the bill do not show how the plaintiffs' property would be injured. The Act provides that no buildings then on the south side of Chestnut Street should be interfered with. The changing of this part of the building was but an alteration.

City *v.* Presbyterian Board of Publication, 9 Phila. 499.

City of Philadelphia's Appeal, 1 WEEKLY NOTES, 197.

D. W. Sellers, contra.

Where there is an encroachment upon public domain the law presumes injury, and the peculiar relations to the subject-matter of the plaintiffs entitle them to sue in behalf of the public right.

The Times Publishing Co. *v.* Ladomus, 33 Leg. Int., p. 130.

Although there was not an entire alteration of the building, the Act applies.

City *v.* Clark, 2 WEEKLY NOTES, 533.

Complainants had no choice, but were compelled by the law to place their building back on the line of 1870, and are specially damaged by the overlapping of the defendant's building.

C. A. V.

April 7, 1877. THE COURT (after stating the pleadings). The effect of the demurrer is to admit the allegations in complainants' bill to be true in point of fact. In view of these admissions let us first inquire whether the plaintiffs are injured, for if they are not, it is no concern of theirs that the defendant's building encroaches upon the street.

The Act of April 28, 1870 (P. L. 1870, 1291), enacts: "That the south line of Chestnut Street, between the rivers Delaware and Schuylkill, shall be at the distance of 539 feet southward of the south side of Market Street: *Provided*, that this Act shall not interfere with any buildings now erected on the south side of Chestnut Street." The plaintiffs, accordingly, have to fall back, in the erection of their building, to the line thus established, which is about five feet south of the north line of defendant's building, thus annexing so much of their land to the street, while the defendant and adjoining owner extends his building that distance into the street. That this is a special injury to the plaintiffs to us seems manifest. The defendant has no greater right to block up five feet of the street directly adjoining the plaintiffs on the west, than he has to block up an equal space of the street directly in front of them. And surely it will not be seriously contended that he could do the latter without causing special injury to the plaintiffs. Besides this, the defendant, by his demurrer, admits the averments of the plaintiffs' bill, that the defendant's erection "will injure them specially in the uses which they propose to make of their property."

Digitized by Google

Assuming then that the plaintiffs are specially injured in the premises, it follows that they may pray for equitable relief, notwithstanding thereby they incidentally also protect the public. It is because of the special injury to plaintiffs that they have a status. In support of this see authorities cited in the case when before us heretofore. (Legal Intelligencer, 1876, p. 130, and also Pittsburgh's Appeal, 29 P. F. Sm. 317.)

The defendant also rests his demurrer upon the allegation or assignment that his acts complained of are not contrary to law. Let us inquire whether this position is correct. The plaintiffs assert in paragraph 8 of their amendment, that the whole of the front wall of the defendant's building "is a new erection not on the line of the former wall, nor on the line established by the Act of April 28, 1870."

It is surely contrary to law for the defendant, in any aspect, to take down his wall and place it elsewhere than designated by law. The moment he took down his wall the only line on which he could replace it, as it seems to us, is that designated by the Act of April 28, 1870, especially as at that time that Act was the only existing law fixing the southern boundary of Chestnut Street. The defendant, by his demurrer, admits that said wall encroaches into the street about five feet beyond said boundary. This purpresture is clearly without warrant of law.

It follows from these views that the plaintiffs are entitled to equitable relief in the premises.

It is therefore ordered that the demurrer be overruled, and the defendant answer in twenty days from this date.

Opinion by BRIGGS, J.

Common Pleas—Law.

C. P. No. 1. March 31, 1877.

Reeves v. Reeves.

Divorce—The affidavit attached to a libel can only be made before a Judge or Justice of the Peace—Act of March 13, 1815—Amendment.

Rule to amend petition in divorce by making an affidavit *nunc pro tunc.*

The original affidavit of libellant to the libel was declared insufficient, in a decision rendered March 24th, inst., by ALLISON, P. J., on the ground of its having been sworn to before a notary public—"an examination of the Acts of Assembly defining the powers of notaries having failed to disclose an intention to confer the right to administer an oath to a libellant in divorce, so as to change the law upon this subject, which restricted the authority to a Judge or a Justice of the Peace." Libellant now moved to be allowed to present an affidavit sworn to before one of the Judges of this Court or a Justice of the Peace.

Hennershotz, for the rule.

This amendment should be allowed under Act of May 10, 1871 (Purd. Dig. p. 70). It can do no harm to respondent.

Dolman, contra.

The foundation of a petition in divorce is the affidavit. If that foundation is defective, it is matter of substance, and cannot be cured by an amendment *nunc pro tunc.*

C. A. V.

April 7. THE COURT. We think we must allow this affidavit to be amended, as so many cases stand in the same position.

Rule absolute.

Oral opinion by ALLISON, P. J.

C. P. No. 2. **Day v. Garrett.** March 31.

Mechanic's lien—Substitution of security under Act of 1873, may be at any time prior to issue of levari.

Sci. fa. sur mechanic's lien.

Rule on plaintiff to file affidavit of amount of claim.

The record showed a claim filed July 29, 1876, and on January 9, 1877, on motion of defendant, a rule on plaintiff to issue a *sci. fa.*. Feb. 7, 1877, the issue of a *sci. fa.*, and, subsequently, an affidavit of defence filed by defendant.

Morgan, for the rule.

The Act of 1868 (Purd. Dig. 1037), and the Act of 1873 (P. L. 216), do not limit the time within which the defendant must apply for the benefit of these Acts. The decisions prior to 1873 are not now applicable.

Roberts and *Sellers*, contra.

It is too late after defendant has compelled the plaintiff to issue his *sci. fa.*

Hood *v.* Building Association, 9 Phila. 105.
Maulsbury *v.* Simpson, 33 Leg. Int. 108.

C. A. V.

April 7. THE COURT. The Act of August 1, 1868, provided for the release of any property against which a mechanic's claim is filed, from the lien of such claim upon the substitution of security or the payment of money into court; but it made no provision for the subsequent proceedings to test the validity of the claim, and to recover the amount due. Much embarrassment in practice arose from this omission, but it was held by the Court of Common Pleas in Hoffman *v.* Haines (8 Phila. 248), and by the District Court in Seipel *v.* Wireman (8 Phila. 26), that the proceedings subsequent to the entering of security should not be by *scire facias* on the claim,

Digitized by Google

but by action upon the bond; or, where money was paid into court, by a rule to take it out, and, if necessary, a feigned issue. Following these decisions, a carefully considered rule of Court was adopted by the District Court, providing for the various contingencies, and regulating the practice in such cases.

In this state of the law it was held by the District Court that, although no time was fixed in the Act of 1868 within which the defendant must apply to substitute security and release his property, yet as such substitution practically checked the plaintiff in his action, and turned him over to a new one, the defendant must avail himself of the privilege of the Act within a reasonable time, to wit, before the substitution would subject the plaintiff to unnecessary expense, trouble, or delay. It was therefore held that, after a *sci. fa.* had been issued, the Court would not allow security to be entered in the *usual form*, but would let the case take the regular course of adjudication by plea to the *sci. fa.*, issue, and trial. (Hood *v.* Building Assoc., 9 Phila. 105.) Of the soundness of this decision, and the equity of the result, no question could be made; but in 1873 the Legislature again intervened, and unsettled the practice by the Act of March 6, which directs that after the substitution of security the remedy for the recovery of the claim shall still be by *scire facias*, in the manner theretofore prescribed by law. The question, therefore, now arises in the present case, whether the decisions above referred to (such as Hood *v.* Building Assoc.) are any longer applicable in the present state of the law; and after careful consideration I am of opinion that they are not. The only ground upon which they rested was the injustice of turning over the plaintiff to the trouble and delay of a new proceeding upon the security instead of his original claim; but as the proceeding is now under the Act of 1873, by *sci. fa.* on the claim, as in other cases, the ground of the decisions fails, and there is no reason for imposing upon the defendant a restriction as to time not contained in the statute itself.

I am aware that it has been held differently in Maulsbury *v.* Simpson (33 Leg. Int. 108), and that the language of the opinion in that case may seem to imply that the *scire facias* meant by the Act of 1873 is a *scire facias* on the judgment on the security bond; but I am convinced that that was an inadvertent expression, and that a careful consideration of the statute in connection with the state of the law when it was passed, will show that not only its grammatical construction, but its plain intent, was that the *sci. fa.* should be on the *claim*, as it is in all other cases. And this construction was put on the Act after careful consideration by the District Court (Henson *v.* Stewart, 1 WEEKLY NOTES, 4), which has been followed by the Court of Common Pleas No. 4, in Ashmead *v.* Prowhattain (2 WEEKLY NOTES, 98). In the latter case the delay of defendant in applying to substitute security was extreme; but the Court did not hesitate to allow the substitution.

True, this construction results in a remedy by *scire facias* against one property, and a *levari* against another; but however startling such a solecism may be to the mind of a common-law lawyer, it is not beyond the scope of legislative power. The language of the statute is plain, and has been, as already said, adjudicated by the District Court and the Court of Common Pleas No. 4, whose decisions I follow as not only the latest, but the most in accordance with the words and the intention of the Act.

It follows that a defendant may have the benefit of the Act of 1868 by substituting security at any time prior to the issue of a *levari*, unless in some special case where it would impose an inequitable burden on the plaintiff.

Rule absolute.

Opinion by MITCHELL, J.

C. P. No. 3. March 21, 1877.

McClellan v. Melloy, Adm'x, etc.

Evidence — Act of April 15, 1869 — Action against administrators—Competency of witnesses—Interest—New trial.

Rule for a new trial.

Case for alleged negligence of defendant's decedent.

Michael Melloy, deceased, was, in his lifetime, the owner of a tug-boat upon the river Delaware. Some time before his death, while his boat was employed in towing a barge loaded with iron, the barge tilted, and a large portion of the freight shot overboard and was lost. This action was brought against the administratrix of his estate, to recover for alleged negligence in causing the loss.

On the trial, defendant called as a witness one Peterson, who was captain of the tug-boat at the time of the accident, for the purpose of testifying as to the condition of the barge and the unskilful manner in which it was loaded. Objected to, on the ground of incompetency. Objection overruled, and witness admitted to testify. The verdict was for defendant.

Dougherty showed cause

Dolman, for the rule.

The question of Peterson's competency ought to have been determined by the law as it stood prior to the Act of April 15, 1869 (Purd. 624, pl. 16). Being liable over to the administratrix, if the verdict should be against her, he was thus interested in the event of the suit, and was excluded from testifying by the proviso to the above

Digitized by Google

Act, which declares that "this Act shall not apply to actions by or against executors, administrators, or guardians." To have rendered him competent as a witness, a release ought to have been tendered him by the defendant. No release was tendered.

C. A. V.

March 24. _ Rule absolute

C. P. No. 3 April 7, 1877.

Harris v. Govett.

Want of knowledge by a party that his case is on the list for trial—His duty to keep his counsel informed of his address.

Rule to open judgment and let defendant into a defence.

This was an appeal by the defendant from an alderman's judgment in an action of trover and conversion. The depositions showed, *inter alia*, that the defendant had not been notified by her counsel of the time of trial, and when the case was called, she being absent from Court, the judgment was affirmed; that the first notice she received thereof was when execution was issued. Facts relied on as a defence were also shown.

A letter from her counsel was read, in which he stated that he did not know her residence, and was therefore unable to notify her.

Jefferson, for the rule, argued that this was a proper case for the exercise of the discretion of the Court. If this rule is discharged, the defendant will be liable, from the nature of the action, to imprisonment, which, under the facts appearing by the depositions, would be an injustice.

Kratz, contra.

THE COURT. If a client fails to keep his attorney advised of his residence, how can the attorney be said to be responsible for the consequences?

Rule discharged.

C. P. No. 4. April 14, 1877.

Thompson v. Buckley.

Constitutional law—Act of 23d of March, 1877 (Stay Law) declared constitutional under the ruling in Chadwick v. Moore (8 W. & S. 49) —Said Act applicable to cases in which unexecuted writs of vend. exp. were in the hands of the sheriff at the time of its passage—Demand by the debtor for appraisement necessary in cases of levy upon personal property, but not in cases of levy on real estate—Defendant may claim benefit of Act at any time before acknowledgment of sheriff's deed—Present Act compared with the Stay Law of 16 July, 1842.

Rule to set aside sheriff's sale.

On Feb. 20th, 1877, an alias *fi. fa.* was issued and real estate belonging to the defendant levied on and condemned. March 21st, a *vend. exp.* was issued, and the property advertised to be sold April 2, 1877. On March 23d, an Act of Assembly allowing a stay of execution where the property levied upon did not sell for two-thirds of its appraised value, and requiring the sheriff to appraise property before sale, was approved by the Governor.

The first section of said Act provides, *inter alia*, "that in all cases where lands, tenements, or hereditaments have been or hereafter shall be levied on by virtue of any writ of *fieri facias* or other writ of execution, and an inquest of six men, summoned by the sheriff or coroner of any of the cities and counties, agreeably to the existing laws of this Commonwealth, shall find that the rents, issues, and profits of such property are not sufficient beyond all reprisals within the space of seven years to satisfy the damages and costs," it should be the duty of the sheriff to summon a jury of six men to appraise the property, etc.

The second section provides as follows:—

"That in all cases where lands, tenements, or hereditaments, have been heretofore levied upon and condemned or extended, or that hereafter may be extended in virtue of any writ of *fieri facias*, and in all cases where any lands, tenements, or hereditaments, have been or hereafter shall be seized or levied on by virtue of any writ of *levari facias*, it shall be the duty of the sheriff or coroner before exposing the said property to sale, pursuant to any writ for that purpose issued, or in pursuance of such writ of *levari facias*, to summon six good and lawful men of his bailiwick, who, being sworn or affirmed, shall go upon the premises and make a true valuation or appraisement of such property as directed by the first section of this Act."

On April 2d, before the sale, a rule to show cause why the property should not be valued and appraised was obtained by the defendant, but, no notice being given to the sheriff, the sale proceeded. On April 7th the present rule was taken.

A. M. Beitler and *Jas. Alcorn*, for the rule.

The Act of March 23, 1877, is obligatory on the sheriff.

Gordon *v.* Green, 34 Leg. Int. 134.

This Act is similar to the Act of 16 July, 1842, held constitutional in—

Chadwick *v.* Moore, 8 W. & S. 49. See also—
Evans *v.* Montgomery, 4 W. & S. 218.
Satterlee *v.* Matthewson, 16 S. & R. 169.
Gault's Appeal, 9 Casey, 94.
Billmeyer *v.* Evans, 4 Wr. 327.
Satterlee *v.* Matthewson, 2 Pet. 380.
Conkey *v.* Hart, 4 Kern. 22.
Van Rensselaer *v.* Snyder, 3 Id. 299.
Kent's Com., vol. i. 419.
Penrose *v.* Canal Co., 6 Sm. 46.

W. H. Staake and *T. J. Diehl*, contra.

The writs were in the hands of the sheriff

Digitized by Google

before the approval of the Act. The defendant by making no demand acquiesced in the sale.

Crowell v. Meconkey, 5 Barr, 168.

A jury of twelve men held an inquisition and co demned the property. Under the new Act it became necessary to have a second inquisition made by six men. We submit that, the property having been condemned under the Act of 1836, the Act of 1877 does not apply.

T. J. Barger, for the sheriff.

The Act alludes to a condemnation by a jury of six men. It would seem, therefore, to be confined in its operation to those counties where it is the practice to hold an inquisition by a jury of six men, and does not apply to the city of Philadelphia, where it has always been the practice to summon a jury of twelve men.

C. A. V.

April 21. THE COURT. The late Act of Assembly "to regulate Stay of Executions in certain cases, approved March 23, 1877, is almost a literal copy of the Act of 16th of July, 1842 (P. L. 407). Each of these acts consists of five sections, and, with slight differences, the provisions and the very language of the two Acts are the same. The chief points of difference are the following:—

Under the Act of 1842, the inquest of twelve which was summoned to condemn or extend the real estate was directed to value and appraise it, and if no condemnation was necessary the sheriff was commanded to summon an inquest of twelve good and lawful men to value and appraise the property.

The Act of 1877 requires the appraisement to be made after condemnation by a jury of six men, and where no condemnation is necessary, the six men who are to make the appraisement must be freeholders. The Act of 1877 requires the inquest to go upon the premises to make the appraisement. That was not required by the Act of 1842.

The provision at the end of the 3d section of the Act of 1877, requiring security from the defendant, where life estates and terms for years are levied upon, was not in the Act of 1842.

The provision in the 4th section of the Act of 1877, authorizing the entering up of the bond given by the defendant for the restoration of personal property at the expiration of the stay, and declaring it to be a lien, was not in the Act of 1842.

The conditions (designated in the 5th section of each Act) upon which the defendant is to be entitled to a stay of execution against real estate are more stringent in the Act of 1877 than in the Act of 1842.

Finally, the proviso in the 5th section of the Act of 1877 exempting from the operation of the Act claims for labor, and interest on moneys due to the estates of decedents, widows, or minors, was not in the Act of 1842.

Except in the particulars which I have designated, the two Acts are precisely the same.

The Supreme Court in the case of Chadwick v. Moore (8 W. & S. 49), upon solemn argument, and after great deliberation, held the Act of 1842 to be constitutional; Chief Justice GIBSON delivering the opinion of the Court, in which (not, however, without the expression of some doubt and much dissatisfaction with the distinctions upon which he rested the grounds of his decision) he held that, while an absolute denial, or an indefinite postponement, of execution, would be clearly a violation of the Constitution, yet that a reasonable temporary suspension of execution is not, and that it is not incompetent for the Legislature, by laws enacting such temporary suspen sion, to relieve the public from the pressure of sudden distress occasioned by a general sacrifice of property. That the task of reconciling such an act with the imperative prohibition by the Constitution directed against all legislation impairing the obligation of contracts, was by no means a light one, and that the clear and vigorous intellect of the Chief Justice did not repose with complete satisfaction upon the results of his own reasoning, must be apparent to any one who will attentively consider the opinion. Nevertheless, the decision that the Act of 1842 was constitutional was the unanimous judgment of the Supreme Court, and is absolutely binding upon all subordinate tribunals. If that Act was constitutional, the Act of 1877 is undoubtedly constitutional, for the principle upon which both Acts rest is the same.

It was urged upon the argument that, inasmuch as the first section of the Act awards the inquest of valuation wherever there has been, or may hereafter be, a condemnation by an inquest of six men, and as we had in this county at the time of the condemnation of this property no inquest of six men for any such purpose, and as this property was never condemned by any inquest so constituted, the Act could not apply to the present case. But this is altogether hypercritical. Whether the effect of the words used is to substitute six jurors for twelve in an inquest for condemnation, we are not now to decide. If the defendant's right depended upon the first section alone, we should be obliged, upon the soundest principles of interpretation, to hold that he is entitled to the remedy, for, in considering a statute, the law respects the effect and substance of the matter, and not every nicety of form or circumstance. He who considers merely the letter of an instrument goes but skin deep into its meaning. It is a general rule that cases without the letter, if within the mischief, should have remedy. (4 Bac. Ab. 648.) Nay, words shall sometimes be expounded against the letter, in order to maintain the intent. (19 Vin. 519, 1 Bl. Com. 61.)

Digitized by Google

But independent of these considerations the second section of the Act requires a valuation and appraisement in all cases where lands have been levied on and condemned.

Nor is it necessary that the defendant should demand the appraisement of his real estate in order to impose upon the sheriff the duty of holding the inquest for those purposes. By the express words of the Act it is his duty to summon the inquest for valuation and appraisements before exposing the property to sale. To sell without it would be a gross irregularity, for which the sheriff would be responsible to the defendant, although it might not affect the title of a purchaser at the sale. (Crowell *v.* Meconkey, 5 Barr, 168.)

A different rule is applicable to personal property, for by the fourth section the sheriff is not bound to have personal property appraised unless it shall be requested by the debtor; and this qualification relative to personal property, and its omission in the section relating to real estate, show conclusively that, where real estate is levied upon, an appraisement must always be made before the sale, unless, indeed, the stay has been expressly waived by the debtor. (Billmeyer *v.* Evans, 4 Wright, R. 324.)

That the act is applicable to cases in which there were unexecuted writs of *venditioni exponas* in the sheriff's hands at the time of its passage, admits of no doubt, in view of the language of the second section. The defendant is in time in claiming the benefit of the Act, having made his claim before the acknowledgment of the sheriff's deed. The sheriff's sale must therefore be set aside in order that the appraisement may be made.

Rule absolute.

Opinion by THAYER, P. J.

C. P. No. 4. **City v. Scott.** March 19, 1877.

Municipal tax claim—Scire facias to revive lien of—Prosecution of scire facias—A scire facias sur tax claim must be prosecuted to judgment within five years of the issue of the scire facias, in order to preserve the lien of the claim.

Rule for a new trial and motion in arrest of judgment.

The city of Philadelphia filed a claim for taxes March 16, 1871. A *sci. fa.* was issued November 1, 1871, and returned "nihil habet." December 1, 1871, an *alias sci. fa.* was issued, and returned "served." Pleas were then filed and issue joined. October 31, 1876, a *sci. fa.* to revive the lien was issued. January 11, 1877, the case was tried, and a verdict rendered for the plaintiff for $2132.78

C. Meyer, for the rule.

A *sci. fa.* to revive cannot issue on a pending *sci. fa.* Therefore the third *sci. fa.* must be predicated either upon the municipal claim or a judgment. No judgment has been obtained, and more than five years had elapsed since the filing of the municipal claim, when the third *sci. fa.* issued. It is, therefore, an independent writ, unwarranted, and of no effect.

Act of June 16, 1836, § 24, Purd. Dig. 1036.
Act of April 16, 1845, § 2, Id. 1089.

Unless the *sci. fa.* (or *alias*, as is the case here) be duly prosecuted to judgment, the lien on which it issues will not be preserved.

Ward *v.* Patterson, 10 Wr. 372.
Vitry *v.* Dauci, 3 R. 14.

Due prosecution is within five years from the issue of the writ.

Silverthorn *v.* Townsend, 1 Wr. 263.
Hood's Appeal, 1 Sm. 204.
Meason's Estate, 4 W. 344.

J. S. Powell showed cause.

The third *sci. fa.* was not an independent writ or an abandonment, for it was of the same term and number as the others, and referred to the original *sci. fa.* and the lien.

[BRIGGS, J. Abandonment means *laches*. You must obtain judgment within five years from the exit of the writ, and then you may issue a *sci. fa.* to revive that judgment.]

The authorities quoted in favor of the rule all refer to *sci. fas.* issued to revive judgments, not to *sci. fas.* sur municipal or mechanics' liens.

[BRIGGS, J. Under Hunter *v.* Lanning (26 Sm. 25) there is no distinction.]

[THAYER, J. I agree with Judge BRIGGS that the same principle applies as to the due prosecution of *sci. fas.* to revive judgments and *sci. fas.* sur mechanics' or municipal liens (citing Hershey *v.* Shenk, 8 Sm. 385).]

The third *sci. fa.* is justified by long practice, and is for the purpose of giving notice to third parties. The rule of *lis pendens* applies.

[ELCOCK, J. But you issued a new writ instead of prosecuting the old writ to judgment. If it were connected with the original writ, it was merely a *pluries*.]

[THAYER, P. J. If a judgment be entered, it must be on the *alias*, not on the third writ. All the pleas relate to the old writ.]

C. A. V.

March 31, 1877. THE COURT. The verdict in this case was obtained on the eleventh day of January, 1877, upon an *alias scire facias* issued upon a claim for taxes registered on the sixteenth day of March, 1871, against a lot of ground at Fifteenth and Columbia Avenue, being five years, one month, and twenty-five days after the writ of *alias scire facias* was issued.

The first section of the Act of the 11th March, 1846 (Brightly's Digest, 1086), provides that

Digitized by Google

"All registered taxes, as aforesaid, shall cease to be a lien after the expiration of five years from the first day of January in the year succeeding that in which they became due, unless suit be brought to recover the same, as it now is or may be provided by law for the recovery of the same, and duly proceeded in to judgment." The second section of said Act gives a remedy upon such claims by writ of *scire facias*, as in the case of mechanics' claims. And by the Act of June 16, 1836 (Brightly's Digest, 1036), for remedy upon mechanics' claims, it is provided that—"The lien of every such debt for which a claim has been filed, as aforesaid, shall expire at the end of five years from the day on which such claim shall have been filed, unless the cause shall be revived by *scire facias* in the manner provided by law in the case of judgments."

It follows, from these Acts of Assembly, that the same time is given the plaintiff to obtain judgment upon his writ of *alias scire facias*, as is given to prosecute to judgment a like writ to continue the lien of a judgment, and this, by the very terms of the Act of the twenty-sixth of March, 1827 (Bright. Dig. 820), and the adjudications thereupon, is limited to five years from the time of issuing the *scire facias*. (*In re* Fulton's Estate, 1 P. F. Sm. 204; Meason's Estate, 4 Watts, 344; Silverthorn *v.* Townsend, 1 Wright, 263; Ward *v.* Patterson, 10 Wright, 372; Hershey *v.* Shenk, 8 P. F. Sm. 384; Hunter *v.* Lanning, 26 P. F. Sm. 25.)

It therefore follows that the plaintiff's *scire facias* has not, in the language of the Act of the eleventh of March, 1846, been "duly proceeded in to judgment." And this notwithstanding the plaintiff caused a *scire facias* to revive the lien to be issued October 31st, 1876. It is not pretended that this writ was a *pluries*. Indeed, it could not be; for, as the *alias* was duly served, there was no legal requirement in the case which a *pluries* could answer. Regarding it, then, as an independent writ, as it was held under like circumstances in Meason's Estate (4 W. 341), it was an abandonment of the *scire facias* previously issued, and in this view there was no lien to revive, as the lien had already expired on the sixteenth of March preceding. Viewed in either aspect, the presentment is alike fatal to the plaintiff's case.

We therefore order that the rule for a new trial be discharged, and that judgment on the verdict be arrested.

Judgment arrested.

Opinion by Briggs, J.

C. P. No. 4 April 14, 1877.

Marberry v. Freno.

Practice—No appearance by defendant—Declaration and rule to plead filed after return-day—Judgment for want of a plea, when set aside—Defendant put on terms to appear and plead.

Rule to open and set aside judgment.

This was an action of trespass. The writ was returned "served," but no appearance was entered by the defendant. The plaintiff after the return-day filed a declaration and a rule to plead, and served the same personally on the defendant. Eleven days after the filing of the narr. judgment was entered against the defendant for want of a plea. Subsequently writs of *fi. fa.* and *ca. sa.* were taken out.

John Cadwalader, Jr., for the rule.

No declaration having been filed before the return-day, no judgment could have been taken for want of appearance.

Foreman *v.* Schricon, 8 W. & S. 43.
Dennison *v.* Leech, 9 Barr, 164.
Black *v.* Johns, 18 Sm. 83.

No appearance having been entered, the defendant was not in Court, and could not be ruled to plead, and therefore a judgment against him for *want of a plea* was irregular.

The facts set forth in the affidavit on which the rule was granted show a good defence.

G. F. B. Collins, contra.

The Court was of opinion that the judgment was not irregular, but, on consideration of the affidavit as to merits, made the rule absolute, on condition that the defendant immediately appear and plead issuably.

C. P. No. 4. **Stokes v. Harrison.** Mar. 17, 1877.

Legal tender—Ground-rent payable in "current silver money of the United States"—Coinage under Act of Congress of Jan. 18, 1837—*Tender made in silver coin of the denomination of five and ten cents each coined before the* 21*st of Feb.* 1853.

Rule for judgment for want of a sufficient affidavit of defence.

Covenant on a ground-rent deed created in 1806, covenanting for payment in current silver money of the United States. The affidavit set forth a tender of "current silver money of the United States, in silver coins of the denomination of five and ten cents each, all coined at the mint of the United States before the 21st day of February, 1853."

A. L. Wilson (with whom was *John G. Johnson*), for the rule, cited—

Maule *v.* Stokes, 3 Weekly Notes, 373.

N. H. Sharpless, contra, contended that the tender was a good one, that the coins under Act of Congress of January 18, 1837, were legal

Digitized by Google

tender of payment according to their nominal value for any sums whatever, that they were still in circulation as "current silver money of the United States," and that they were not demonetized by subsequent Acts of Congress of 1853 and 1873.

The majority of the Court were of opinion that this case was ruled by the late decision of the Supreme Court (Maule *v.* Stokes, cited *supra*).

Rule absolute.

C. P. No. 4. **Collins v. J. F. O'Toole.** March 5.

Affidavit of defence law—Book entries in which defendant's first name is omitted insufficient to sustain a judgment for want of affidavit—A defective entry cannot be cured by an averment.

Rule for judgment for want of a sufficient affidavit of defence.

The following copy of book entries and averment was filed:—

O'TOOLE.

1873. Sept. 9,	To 3 bags oysters . . .	$6 75
"	" Expressage . . .	1 75
	etc. etc.	
		$55 25

"And the plaintiff avers that the said O'Toole against whom the said charges are made is the said John F. O'Toole, defendant herein" . . . etc.

The affidavit, *inter alia*, suggested that the copy filed is not such as to warrant judgment under the affidavit of defence act.

N. Keim, for rule. The copy filed is a true copy of the book account, where the defendant is named simply "O'Toole." The averment puts upon the defendant the burden of saying whether he was or was not the party.

[ELCOCK, J. You cannot cure a bad entry by an averment.]

W. Hartman, contra.

This is not such an entry as would be submitted to a jury, and is not cured by an averment.

C. A. V.

March 15. Rule discharged.

Orphans' Court.

Jan. 18, 1877.

Buckingham's Estate.

Orphans' Court practice—Depositions—Evidence before examiner—Testimony will not be received upon depositions where it could be taken before an examiner—Rule XII. of Orphans' Court.

Sur exception of trustee to rule entered by petitioner to take depositions.

The Orphans' Court docket showed the following entries:—

Nov. 11, 1876. Sur petition, citation awarded, directed to William Duane, executor, to file account. Answer filed.

Dec. 2. Sur supplemental petition, citation awarded, directed to William Duane, trustee, to file an account, returnable Dec. 16. Answer filed.

Dec. 23. Rule entered to take depositions on behalf of petitioner on eight days' notice.

The counsel for the trustee applied to the Court, upon the exhibition of the above record, to vacate the rule entered to take depositions on behalf of petitioner, and appoint an examiner to take proofs on petition, answer, and replication.

Chas. Henry Hart, for trustee.

This rule to take depositions was entered under Rule XII., Sec. 5, of the Orphans' Court. This rule applies to witnesses and depositions on audits, and Sec. 5 is, by its terms, expressly "subject, nevertheless, in all other respects to the existing rules and regulations;" it is, therefore, subject to Sec. 3 of the same Rule, which provides that no deposition taken under a rule of Court shall be read in evidence, unless the party cannot be produced to testify upon subpœna.

The proceedings before the Orphans' Court are upon petition, answer, and replication, by analogy to the practice in equity, this Court being, within the limits of its jurisdiction, a Court of equity, proceeding substantially according to the forms and rules of chancery practice.

Dundas's Appeal, 14 Sm. 332.
Woodward's Appeal, 2 Wr. 328.
Loomis *v.* Loomis, 3 Casey, 236.
Shollenberger's Appeal, 9 H. 340.

Depositions are but secondary evidence, and can be used only when witness cannot be produced.

1 Greenleaf's Evidence, 321, 324.
Haupt *v.* Henninger, 1 Wr. 140.
Stiles *et al.* *v.* Bradford, 4 Rawle, 400.

Depositions taken on the pending rule would not be part of the record.

Brown *v.* School Directors, 6 H. 78.

The Act of March 29, 1832 (Purd. Dig. 1106, pl. 27, and 1109, pl. 48), provides how testimony shall be taken in the Orphans' Court in support of petitions, and Carbart's Estate (1 WEEKLY NOTES, 85) is a decision of this Court upon the practice in such cases.

J. J. Ward, contra.

March 31. THE COURT vacated the rule entered to take depositions, and appointed an examiner.

(No opinion.

Digitized by Google

Seyfert's Estate. Feb. 20, 1877.

Testamentary trustees—Removal of—Incompatibility of dispositions sufficient ground for removal when the interests of a cestui que trust may suffer—Petitioning trustee removed as well as respondent.

Sur petition of Louisa E. Seyfert, widow of the decedent, and co-executrix and co-trustee of above estate with Henry Knauff, in which petition Theodore H. Seyfert, Emma G. Seyfert, and Maria L. Seyfert, also joined, they being all the parties in interest in said estate.

The petition set forth that the decedent's entire estate was devised in trust for the afore-mentioned petitioners, but that the said Henry Knauff is in no manner interested in the said estate, except in his fiduciary capacity as executor and trustee, and is an entire stranger to the blood of the decedent, and that during the past ten years there has been a want of congeniality and concert of action between himself and his co-trustee, which has led to expense and litigation.

The petition further set forth that the said Henry Knauff has in his possession certain ground-rents of above estate, nearly all of which are prompt paying, also $4500 in coupon bonds; that the payments of income to the *cestuis que trustent* are very irregularly made, and often in the individual checks of Knauff. The petition also alleged a disregard of an order of Court for a reinvestment; and that a balance due the petitioners under an adjudication of this Court of his account to Jan. 1, 1876, made in July, 1876, has only recently been paid and settled, which was only done in pursuance of a rule granted to show cause why an attachment should not issue to compel him to obey the order of this Court. The petition also averred general mismanagement and wasting of the estate, and prayed for the appointment of Wm. H. Peters and Theodore H. Seyfert (one of the *cestuis que trustent*), in the place and stead of Louisa E. Seyfert and Henry Knauff.

The answer set forth that the respondent had for many years enjoyed the confidence and intimacy of the decedent, denied the charges of the petitioners *in toto*, and referred to the opinion of the late Orphans' Court, quoted below, in which LUDLOW, J., said that the same argument which would oblige "the Court to remove the one, would also compel the discharge of the other."

Jerome Carty, for the petitioners.

W. H. Staake, contra.

March 3. THE COURT. The opinion of LUDLOW, J., reported in 9 Phila. Rep. 320, thus concludes: "The difficulty in this case we conceive does not arise from any want of honesty or capacity, but from peculiarities of character upon one side, and a rather hasty and suspicious temper upon the other. Would it not be well to attempt to modify the one and control the other? The interests of the estate demand a careful consideration of this question, for the time may arrive when, by the substitution of other trustees, we may be obliged to introduce into the management of the estate those whose characters and tempers will not be the subject of judicial criticism."

The petition and answer satisfy us that the time thus preconceived has come. It is therefore considered, adjudged, and decreed that Louisa E. Seyfert and Henry Knauff be dismissed and removed from their offices as trustees of the estate of John H. Seyfert, deceased, and it is ordered that they each file their account before the 24th day of March next, and that in default of the nomination by petition on the part of the *cestuis que trustent*, on or before March 24, 1877, an appointment of a new trustee be made by the Court.

Opinion by DWIGHT, J.

U. S. District Court—Admiralty.

April 20, 1877. The Court adopted the following Rule of practice.

In all cases in Admiralty in which depositions have been taken, each party shall furnish to the Court, at or before the commencement of the hearing, a printed or written statement of facts and points of law; and in case of appeal, such statement shall be certified to the Court of Appeal.

March 16, 1877.

Sheppard v. Philadelphia Butchers' Ice Co.

Jurisdiction—Liability of consignee for damages in the nature of demurrage.

Sur exceptions to commissioner's report.

Sheppard and others, owners of the schooner *Curtis Tilton* and other vessels, filed several libels against the Butchers' Ice Company for damage in the nature of demurrage caused, as was alleged, by the neglect of the company to unload their vessels promptly.

The cargoes had been shipped in Maine consigned to the Ice Company, as owners, at Philadelphia. The bills of lading stipulated for the delivery of the ice to the company at the Christian St. wharf, on the river Schuylkill in said city, the consignee to pay freight. No demurrage clause was inserted.

The libels alleged that the *Curtis Tilton* arrived at Philadelphia on May 29th, 1876, at

Digitized by Google

Christian St. wharf, with her cargo aboard; that the company accepted the cargo and commenced to receive the ice, but detained the vessel till the 15th day of June, by reason of which the libellants suffered damages, etc.

The answer alleged that there was no improper delay in unloading; that when libellants' vessel arrived, there were other vessels occupying the wharf, which compelled the libellants' vessels to await their turn, which they did, and that the masters well knew when they shipped the cargo, that this would probably be the case; that there was no liability on the part of respondents, because the bill of lading stipulated only for the payment of freight and nothing more.

At the hearing of the cause, on January 12, 1877, the Court (CADWALADER, J.) said: In these cases the impression of the Court, after the reading of the papers and proof, is that the respective libellants are entitled to decrees in their favor. But if so, it will be necessary to ascertain the damages in every case by a commissioner; . . . therefore, Edward F. Pugh, Esq., is commissioned to inquire and report what damages in every one of the cases ought to be assessed if the libellant is entitled to recover, and to report specifically any proposition of law or fact which may be material on the question of the right to recover.

On February 23, 1877, the commissioner reported as follows:—

(1) The actions were properly brought in the Court of Admiralty; no authorities requiring them to be brought at law.

(2) While it is true that demurrage *eo nomine* is never payable unless expressly stipulated (Robertson *v.* Bethune, 3 Johns. Rep. 342); yet damages for detention, in the nature of demurrage, may be recovered (Horn *v.* Bensusan, 9 Carr. & Payne, 709).

(3) The libels were properly filed in the names of the owners of the vessels, and not in those of the masters (Evans *v.* Foster, 1 Barn. & Ald. 118; Brounker *v.* Scott, 4 Taunton, 1); but the authority of the master to use the owners' names will be implied.

(4) When the bill of lading has in it a demurrage clause, the consignee accepting the cargo is responsible for the payment of the demurrage, according to the terms of the bill of lading; or if the charter party stipulates for demurrage and the stipulation is referred to in the bill of lading, he is responsible. (Jesson *v.* Solly, 4 Taunt. 52; Wagener *v.* Smith, 28 Eng. L. & Eq. 356; Falkenburg *v.* Clark, 16 Amer. L. Regis. N. S. 90); even if he had no actual notice of the arrival of the vessel (Harmon *v.* Clark, 4 Campbell, 159).

But he is not liable for demurrage *eo nomine* if the bill of lading contain no provision for its payment, even if he accept the cargo. (Gage *v.* Morse, 12 Allen, 410; see also Young *v.* Moeller, 5 El. & B. 755; Chappel *v.* Comfort, 10 C. B. N. S. 802.) Nor is he liable when the delay was not from his own default. (Smith *v.* Siveking, 30 Eng. L. & Eq. 389, affirmed 5 El. & B. 945; Rodgers *v.* Forresters, 2 Campbell, 483.)

The consignee, merely as such, is not liable for damages for detention where no demurrage or lay days are mentioned or referred to in the bill of lading. (Abbott on Ship. 221; Sprague *v.* West, 1 Abbott's Adm. R. 554; Gage *v.* Morse, 12 Allen, 410; Donaldson *v.* McDowell, 1 Holmes, 292.) But when the consignee is the owner of the cargo, there is an implied agreement that he will provide for its discharge within a reasonable time, and he must explain delay. (Cross *v.* Beard, 26 New York, 85.) Especially if he be in reality (though not in name) the freighter. (Sprague *v.* West, *supra;* Donaldson *v.* McDowell, 1 Holmes, 292; The Hyperion, 7 Amer. L. Rev. 457; Clendaniel *v.* Tuckerman, 17 Barbour, 190; Cross *v.* Beard, 26 New York, 85; The Woodbine, 1 Law Times, N. S. 200; Falkenburg *v.* Clark, 16 Amer. L. Regis. N. S. 90.) The burden of proof that the detention was reasonable lies upon the respondents, and being the real freighters and owners, and having detained the vessels a longer time than was reasonable, they should be held responsible.

(5) The proper measure of damages is the gross freight which the vessels would have earned, under ordinary circumstances and in their usual course of employment, from the time when they ought to have been discharged to the time when the discharge was actually completed; deducting the amount which would have been expended in earning the freight. (The Steamer Narragansett, Olcott, 395; Sprague *v.* West, 1 Abbott's Adm. R. 554; Vantine *v.* The Lake, 2 Wall. Jr. 58; Swift *v.* Brownell, 1 Holmes, 467; Williamson *v.* Barrett, 13 Howard, 110; Jolly *v.* Terre Haute Bridge Co., 6 McLean, 248; The Cayuga, 2 Benedict C. C. 125; The Corier Maritim, 1 Cht. Rob. 287; The Gazelle, 2 W. Rob. 279; Talbot *v.* Janson, 3 Dallas, 133; The Apollon, 9 Wheat. 363.)

In the present cases, where the crews were discharged, the wages which would have been paid them and the amount of their board are deducted. In all the cases, the port charges and the amounts which would have been paid for discharging a cargo are also deducted. Subject to these deductions the libellants are allowed the gross freight which they would have earned in the carriage of a cargo of coal from Philadelphia to Boston, that being their usual employment.

To this report the respondents filed exceptions.

H. B. Freeman, for exceptants.

H. R. Edmunds, contra.

Digitized by Google

March 16. THE COURT (CADWALADER, J.). Exceptions dismissed and decree for libellants according to the above report.

U. S. District Court—Law.

Nov. 10, 1876.

Detmold & Cox v. Gate Vein Coal Co.
Same v. Fisher.

Affidavit of defence law—Averment filed with copy of instrument—Function and scope of averment in such case—Semble, that the two-term rule, based upon the old Pennsylvania practice, may be acted upon in a case not within the affidavit of defence law—Practice. (NOTE.—*Origin and development of affidavit of defence law*).

Motion to set aside judgment.

Judgment in this case had been entered by default, for want of an affidavit of defence, upon copy filed of an agreement in writing, whereby the company defendant agreed to ship and consign to plaintiffs, within a specified time, a certain quantity of coal to be sold by them at a certain commission. The plaintiffs were to make advances on such shipments, a bond of indemnity being given to secure them against loss, of which a copy was also filed. With these copies plaintiffs filed an averment that the agreement had not been performed, whereby the plaintiffs were entitled to judgment for the amount of commissions upon the sales of the coal which should have been shipped; and also for a balance due on account of advances, as shown by a copy of book entries filed therewith.

An affidavit was filed by defendant denying breach of the agreement, and averring that the copies filed, with the averments, were not such as to entitle plaintiffs to judgment under the affidavit of defence law.

Dallas, for the plaintiffs.

Judgment is asked upon the copies of the agreement and the bond of suretyship, and not upon the copy of book account, which latter is filed with the above instruments merely as an averment to liquidate the plaintiffs' claim, and to assist the clerk in assessing the damages.

Frank *v.* Maguire, 6 Wright, 81.

F. W. Hughes, for the defendants.

Breach of the agreement is alleged in general terms. The instruments of writing upon which suit is brought are for the payment of money at a future time, the consideration being executory, and the demand is for damages for the breach of agreement, dependent upon facts *dehors* the record. They are not within the affidavit of defence law.

Montgomery *v.* Johnson, 1 Miles, 324.
Bank *v.* Blakiston, 2 Id. 358.
Commonwealth, etc., *v.* Hoffman, 24 Sm. 105.

THE COURT. Judgment would be granted upon the copies as filed, if it were not for the fact that the copies of the book entries, filed to assist the assessment of damages, tend to extend and not to limit the claim, as shown by the copies of the instruments of writing. Such a purpose is not within the rule allowing averments to be filed with copies of instruments.

Judgment in each case vacated without prejudice to the right of the plaintiff to move for judgment, in accordance with the practice under the old second term rule, for default of affidavits alleging defence, and the amount thereof; but defendants have leave to file such affidavit in each case.

Oral opinion by CADWALADER, J.

The following order was entered of record:—

"And now, to wit, this 15th day of November, A. D. 1876, the Court orders the judgments to be vacated as having been unadvisedly entered, but without prejudice to any right of the plaintiffs to move for judgment for want of an affidavit of defence under the rule and practice which is in that behalf independent of the statute law of the State."

[The practice of taking judgment by default for want of an affidavit of defence originated in the Supreme Court, in 1795, under an agreement signed by all the attorneys except two, and entered among the records of said Court. As it is believed that this document is not to be found in print, it is here inserted, viz.:—

"It is agreed by the attorneys practising in the Supreme Court of Pennsylvania, that, in all actions now depending or which shall hereafter be instituted in the same Court, either by original process or by removal from any inferior Courts, the defendant's attorney shall confess judgment to the plaintiff at the third Court [here follow certain provisions as to stay of execution] unless the defendant, or some person for him or her, shall make affidavit, at or before the *second term*, that, to the best of his knowledge and belief, there is a just defence, in whole or in part, in the same cause, and if the defence is to part only, then the defendant's attorney shall confess judgment to the plaintiff (if the plaintiff's attorney will accept the same in full satisfaction of his demand) for so much as shall be acknowledged to be due to the plaintiff in the said cause.

Witness our hands this eleventh day of September, 1795.

Cha. Heatly,	Jac. Bankson,
Benj. R. Morgan,	Benj. Chew, Jr.,

Digitized by Google

Jos. Thomas,	Wm. Moore Smith,
Robt. Porter,	Charles Swift,
Samson Levy,	John F. Mifflin,
John Caldwel,	Wm. Tilghman,
Jno. Wells,	William H. Tod,
Robert Henry Dunkin,	W. Brinton,
Jno. Hallowell,	Jno. Read, Jr.,
Jared Ingersoll,	Rich'd Lake,
Alex'r Wilcocks,	James Gibson,
Edw. Tilghman,	Adam Gordon,
Moses Levy,	Walter Franklin,
Jos. B. McKean,	Joseph Hopkinson,
A. J. Dallas,	Thos. W. Tallman,
Peter S. Du Ponceau,	Thos. Armstrong,
Jasper Moylan,	J. W. Condy,
John D. Coxe,	M. Keppele,
W. Rawle.	Jno. R. Smith."

(Entered in Appearance Docket, Supreme Court, September Term, 1795, p. 628-9.)

This agreement was also entered as a rule of the Supreme Court, under date of Sept. 11, 1795 (MS. Book of Rules of Supreme Court, Rule 50, p. 39), but it was not enforced against the two attorneys who refused to sign it, and who neither gave nor took judgments under it.

A modification of the rule (permitting the plaintiff to direct that judgment by default for want of an affidavit of defence should be entered as of course) was afterwards adopted by the Supreme and Circuit Courts in 1799; and a further modification was adopted by the Court of Common Pleas in 1809. (See Vanatta *v.* Anderson, 3 Binney, 417.) The latter rule provided that, in all actions of debt or contract where special bail was not required, the plaintiff might direct judgment to be taken by default, at any time after the fifth Monday of the next succeeding term to which the process was returnable, unless the defendant had made an affidavit, and previously filed the same in the prothonotary's office, stating that, to the best of his knowledge and belief, there was a just defence, in whole or in part, in the said cause; and, if the defence was to part only, the defendant should specify the sum which he admitted was due; provided always that no judgment should be entered by virtue of this rule unless the plaintiff had filed a declaration during the term to which the process was returnable. In actions where special bail was required, if the plaintiff filed his declaration within the first three days of the next term after special bail was entered, and the defendant did not make an affidavit before the fifth Monday of that term, the plaintiff could enter judgment.

The District Court of Philadelphia County also, after its establishment in 1811, adopted a similar rule, which provided that judgment could be taken at the third Monday of the next succeeding term, if the plaintiff had filed his declaration before the third day of that term. (Walker's Court Rules, Ed. E. W. Davis, 1847.)

The remark of READ, J., in Sellers *v.* Burk (11 Wr. 350, decided in 1864), that the provisions of the Act of 1835, and its supplements, "giving power to the Courts in this county to enter judgment by default for want of an affidavit of defence *in certain specified cases*, have, *in a great measure*, superseded all former rules on the subject"—and the intimation of CADWALADER, J., in the above-reported case, would seem to imply that the old practice which obtained before the Act of 1835, and its supplements, may still be invoked in cases which, though not within the Act, would be within the old rule of Court. It is believed that in the U. S. Court for the Eastern District of Pennsylvania, such judgments have been occasionally granted, probably in conformity to the practice in some of the counties comprising that district.

It would seem, however, as stated in 1 Tr. & H. Pr. 368, that in Philadelphia County "the rules of Court which preceded these statutes have now been repealed;" and that the practice is now entirely regulated by the provisions of the Act of 28 March, 1835, sect. 2, relating to the District Court for the City and County of Philadelphia, and its supplement, Act of 14 April, 1846, relating to the Court of Common Pleas. The latter Court in Nov. 1848, repealed its rule, "being of opinion that it was sufficiently supplied by the Acts of Assembly" (Walker's Court Rules, Ed. F. C. Philpot, 1850, p. 14); and the District Court, in 1857, by omitting its former rule on the subject from among those adopted and published in that year, thereby repealed it under an order of January 3, 1857, repealing all rules not then re-announced. (Walker's Court Rules, Ed. E. T. Chase, 1857.)

The Court of Nisi Prius, which was established under Act of 26 July, 1842, was empowered under the provisions of that Act to enter judgment by default for want of an affidavit of defence, as under the Act of 28 March, 1835, and its supplements; and it would appear that it did not establish a practice by rule of Court similar to that under the second-term rule, or like that which had been in force in any of the other courts prior to the Act of 28 March, 1835. (See Rules adopted January 15, 1849: Walker's Court Rules, Ed. 1857, p. 99; New Court Rules, Ed. Davis & Simpson, 1870, p. 248.)

The United States Circuit Court made its practice conformable to that of the Nisi Prius by a rule adopted January 10, 1861 (New Court Rules, p. 353). By Act of Congress of June 1, 1872 (Rev. Stat., § 914), it is provided that the practice of the United States Courts, in civil causes, shall conform to that existing in the Courts of the State in which such United States Courts are held.

It may be added that the Act of 21 March, 1806 (4 Sm. L. 326, P. L. 561), to regulate arbitrations and proceedings in courts of justice, provided that, in all suits for the recovery of any debt founded on a verbal promise or a book account, the plaintiff should file a statement of his demand on the third day of the term to which the process was returnable; and the defendant at least twenty days before the next succeeding term should file a statement of account, if any, against the demand, and particularly stating what was justly due. It was the practice under this Act to take judgment by default for want of a counter-statement as of a plea; and if instead of a specific statement a formal plea was entered, as payment, the cause was at issue. An "affidavit of defence," however, was not required. (3 Penna. Blackstone, p. 205.)

Numerous special Acts of Assembly have been passed extending the Philadelphia affidavit of defence law to other counties of the State (Purd. Dig. 1165, note *g*); and in others it has been adopted, with or without modification, by rule of Court. Chief Justice BLACK remarked, in Lord *v.* Ocean Bank (8 Harris, 387), that "the only regret of those who are well informed on the subject is, that it is not universally adopted in all the courts of the State." The power of a Court, in the absence of a statutory provision, to make and enforce such a rule, has not been seriously doubted since Vanatta *v.* Anderson (3 Bin. 417). Several subsequent cases, in which the power of County Courts to make similar rules has been sustained, are referred to in Linn's Analytical Index, and Landis's Supplement, under the case of Vanatta *v.* Anderson. W. W. C.]

Digitized by Google

DIGEST

OF

SUPREME COURT CASES REPORTED IN VOLUME III. OF THE WEEKLY NOTES.

BY

RICHARD C. DALE, Jr., Esq.

ACTS OF CONGRESS.

1792, April 2 (Coinage), 873.
1851, March 3 (Coinage), 873.
1853, February 21 (Coinage), 873.
1857, June 18 (Coinage), 873.
1864, June 3, § 30 (National Banks), 419.
1873, February 12 (Coinage), 873.
1873, March 3 (Eminent Domain), 221.

ACTS OF ASSEMBLY.

1772, March 21, §§ 12, 13 (Landlord and Tenant), 65.
1772, March 21 (Judgment), 375.
1785, March 26 (Limitations), 1.
1804, April 3 (Tax Sales), 84.
1806, February 24 (Bills of Exceptions), 245.
1806, March 21 (Poor Law), 299.
1810, March 20 (Justice of Peace), 47.
1814, March 28 (Evidence), 213.
1815, March 13 (Tax Sales), 84.
1818, March 24 (Assignments), 379.
1824, March 27 (Canals), 224.
1824, March 29 (Tax Sales), 97.
1825, April 11 (Canals), 224.
1826, February 29 (Canals), 224.
1827, April 9 (Canals), 224.
1828, March 24 (Canals), 224.
1829, March 29 (Road Law), 180.
1830, April 6 (Joint Obligors), 375.
1832, March 29 (Decedents), 416.
1834, February 24 (Rent, Decedents), 144, 362, 416.
1834, April 14 (Criminal Law), 230, 467.
1834, April 15 (Townships), 342.
1836, June 13 (Poor Law), 201, 299.
1836, June 14 (Poor Law), 299.
1836, June 16, § 45 (Execution), 249.
1838, April 16, § 3 (Municipal Claims), 124.
1840, April 13 (Decedents), 416.
1842, August 2 (Judgment), 375.
1843, April 19 (Municipal Claims), 261.
1846, April 8 (Injunctions), 333.
1848, April 11 (Joint Debtors), 375.
1849, February 19 (Eminent Domain), 221.
1849, April 16 (Limitations), 451.
1852, May 4 (Process), 7.
1854, February 2, § 40 (Municipal Claims), 124.

ACTS OF ASSEMBLY—*Continued.*

1856, April 15 (Errors and Appeals), 245.
1856, April 17 (Errors and Appeals), 245.
1856, April 22 (Judgment), 71, 437.
1858, February 17 (Mechanics' Liens), 53.
1858, May 22, § 2 (Usury), 173.
1858, May 28 (Usury), 13, 343.
1860, March 31 (Crimes), 111, 230.
1861, May 1 (Landlord and Tenant), 325.
1862, March 4 (Venue), 366.
1863, April 22, § 2 (Crimes), 230.
1863, December 14 (Landlord and Tenant), 325.
1864, April 27 (Partition), 177.
1865, March 24 (Landlord and Tenant), 65.
1865, March 27 (Landlord and Tenant), 325.
1867, April 10 (Jury), 230.
1868, April 4, § 1 (Railroads), 39.
1868, April 14 (Taxes), 29.
1869, March 24 (Municipal Claims), 33.
1869, April 15 (Evidence), 33, 161, 181, 205, 206, 210, 213, 497.
1870, February 25 (Taxes), 29.
1870, April 2 (Municipal Claims), 413.
1870, April 6 (Partnership), 336.
1870, April 9 (Evidence), 181.
1870, April 28 (Venue), 467.
1870, August 5 (Municipal Claims), 335.
1871, May 11 (Amendment), 3
1872, March 14 (Amendment), 365.
1872, April 9 (Laborer's Lien), 248.
1873, April 2 (Eminent Domain), 221.
1873, April 4 (Insurance), 358.
1874, January 30 (Elections), 163.
1874, April 18 (Affidavit of Defence), 492.
1874, April 19, § 18 (Elections), 165.
1874, May 23 (Municipal Corporations), 393, 422.
1874, May 25 (Writ of Error), 485.

ACCORD AND SATISFACTION. An accord is not good without satisfaction, and when a dispute is to be settled by mutual performances, either party, who

Digitized by Google

ACCORD AND SATISFACTION—*Continued.* desires to set up such an agreement as a defence to the original cause of action, must be prepared to prove either performance or a tender of performance on his part. Weichart *v.* Hook. 488

ACTION. Change of cause of. What amendment allowable under Act of May 10, 1871. See AMENDMENT (*b*). Tatham *v.* Ramey. 8.

ADVANCEMENT. Statute of limitations does not bar any instrument which in reality represents an advancement. See DECEDENTS' ESTATES (*k*). Pillings' Appeal. 252.

ADVERSE POSSESSION. Some clear, positive, and unequivocal act is necessary to give an adverse character to a possession originally subservient to the title of the owner. Cadwalader *v.* App. 1

AFFIDAVIT OF DEFENCE LAW. (a) Generally. In a sci. fa. against an executor or administrator to revive a judgment against a decedent, judgment on the sci. fa. cannot be taken for want of an affidavit of defence. Seymour *v* Hubert. 423.

(b) What is a sufficient instrument within the Act. The exemplification of the record of a judgment of Court of another State. Power *v.* Winsor. 860.

A copy, if in form it appears to be a copy of a book of original entries, although it be styled "copy of book account." Loucheim *v.* Becker. 449.

To a copy of original book entries for goods sold and delivered was added an item "cash paid, draft returned, $300," to counterbalance a credit given the defendant of a draft, which was subsequently returned unpaid: *held*, not to vitiate the copy as one of "original entries." Binswanger *v.* Fisher. 840.

It is a question of grave doubt whether a replevin bond is an instrument within the affidavit of defence law. Sands *v.* Fritz. 531.

(c) What is a sufficient affidavit of defence. In an action against M. and three others, "trading as the C. S. & M. Co., and also as B. & W.," for goods sold and delivered, M. filed an affidavit of defence denying that he was a partner in the firm of B. & W.; and that the goods, charged in the copy filed to the C. S. & M. Co., of which he was a member, had not been purchased by them, nor by any one authorized to purchase for them, but by B. & W., which last firm was in debt to the C. S. & M. Co.: *held* (reversing the Court below) that this affidavit was sufficient. Martien *v.* Manheim. 10.

In a suit on a mortgage, payable in one year from its date, an affidavit of defence set out that the defendant, a woman, had agreed to give the mortgage upon the express understanding that it should be drawn payable in *three* years; that, at the time of her signing it, seeing that it was drawn for *one* year, she remonstrated with the plaintiff, whereupon he assured her that, if she signed, the mortgage should run for three years, and payment of the principal should not be enforced until the expiration of that time: *held* (reversing the Court below) to be sufficient. Lippincott *v.* Whitman. 813.

In an action upon a promissory note, the affidavit of defence set out a valid defence against the party from whom the plaintiff received the note, and proceeded "the affiant avers, expects to be able to prove," and show on the trial of the cause, that the plaintiff is not the owner and holder for value, but that the same was handed him for the purpose of debarring the defendant from a valid defence: *held* (reversing the Court below), that the phrase "avers, expects to be able to prove," was legally no weaker than the usual phrase "verily believes, etc.;" and that the affidavit was sufficient. Moeck *v.* Little. 841.

In a scire facias to revive a judgment originally obtained on a promissory note, the affidavit set out that

AFFIDAVIT OF DEFENCE LAW—*Continued.* it had been paid by illegal and usurious interest: *held* (reversing the Court below) to be sufficient. Seymour *v.* Hubert. 423.

See PARTNERSHIP. Hart *v.* Kelley. 836.

(d) What insufficient. In an action for work and labor done, an affidavit alleging as a set-off that the work was not done in the time agreed upon, must set out with particularity the items of damage, and the time within which the work should have been done. Loucheim *v.* Becker. 449.

In an action upon a note for goods sold and delivered, an affidavit alleging as a set-off that the plaintiffs, auctioneers, had failed to deliver goods subsequently knocked down to the defendant, although he had tendered in payment therefor his note for the price of the same; there being a continuing offer from the plaintiffs to the defendant to sell on four months' credit, and that, by reason of the non-delivery of these goods, the defendant had suffered damage greater in amount than the note sued upon: *held* (by an equally divided Court), that the affidavit was insufficient. Hopple *v.* Bunting. 472.

An affidavit of defence referring to a matter of record should set it out *ipsissimis verbis*, or by a *prout patet per recordum*. In an action upon a book account, the affidavit set up that the same account had been sued upon in a former suit between the same parties, together with a note, and the plaintiff took judgment in the former case for the amount of the note; and that the balance of the plaintiff's claim was allowed by the plaintiffs: *held* to be vague and insufficient. Richards *v.* Bisler. 485.

In an action on a bill of exchange by the holder against the acceptor, an affidavit containing merely general allegations that the acceptance was procured out of the usual course of business, and by means of false statements, is insufficient. It should have stated facts distinctly to show how the acceptance was procured and what false statements were made. Matthews *v.* Long. 512.

The action of the Court below in discharging a rule for judgment for want of a sufficient affidavit of defence will not be reviewed when the affidavit seems to disclose questions of fact which need the intervention of a jury. City of Philadelphia *v.* P. & R. R R. Co. 492.

AGENT. (a) Extent of authority. The powers of the substitute of an attorney in fact cease upon the death of such attorney. Lehigh Nav. Co. *v.* Mohr. 322.

Where the power given to an attorney in fact is coupled with an interest, the death of the attorney does not revoke the power. Lightner's Appeal. 295.

Although an agent for making sales and collections has no authority to indorse notes for discount with the name of his principal, if the principal receive and appropriate the proceeds of such discount, such action will operate as a ratification of the unauthorized act, and render the principal liable as an endorser. Horter *v.* Silliman. 405.

Where goods are consigned on condition of payment by the consignee of a draft drawn on him, no property in the goods passes to the latter under the bill of lading until the payment of the draft.

Such a condition will be inferred from forwarding, with the bill of lading, the draft drawn on the consignee for collection.

If the consignee take the goods, without payment of the draft, the consignor may maintain trover for them. Millar *v.* The Ass'n. 480.

See INSURANCE (*a*). Leonard *v.* Lebanon Ins. Co. 527.

(b) Liability of, as regards third parties. An agent of a corporation who enters into a contract under his hand and seal is individually liable thereon, although

Digitized by Google

AGENT—*Continued.*

he is named agent, and the contract is expressly made for the benefit of the corporation. Quigley *v.* DeHaas, 815.

(c) Service of summons on. See PRACTICE (*b*). Lehigh Valley Ins. Co. *v.* Fuller, 7; Liblong *v.* Kansas Ins. Co., 358.

(d) Rescission of contract with. See CONTRACT (*e*). Seipel *v.* Trust Co. 537

ALDERMEN. See APPEAL FROM ALDERMAN.

ALTERATION OF WRITING. The question of an alleged fraudulent alteration in the date of a receipt for premium upon a policy of insurance, though supported by vague evidence only, should be submitted to the jury especially when surrounding circumstances tend to illustrate the issue. Farmers' Ins. Co. *v.* Bair. 126.

AMENDMENT. (a) Addition of new parties. The statutes relating to amendments do not authorize the addition of parties to a suit in ejectment who are not connected either in person or title with the original parties thereto.

If, in the discretion of the Court such additional parties are introduced, the action as to them commences only from the time when their names were put on the record so that no rights acquired under the statute of limitations prior to such amendment can be affected. Kille *v.* Ege. 443.

If an error in naming the party is technical, as if an action is brought in the name of an assignee for the benefit of creditors instead of the assignor as legal plaintiff to the use of such assignee, an amendment of the record will be allowed even after writ of error taken. Shryock *v.* Bashore. 360.

(b) Change of cause of action. The Act of 10 May, 1871, does not authorize the change of an action of dower to one of debt for arrears of interest on the agreed value of the demandant's estate in the realty of her husband. Tatham *v.* Ramey. 3.

(c) When not allowed because of delay. After a delay of fifteen years a plaintiff cannot substitute special counts in the place of common counts for the purpose of introducing evidence of special matter which would not be admissible under the common counts. Bricker *v.* Dull. 254.

An amendment of a defect in the record which is cured by verdict and judgment will be made as of course in the Supreme Court after writ of error taken; as for example, in debt on a bond a copy of the bond was filed, but no declaration, the defendant pleaded *nil debet*, after trial and verdict and judgment for the plaintiff the defect was cured. Jones *v.* Freyer. 865.

See ELECTIONS (*c*). Welti's Case. 165.

ANCILLARY ADMINISTRATION. See DECEDENTS' ESTATES (*c*). Baldwin's Appeal. 73.

APPEAL FROM ALDERMAN. Under Landlord and Tenant Act of Dec. 14, 1863, must be supported by an affidavit that the appeal is not intended for delay. Carter *v.* Hess. 825.

ARBITRATION. (a) Arbiter, decision of, when prerequisite to an action. When in a contract an arbiter is named to determine whether the work contracted for is done in accordance with its provisions, a decision of such arbiter upon the sufficiency of the work is a *sine qua non* to an action for the price unless such decision is rendered impossible or is waived by the parties. Quigley *v.* DeHaas. 815.

(b) When conclusive. An agreement for an arbitration is not conclusive unless in the form of a definite submission. Weichart *v.* Hook. 488.

The award of a referee to whom certain disputes were submitted is conclusive upon the parties as to findings of fact except in cases of manifest fraud or mistake.

ARBITRATION—*Continued.*

But an award against one who was not a party to the suit is so palpably erroneous that it will be stricken off as against such third party as surplusage. Danville, Hazleton, etc. R. R. Co. *v.* Ashton. 281.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS. An assignment for the benefit of creditors, if not recorded within thirty days, is void. Creditors are not debarred from levying upon the property of their debtor, which passed into the hands of assignees, who have expended a large amount of their own money on the property, because of having signed an agreement providing for such assignment, but which also recited that it should be signed by all the creditors unless all have signed, or unless knowledge of the action of the assignees had been given to the creditors. Lane's Appeal. 379.

See DEBTOR AND CREDITOR (*d*). Bair & Shenk's Appeal. 81.

ASSUMPSIT. An action for money had and received is maintainable against a broker for improper charges of extra interest in carrying stocks for the plaintiff. Wagner *v.* Peterson. 844.

Assumpsit is not the proper action to sue for the value of chattels seized under a claim of right and without fraud, where there has been no conversion of the chattels into money, and no circumstances from which the law would imply such conversion or imply a contract to pay their value. Bethlehem *v.* Perseverance Fire Co. 104.

ATTORNEY AND CLIENT. An attorney who receives a claim to be forwarded for collection to a distance is responsible for the embezzlement of the proceeds collected by his correspondent, and if upon inquiries made by the owner of the claim, such attorney replies it is uncollectible, such reply will prevent the running of the statute of limitations, even though he has no knowledge of the fraud of his correspondent. Morgan *v.* Tener. 398.

When one of two partners of a firm of attorneys receives money belonging to clients, but gives no notice of the receipt, and then leaves the neighborhood, and the other partner who continues the business, but has no knowledge of the receipt of the money, continually informs the clients that the claim is uncollectible, such conduct will prevent the running of the statute of limitations against the firm. Wickersham *v.* Lee. 400.

An assignment of a debt does not carry with it to such assignee the right of action against an attorney, through whose negligence the means of collecting the debt have become unavilable. Morris *v.* McCullough. 357.

ATTORNEY IN FACT. See AGENT. Lehigh Nav. Co. *v.* Mohr. 822.

ATTORNEY'S COMMISSION. See DECEDENTS' ESTATES (*d*) (*e*). Price's Estate. 320; See MORTGAGE (*c*). Faulkner *v.* Wilson. 339. PRACTICE (*o*). Schmidt & Friday's Appeal. 282.

AUDIT. Costs of, how apportioned. See DECEDENTS' ESTATES (*e*). Price's Estate. 320.

AUDITOR. Practice before. Absence of counsel. See PRACTICE (*q*). Copely's Appeal. 145.

Power of. See PARTNERSHIP (*d*). Bogue's Appeal. 256.

BAILMENT. The receipt by a bailee of a notice forbidding him to deliver up goods placed in his hands by his principal, where the sender of such notice presents no evidence or claim of title, does not justify the bailee in refusing to deliver the goods to his principal or in demanding a bond of indemnity as a condition of such delivery. If, after a refusal to deliver, the goods are lost, the bailee is responsible for their value, irrespective

Digitized by Google

BAILMENT—*Continued.*
of the question of negligence in his care of them. Susquehanna Boom Co. *v.* Rogers. 478.
See NEGLIGENCE.

BANKRUPTCY. (a) Fraudulent preference, what constitutes. The signing of an agreement for an amicable revival of a judgment by an insolvent debtor is not a fraudulent preference within the purview of the Bankrupt Act. Kemmerer *v.* Tool. 69.

(b) Of partnership, effect of, on suing capacity of members of firm. The filing of a petition by a member of a firm praying that the firm be adjudicated voluntary bankrupts does not bar the other members of the firm from bringing suit on individual claims before an adjudication. Booth *v.* Meyer. 196.

(c) Who can take advantage of an act of. A debtor of a State bank cannot in an action against him by the assignees of the bank for the benefit of its creditors, set up as a defence to such action that the deed of assignment was in contravention of the bankrupt Act. Shryock *v.* Bashore. 360.

In an action for breach of covenant in failing to purchase land, the vendee cannot set up as a defence to such action that at the time of the agreement of sale, the vendor was insolvent, for the purpose of showing that the title might have been impeached by an assignee in bankruptcy, unless he show that the agreement of sale was entered into with fraudulent intent by the vendor, of which intent the vendee had knowledge. Weaver *v.* Zimmerman. 56.

BENEFICIAL ASSOCIATIONS. See HUSBAND AND WIFE. Berlin Beneficial Association *v.* March. 55.

BILLS OF EXCHANGE AND PROMISSORY NOTES. (a) Rights of holder. In an action on a bill of exchange by the holder against the acceptor, an affidavit of defence containing merely general allegations that the acceptance was procured out of the usual course of business and by means of false statement, is insufficient. Matthews *v.* Long. 512.

In an action against the maker by an endorser, an affidavit of defence setting out facts constituting a good defence against the payee is sufficient if it avers that the defendant expects to be able to prove and show on the trial that the plaintiff is not the owner and holder for value, and before maturity of the note in suit, but the same was handed to him by the payee for the purpose of bringing suit and debarring the maker from a defence. Moeck *v.* Little. 341.

The holder of a promissory note may strike off an irregular endorsement through which he has not derived title placed before that of the payee. Rand *v.* Dovey. 549.

(b) Endorser, liability of. The liability of an endorser is not released by the omission of an actual protest of the note; an averment filed with the copy of the note that the defendant waived notice, if not denied in the affidavit of defence, is sufficient. Eby *v.* National Fire Ins. Co. 487.

As to validity of note dated on Sunday, see Bear *v.* Trexler, 214 (note).

See AGENT (*a*). Horter *v.* Silliman. 405. USURY.

BILL OF LADING. A broker, purchasing goods for his principal, can pledge the bill of lading therefor, for the payment of a draft drawn on the principal, as consignee, for the price of the goods. See AGENT (*a*). Millar *v.* St. Louis Saving Association. 480.

BOOK ENTRIES. Entries against one partner, when evidence against firm. See EVIDENCE (*f*). Bear *v.* Trexler. 214.

BRIBERY. See QUO WARRANTO. Com'th *v.* Walter. 376.

BURGLARY. See CRIMES (*d*). Rolland *v.* Commonwealth. 230.

CANALS. Ownership of land under. See LAND LAW (*b*). Wyoming Coal Co. *v.* Price. 224.

CAPITAL AND INCOME. What is. See DECEDENTS' ESTATES (*f*).

CERTIORARI. (a) In road cases. The distinction between a certiorari and an appeal is marked; a certiorari brings up the record only, and upon such writ the appellate Court can look merely at the regularity of the proceedings.

The Act of 23 March, 1829, which provided that no certiorari shall issue to the Quarter Sessions of Philadelphia County in road cases, unless upon an affidavit of the party, and a special allocatur by the Supreme Court is still in force. McIlvaine's Appeal, *In re* 34th Street. 130.

(b) In partition. Although a certiorari only brings up the record, if upon its face it appears that the Court have taxed an excessive counsel fee as part of the costs upon a manifestly erroneous interpretation of the law, the Court will give all the effect of a writ of error to such certiorari, and reverse the Court below in a case where no adversary rights can be impaired, and it affords the only means of averting an injustice. Grubb *v.* Grubb. 177.

See LANDLORD AND TENANT (*e*). De Coursey *v.* Guarantee Trust Co. 65.

CHARGE OF COURT. See ERRORS AND APPEALS (*a*), (*b*). Ins. Co. *v.* Bair. 126.

CHARITABLE USE. See CORPORATION (*e*). Bethlehem *v.* Perseverance Fire Co. 104.

COLLECTION AGENCY. Liability of, to employer. See ATTORNEY AND CLIENT. Wickersham *v.* Lee. 400.

COMMISSIONS. See DECEDENTS' ESTATES (*d*), (*e*), TRUSTEES, MORTGAGE (*c*), PRACTICE (*o*).

COMMON PLEAS. See COURTS (*b*).

CONSTITUTION OF UNITED STATES.
Article I., § 10. Contracts. 196.

CONSTITUTION OF PENNSYLVANIA.
Article I., § 17. Contracts. 196.
III., § 7. Legislation. 32.
III., § 23. Venue. 467.
V., § 8. Supreme Court. 288.
VIII., § 3. Elections. 477.
VIII., § 9. Elections. 376.
IX., § 1. Taxation. 29.
XVI., § 4. Corporations. 549.
Schedule, § 2. Actions. 467.
§ 26. Officers. 174.
§ 31. Legislature. 29.

CONSTITUTIONAL LAW. (a) Effect of Constitution of 1874 on existing laws, charters, contracts, and suits. The effect of the Schedule, § 2 of the Constitution of 1874, is to preserve laws then in existence, wherever legislation is necessary to carry the provisions of the Constitution into proper effect. Watson *v.* Chester and Delaware River R. R. Co., 467; Lehigh Iron Co. *v.* Supervisors, 29; Hays *v.* Com'th, 549; Kersey Oil Co. *v.* R. R. Co., 288.

(b) Eminent domain. The right of eminent domain exists in the United States government, but as such right is in derogation of the common law, it must be exercised in each individual case according to the statutory mode specially prescribed therefor.

An Act of Congress directs the Secretary of the Treasury to purchase at private sale, or, if necessary, by condemnation in pursuance of the Statutes of Pennsylvania, a lot of ground for federal purposes. *Held*, that no power is thereby given to proceed against four sites at once.

An Act of Assembly passed subsequently to the Act of Congress, appearing to confer such power, is invalid, because one sovereignty cannot proceed by virtue of the

Digitized by Google

CONSTITUTIONAL LAW—*Continued.*

right of eminent domain to take land for the use of another sovereignty.

Held, further, that proceedings for the condemnation of any land under this Act must show that an unsuccessful attempt had been made to purchase the land. Darlington *v.* United States. 221.

(c) **Taxation.** Although Art. IX., § 1, of the Constitution of Pennsylvania provides that "all taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws," it did not, *per se*, repeal prior Acts of Assembly imposing special taxes upon special objects for special purposes.

But this article, together with § 31 of the Schedule, appeals to the consciences of the members of the Legislature, by their oath of office, to provide general laws for uniform taxation, and to bring all the laws of the State into accord with the Constitution by repealing all special and local provisions inconsistent therewith. Lehigh Iron Co. *v.* Lower Macungie Township. 29.

Certain portions of an Act of Assembly, even if unconstitutional, yet if not called into life because only applicable in an alternative which has not arisen, will not invalidate the provisions of an Act relating to the levying of a tax for the erection of municipal buildings. Lea *v.* Bumm. 335.

(d) **Municipal assessments.** The paving of a street in a city is an act purely local, notwithstanding the fact that a general benefit may result to the public, and hence an Act of Assembly authorizing the city of Meadville to pave its streets, and collect the cost from the owners of adjoining property is not a violation of Art. IX., § 1, of the Constitution providing for uniformity of taxation. The power conferred by such Act of Assembly is well executed by a general ordinance regulating the paving of streets and the manner of collecting the cost, followed by a special ordinance authorizing the paving of a particular street. Huidekoper *v.* Meadville. 469.

Though the assessment of the cost of municipal street improvements upon surrounding property in proportion to the frontage is sustained by a long line of decisions as to closely built portions of a city, it is when applied to suburban districts in derogation of the constitutional rights of the property holders. Seely *v.* City of Pittsburg. 418.

See MUNICIPAL CORPORATIONS (*a*). Fell *v.* City, 261; Wistar *v.* City, 124.

(e) **Retrospective legislation.** An Act repealing an Act appointing commissioners to construct a road and issue certificates of indebtedness for the cost thereof, to be paid out of future road taxes, is not unconstitutional, nor does it impair the obligation of any contract.

The holders of such certificates have an adequate remedy for the enforcement of their rights, as the regular township officers of the county are responsible under the general road laws to such holders.

Per PAXSON, J. The charter of a municipal corporation is not a contract within the protection of the constitutional prohibition against laws impairing the obligations of a contract; still less is an Act creating a temporary commission to perform a function of a municipal corporation. Com'th *ex rel.* *v.* Thompson. 196.

Power of Legislature to create and abolish special commission. Effect of repeal on existing contracts. Com'th *v.* Thompson. 196.

(f) **Titles of Statutes.** If the title of an Act of Assembly fairly expresses the real purpose of the Act, and is not so framed as to tend to mislead and draw the mind from a covert purpose in the body of the bill, it sufficiently complies with Art. XI., § 8, of the Constitution.

If a portion of an Act is not fairly covered by the title, it may be declared unconstitutional, but the remainder of the Act will stand. Mauch Chunk *v.* McGee. 83.

CONSTITUTIONAL LAW—*Continued.*

(g) **Disqualification from holding office.** See QUO WARRANTO. Com'th *ex rel.* *v.* Walter. 376.

The provision of § 26 of the Schedule extending the terms of those in office at the time of the adoption of the Constitution until their successors shall be qualified, does not apply to officers whose terms did not begin until after January 1, 1874, when the Constitution went into effect. Com'th *v.* Kilgore. 174.

(h) **Effect of Constitution on pre-existing corporations.** Article XVI., § 4, of the Constitution, providing for cumulative voting at corporation elections, does not apply to companies incorporated prior to the adoption of the Constitution. Hays *v.* Com'th. 549.

See ELECTIONS. Com'th *v.* McCarthy. 477.

CONTRACT. (a) **Consideration of.** The validity of a contract does not depend on the payment of a cash consideration, and it is not essential for a purchaser of stock suing the seller upon a guarantee that within six months it would sell at a certain price, to prove that at the time of such purchase he had sufficient cash to pay the purchase-money of the stock. Burke *v.* Maxwell. 48.

When the consideration of a contract is dependent upon the happening of a certain event, it is for the jury to say whether such event has happened.

An agreement for a release of certain notes given for an assignment of a railroad construction contract, upon proof that no money had been made out of the contract, throws the burden of proving that no money was made upon the defendant. Malone *v.* Dougherty. 116.

(b) **How avoided.** Although a promissory note dated on Sunday is voidable, if it is admitted in evidence without objection, and followed up by proof of the sale of the goods for which it is given, the Supreme Court will not reverse a judgment because these facts are called to their notice. Bear *v.* Trexler. 214.

(c) **Warranty.** In the absence of fraud or representations of quality, a sale by sample is not in itself a warranty of the quality of the goods, but simply a guarantee that the goods shall be similar in kind and merchantable. Beyd *v.* Wilson. 521.

But if there be any stipulation by the vendor at the time of sale that the goods shall be of a certain quality, such stipulation will have the effect of a warranty, although no technical words of warranty are used. Warren *v.* Philadelphia Coal Co. 525.

(d) **Construction of.** Whether a contract be severable or entire depends more on the intention of the parties as gathered from the whole instrument than upon the specific method of performance or payment.

Even though the part of the contract to be performed by one of the parties consists of several and distinct items, and the price to be paid by the other is apportioned to each item, if it clearly appears from the face of the contract that the parties intended it to be entire, it will be so construed. Quigley *v.* DeHaas. 315.

An agreement with a corporation to take in payment for supplies, stock of the latter, is a purchase to that extent of the stock, and entitles the seller to demand a certificate therefor.

Hence the failure of the corporation to deliver its stock as agreed upon, does not entitle such seller to disaffirm the contract and sue for money, on a *quantum valebant:* he must demand certificates for the stock of which he has become owner. Phillips *v.* Allegheny Car Co. 347.

Where a ground-rent is made payable "in current silver money," it must be paid in silver coins which are by law "money," *i. e.*, a legal tender for the payment of the amount of the rent, at the time of payment. Hence silver dimes which were, prior to 1853, a legal tender to any amount, but which now are only so for sums under

Digitized by Google

CONTRACT—*Continued.*

five dollars, cannot be tendered in payment of a groundrent of $100, although created prior to 1853. Maule *v.* Stokes. 378.

A sealed agreement between A. and B., whereby A. was given the right to float logs down a certain stream, through the lands of B., "provided that the said floating or driving of logs shall not at any time be allowed to work or cause any detriment or injury to said B., and that any accidental injury shall be promptly repaired by said A.," construed to be a covenant to repair, and evidence of damages caused by a breach of this covenant admitted to show a set-off in an action by A. against B. upon a single bill. Halfpenny *v.* Bell. 9.

A. received of B. certain moneys, in consideration of which he agreed to run into a boom 2500 logs, which were to remain under the control of B., who was to saw them, sell the lumber, and after paying expenses, and retaining the amount of his advances, hand over the balance to A.: *held*, that the property in the logs did not pass from A. to B. by this agreement so as to prevent A. from maintaining trover for them against the boom company through whose negligence they were lost. Susquehanna Boom Co. *v.* Rogers. 478.

(e) Rescission of. When by the action of a party to an executory contract new circumstances and conditions are thrown around it so as to substantially change its character, the other party may treat it as rescinded. An abandonment by a foreign life insurance company of its business in this State warrants its agents in rescinding the contracts under which they work. Seipel *v.* International Ins. Co. 537.

CORPORATION. (a) Increase of capital stock. Proceeds of, to be treated as capital in distribution.

See DECEDENTS' ESTATES (*f*). Moss' Appeal. 428.

(b) Liability of, for improper transfer of loan. A corporation permitting the transfer of a certificate of its loan by the substitute of an attorney in fact after the death of the attorney, is liable to the owner of the certificate if the proceeds are embezzled by such substitute. Lehigh Nav. Co. *v.* Mohr. 322.

(c) Liability of Directors of. Although the promoters and directors of a corporation have no right to profit by their own dealings with it, if stockholders sleep on their rights their laches will bar a subsequent recovery. Evans *v.* Borie. 86.

Although the directors of a bank are liable for negligent management, whereby it became insolvent, the form of action must be such as to protect the interests of the corporation as trustee for all the stockholders and creditors, *i. e.* either by a bill in equity to which the corporation is a party, or by an action by the corporation against the directors.

An action at law is not maintainable by individual stockholders for the damage done to them in their own right. Craige *v.* Gregg. 287.

(d) Banks. The question of the invalidity, under the Bankrupt Act, of an assignment by the directors of a bank for the benefit of its creditors, cannot be raised by a debtor of the bank in an action brought against him by the assignee to recover such debt. Shryock *v.* Bashore. 360.

(e) Fire Company. Rights of members. A fire company, incorporated for the declared purpose of protecting the property of its fellow-citizens from fire, holds all property acquired by it in trust for that purpose, and the rights of the *cestuis que trustent* therein must be protected and enforced by the courts.

The borough authorities have no right to take from such company their property and apparatus because of an alleged forfeiture of their rights. Bethlehem *v.* Perseverance Fire Co. 104.

CORPORATION—*Continued.*

(f) Original jurisdiction of Supreme Court in injunction cases, against a corporation. See COURTS. Kersey Oil Co. *v.* R. R. Co. 288.

(g) Effect of new Constitution on pre-existing corporations. Article XVI., § 4, of the Constitution, providing for cumulative voting at corporation elections, does not apply to companies incorporated prior to the adoption of the Constitution. Hays *v.* Com. 549.

COSTS. The provisions of the Act of 27 April, 1864, for the allowance of counsel fees in actions of partitions have reference only to fees for such professional services as are indispensable for conducting the formal proceedings, and would properly enter into the bill of costs of an attorney under the English practice; not to counsel fees in the ordinary sense for services in the litigation of contested causes.

An order of the Common Pleas for the payment of such counsel fees is in the nature of a definitive judgment which may be reviewed by the Supreme Court; but a writ of error, and not a certiorari, is the proper method of bringing the case up. Grubb *v.* Grubb. 177.

See DECEDENTS' ESTATES (*e*). Price's Appeal. 320. COURTS (*b*).

COURTS, JURISDICTION OF. (a) Supreme Court. Although by virtue of Art. V., § 3, of the Constitution, the Supreme Court has original jurisdiction in cases of injunction, where a corporation is a party defendant, the exercise of that jurisdiction is discretionary, and will not be invoked except where justice cannot be done in the Common Pleas.

Equity as well as common law cases, instituted in the Supreme Court at Nisi Prius before the adoption of the Constitution of 1874, are to be certified to the Common Pleas of Philadelphia County, in accordance with the provisions of the Schedule, § 21. Kersey Oil Co. *v.* Oil Creek R. R. Co. 288.

(b) Common Pleas. The Common Pleas, and not the Quarter Sessions, is the proper Court to issue a mandamus against the overseers of the poor of a township to compel them to remove a pauper to his proper domicil. Comm. *ex rel.* *v.* Overseers of Jersey Shore. 299.

If a claim for a sum exceeding $100 be reduced below that amount by the allowance of a set-off, and not by evidence of direct payments, the plaintiff may recover costs without an affidavit that the sum in demand exceeded that amount.

A credit claimed by an agent for compensation for services, in an action against him by his principal for the balance in his hands, is to be regarded as a set-off, and not as evidence of direct payments. Shirley *v.* Entriken. 51.

If the sum in demand exceed $100, a justice of the peace has no jurisdiction, and no delay in making the objection can cure the defect, which, if it appear upon the record, can be taken advantage of in the Supreme Court. Peter *v.* Schlosser. 47.

(c) When concurrent with the Orphans' Court. A court of equity has concurrent jurisdiction with the Orphans' Court in a proceeding to annul a marriage settlement upon the ground of the fraud and misrepresentation of the decedent, the husband, since it is a proceeding entirely collateral to the distribution of his estate in the Orphans' Court, although the amount for distribution may be indirectly affected thereby. Hammett *v.* Hammett. 189.

When an action is brought to establish a debt against the estate of a decedent which does not necessarily involve the determination of any question as to the amount of such estate, the Common Pleas and Orphans' Court have concurrent jurisdiction. Kimble *v.* Carothers. 88.

Digitized by Google

COURTS, JURISDICTION OF—*Continued.*

(d) Orphans' Court. The Orphans' Court has exclusive jurisdiction to ascertain the amount of the estates of decedents, and to order their distribution among creditors, as well as legatees and distributees.

Hence, as this Court has full power to adjudicate all claims of creditors, they should not postpone the distribution of an estate to await the conclusion of suits against the estate in other tribunals, but it may, in its discretion, order a temporary suspension of the distribution until the notice provided for in the Act of 29 March, 1832, § 20, could be given. Hammett's Estate. 416.

COVENANT. For sale of real estate, breach of. See Weaver *v.* Zimmerman. 56.

CRIMES, CRIMINAL LAW AND PROCEDURE. (a) Powers of District Attorney. The District Attorney may prefer an indictment before the Grand Jury without a preliminary hearing or previous commitment of the accused. This power is to be exercised under the supervision of and subject to the revision and approval of the proper court of criminal jurisdiction, and it is the duty of such court to restrict the exercise of the power to cases of pressing necessity, but the Supreme Court will not review the action of the Quarter Sessions in such case.

The return of "ignoramus" to an indictment does not prevent the District Attorney from sending up a new indictment upon the same information at the next term. Rowand *v.* Commonwealth. 318.

(b) Challenge of jury. The keeping of a jury-wheel in a locked chest in the vault of the County Commissioners is a sufficient custody of the wheel under the Act of 10 April, 1867, although the key to the wheel was kept in an unlocked drawer at the sheriff's office.

A failure to comply with the Act of 14 April, 1834, § 135, in not returning the names of excused and exempted jurors to the wheel cannot be taken advantage of by a defendant.

It is not a cause of challenge to an array of jurors that the sheriff drew the minimum number, and failed to draw substitutes for three of these, who were dead or had removed from the county, there being no evidence that their death or absence was known to him at the time of drawing.

It is the duty of jury commissioners to make return to a venire, but their failure to do so is amendable even after the taking of a writ of error. Rolland *v.* Com'th. 230.

A mere want of accuracy in the jury list as to the occupation of a juror, if his name and residence are properly given, is not sufficient to support a challenge for cause. Quigley *v.* Com'th. 490.

(c) Homicide. Murder in the first degree, essentials of. When the evidence discloses a fully formed purpose to kill, with so much time for deliberation and premeditation as to show that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design, the fact that the prisoner was greatly excited by the opprobrious language of the deceased does not reduce the degree of his guilt. Green *v.* Com'th, 424; Quigley *v.* Com'th, 490.

Quære: Whether a doubt in the minds of the Supreme Court of the existence of an intention to kill, will after a verdict of guilty cause a reversal. Meyers *v.* Com'th. 506.

In a homicide case where the prisoner sets up the plea of insanity, he is not bound to satisfy the jury beyond a reasonable doubt of the fact of his insanity; it is enough if the evidence of that fact be satisfactory.

Per Paxson, J. It is the duty of the Court in a homicide case to charge the jury fully upon all questions of law arising upon the evidence, irrespective of the points presented by counsel, and the failure of the Court so to do is a sufficient ground for reversal. Meyers *v.* Com'th. 506.

CRIMES, CRIMINAL LAW AND PROCEDURE—*Continued.*

(d) Burglary. Where there has been no burglarious entry, the breaking out of a house by a thief in an attempt to escape does not constitute burglary.

But where thieves gain access to a house by fraud or artifice with felonious intent, there is a constructive breaking in and entry, and the offence is burglary. Rolland *v.* Com'th. 230.

(e) Forgery. Although altering or mutilating the tax books of a school district is not an offence within the Act of 31 March, 1860, § 118, an indictment for forgery at common law as modified by the Act of 31 March, 1860, § 13, may be sustained upon the proof of these facts. Com'th *v.* Beamish, 111.

CURTESY. See Husband and Wife (*a*). Ege *v.* Medlar. 437.

DAMAGES, MEASURE OF. (a) For negligence. Per Paxson, J. In an action against one through whose negligence the plaintiff's property had been destroyed by fire, the measure of damages should be the value of the property, not the value of plaintiff's interrupted business. Raydure *v.* Knight. 109.

(b) Stock contracts. In an action for the wrongful conversion of stock, if the plaintiff waives the tort and sues in assumpsit, the measure of damages is the value of the stock at the time of the conversion. Wagner *v.* Peterson 344.

(c) In replevin. The measure of damages is the value of the goods at the time the writ issued, and evidence of value at a time long subsequent, although accompanied by an offer to show the amount of intermediate deterioration is inadmissible. Brindle *v.* Adams. 5.

(d) In action for mesne profits. In this action the plaintiff may recover for the fair rent or yearly value of the premises, and for injury done thereto. Compensation is the proper measure of damages; and a bona fide occupant under claim of title who has made permanent and valuable improvements may show them to be a full compensation for the use of the premises. The value of the improvements may be shown by expert testimony as to the value of the premises before and after such improvements. Kille *v.* Ege. 443.

(e) In trespass quare clausum fregit. In this action, unless the trespass is wilful or proceeds from recklessness or gross carelessness, only compensatory damages can be recovered. Blair Iron & Coal Co. *v* Lloyd. 103.

DEBTOR AND CREDITOR. (a) Fraudulent preference. See Bankruptcy (*a*). Kemmerer *v.* Tool. 69.

(b) Fraudulent conveyance. The confession of a judgment in ejectment by a vendee under articles of agreement in favor of his vendor, at a time when such vendee is financially embarrassed, of which fact the vendor had notice, is fraudulent, and the creditors may recover the land even from a stranger to whom such vendor had conveyed it for a nominal consideration. Forrester *v.* Hanaway. 113.

(c) Fraudulent possession of goods. The possession by a wheelwright with whom a wagon had been left for repairs does not, although he had once been the owner, create such a legal presumption of his ownership in it, as to warrant the case being taken from the jury in a contest between a claimant of the wagon and the wheelwright's execution creditors.

In all such cases the jury should be permitted to pass

Digitized by Google

DEBTOR AND CREDITOR—*Continued.*
on the good faith of the parties in the whole transaction under proper instructions from the Court. Boud *v.* Bronson. 298

(d) Assignment for the benefit of creditors. See Lane's Appeal. 379.

Distribution of fund under. When two persons are liable for the same debt, and each makes an assignment for the benefit of his creditors, the creditor may claim a dividend from each estate on the full amount of the debt until the debt is fully satisfied. Bair and Shenk's Appeal. 81.

A creditor having several securities for the same debt, has the right to avail himself of any one of them until he has realized his whole claim. Taylor's Appeal. 75.

In an action against the sheriff for failing to levy an execution, where the sheriff alleged that an assignment for the benefit of creditors had been executed and delivered prior to the issuing of the execution, evidence of a fraudulent intent on the part of the defendant in making the assignment, though admissible to prove fraud, has no bearing upon the question of the time of the delivery of the deed. Leeds *v.* Com'th. 554.

(e) Subrogation. Although ordinarily when one creditor has a lien upon two properties, and another creditor has a lien only upon one, equity will compel the first to obtain satisfaction of his debt out of the property to which the other cannot resort, this doctrine will not be carried out when the rights of a purchaser of such property for value without actual notice have intervened.

The equity of a purchaser for value without notice is superior to that of a creditor to subrogation. Hoff's Appeal. 461. See PARTNERSHIP (*e*). Fessler's Appeal. 71. USURY

(f) Attaching creditors have the right to ask that a policy of insurance be reformed by substituting the real date of the beginning of the contract. Farmers' & Mutual Ins. Co. *v.* Bair & Shenk. 126.

(g) Composition agreement, "in consideration that all the creditors agree," is not binding on any unless all sign. Lane's Appeal. 379.

DECEDENTS' ESTATES. (a) Lien of debts on lands. Under the Act of 24 February, 1834, a judgment obtained against the personal representatives of a decedent at any time within five years after his decease, continues the lien of such debt against the real estate of the decedent for a period of ten years from the time of his decease.

It is immaterial how soon judgment was obtained within the first period of five years, the lien extended to the termination of the period of ten years without any further proceeding. Corrigan's Appeal. 362.

(b) Executor de son tort, power of. While an executor *de son tort* may make a binding *quasi* administration, a settlement of mutual accounts existing between the decedent and another, in which no property changed possession, and no cash was directly paid, is of no effect. Roumford *v.* McAlarney. 6.

(c) Liability of executors. Executors should not be surcharged with the value of a vessel belonging to the estate of their testator, which they had permitted to sail on a coasting voyage uninsured, when the widow and heirs to whom the vessel had been bequeathed had requested that no insurance should be effected. Seaton's Appeal. 364.

An administrator who permitted his attorney to satisfy a first mortgage belonging to his intestate, and take in its place a third mortgage on a part of the premises originally mortgaged, in consequence of which the whole was lost, is liable to be surcharged with the whole amount of the mortgage.

The fact that the mortgage was located in New Jersey, the intestate having died domiciled in Pennsylvania,

DECEDENTS' ESTATES—*Continued.*
does not relieve the administrator from liability to account for it in Pennsylvania. Baldwin's Appeal. 73.

The conversion by an executor of United States bonds into money, which he retained five years uninvested, expecting the unfavorable termination of a suit against the estate, prima facie renders him chargeable with interest on the sum so retained. Copeley's Appeal. 145.

When two executors join in filing an account, they are jointly liable for a surcharge as to items of which both had knowledge. If one of them refuses to include such items, the other to escape liability therefor must file a separate account. Bierly's Appeal. 210.

The Orphans' Court is justified in removing an executor when they are satisfied that the executor's conduct is guided by his own selfish interests instead of the interests of the estate. Halloway's Appeal. 556

(d) Commissions. Five per cent. in an estate of $70,000, which is administered with less than ordinary trouble, is too much. Copely's Appeal. 145.

In the absence of fraud or bad faith an executor should not be disallowed commissions merely because he has been surcharged in his account. Price's Appeal. 320.

(e) Counsel fees and costs of audit. An executor is entitled to the services of counsel only so far as those services are rendered for the benefit of the estate, and to protect the accountant in his rights; counsel employed to defend an executor against a surcharge which the Court sustain must not be paid out of the funds of the estate

The same rule applies to the cost of auditing the account. Price's Estate. 320.

(f) Distribution. The proceeds of the sale of options to subscribe to the new issue of stock of the Pennsylvania Company for Insurance on Lives, etc., belonging to the estate of a decedent in the distribution of such estate is to be treated as capital and not income. Moss's Appeal. 428.

(g) Funeral expenses. See HUSBAND AND WIFE. Berlin Beneficial Society *v.* March. 55.

(h) Advancements. The statute of limitations does not run against an advancement. An instrument, although upon its face an ordinary promissory note, will be treated as an advancement when its true character is made clearly to appear. Pilling's Appeal. 252.

See AFFIDAVIT OF DEFENCE LAW. Seymour *v.* Hubert. 423. COURTS (*c*). EVIDENCE. ORPHANS' COURT

DEED. Proof of genuineness. When the evidence given to impeach the genuineness of a deed is very slight, and not sufficient to overthrow the direct and positive proof previously given of its execution, such evidence should not be submitted to the jury. Ege *v.* Medlar. 437.

When it is sought to impeach a sealed instrument by parol for alleged fraud, the evidence of fraud must be clear and precise, otherwise it should be withdrawn from the jury.

If an illiterate person execute a written instrument without demanding to have it read to him, he is estopped by reason of his negligence from impeaching such instrument on account of alleged fraud or misrepresentation, when the only evidence of such fraud is his own uncorroborated testimony. Penna. R. R. Co. *v.* Shay. 45.

DISTRESS. See LANDLORD AND TENANT (*c*).

DISTRIBUTION. Of assigned estates. See DEBTOR AND CREDITOR (*d*). Bair and Shenk's Appeal. 81. Of sheriff's sale of personalty. See EXECUTION (*b*). Brady *v.* Conway. 110. Of fund, as capital or income. See DECEDENT'S ESTATES (*f*).

DOWER. The action of dower is a real action, and cannot be brought except in the county where the lands lie. Tatham *v.* Ramey. 8.

Digitized by Google

EJECTMENT. In an action of ejectment after a general plea of not guilty, it is within the power of the Court to admit a landlord of the defendants to become a party, and to limit his defence to a portion of the land claimed. Ege *v.* Medlar. 437.

When after one verdict and judgment in ejectment the successful party brings suit for mesne profits of the land for a period prior to the commencement of such suit in ejectment, the defendant is not estopped by such judgment from setting up the same title which was unsuccessfully relied on by him in the ejectment. Kille *v.* Ege. 443.

See AMENDMENT (*a*). DAMAGES, MEASURE OF (*d*). EVIDENCE (*a*) (*b*). FRAUDS, STATUTES OF. LAND LAW LANDLORD AND TENANT (*f*). LIMITATIONS, STATUTE OF.

ELECTIONS. (a) Municipal, time of holding. The effect of Art. VIII., § 3, of the Constitution is to establish the third Tuesday of February as the day for holding all city, ward, borough, and township elections.

In the City of Pittsburgh, where by the municipal charter such elections, prior to the adoption of the constitution, were held on the first Tuesday of December, the effect of the constitutional provision is to set back the time from December to February in each year. Com'th *ex rel.* Magee *v.* McCarthy. 477.

(b) Irregularity in holding election. The absence from the poll of the copy of the list of resident taxables required by the Act of 30 January, 1874, is not, in the absence of proof that votes of unqualified electors were received, such an irregularity as will warrant the rejection of all the votes cast. In the absence of fraud at an election, every reasonable intendment should be made in favor of the regularity of the proceeding. Davis's Appeal. *In re* Wheelock's Election. 163.

A quo warranto may issue against a public officer for alleged bribery, fraud, or wilful violation of any election law under Art. VIII., § 9, of the Constitution without a previous conviction of the respondent for the offence in the Quarter Sessions. Com'th *v.* Walter. 876.

(c) Practice in contested elections. To give jurisdiction in cases of contested elections, the petition must show that the statutory requisitions have been strictly complied with. The omission to state that the petitioners were "qualified electors, who voted at the election contested," is a fatal defect, which cannot be amended after thirty days from the election. Welti's Case. 165.

EMINENT DOMAIN. Right of United States Government to exercise. See CONSTITUTIONAL LAW (*b*). Darlington *v.* United States. 221.

EQUITABLE ESTATE. Lien of the city on, for unpaid taxes. See TAXES (*c*).

EQUITY. (a) Injunction. The granting of an interlocutory injunction which restrains the defendant's power of distribution over all his property, real or personal, upon the ground that such property has been purchased with money received by the defendant as the agent of another, is oppressive, and cannot be sustained as a reasonable exercise of chancery powers, in the absence of clear evidence tracing such money into the property covered by the injunction. Ervin's Appeal. 18.

An injunction will not be granted restraining the completion of public works after the expenditure of a large amount of money upon them, except in a clear case of abuse by the representatives of the people of the powers conferred upon them. Wheeler *v.* Rice. 833.

(b) Equitable assignment. A verbal agreement by a debtor to transfer stock to his creditor as security for a debt, followed by the execution of an irrevocable power of attorney to an agent of the creditor for the transfer of the stock, amounts to an equitable assignment of the stock, and the power being coupled with an in-

EQUITY—*Continued.*

terest is not revoked by the death of the attorney without having executed it. Lightner's Appeal. 295.

(c) Cancellation of post-nuptial marriage settlement. See HUSBAND AND WIFE (*d*). Hammett *v.* Hammett. 189.

EQUITY PRACTICE. Decree against one not a party to the suit is erroneous and will be stricken out as surplusage. R. R. Co. *v.* Ashton. 281.

ERRORS AND APPEALS. (a) What constitutes the record. The charge and answers to points are not parts of the record, and cannot be assigned for error unless the record affirmatively show, that they were filed in pursuance of a request by one of the parties.

The Act of 17 April, 1856, providing that answers to points shall be filed as part of the record, is not general in its application, but confined to the Sixth Judicial District. Alexander *v.* Weidner. 245.

The affidavit and depositions taken under a rule to open a judgment are not part of the record, and will not be examined upon a writ of error. Insurance Co. *v.* Fuller. 7.

(b) What constitutes sufficient error. There is a presumption that the proceedings below are right, and it is incumbent on the plaintiff in error to make the error clearly appear before he can ask for a reversal. Lahey *v.* Heenan. 181.

In proceedings under the poor laws, a judgment will not be reversed because of the weakness of the evidence upon which it rests. The Appellate Court must be satisfied that the Court below should have drawn a different conclusion from the evidence to warrant a reversal. Overseers of Moreland *v.* Overseers of Benton. 20.

A clerical error in entitling papers filed in the Quarter Sessions as if filed in the Common Pleas, is not ground for reversal, when the Quarter Sessions was the proper forum. Centreville School District's Appeal. 75.

After a trial upon the merits the Supreme Court will not reverse for a clerical error in naming the owner of the premises in the body of a mechanic's claim. Palmer *v.* Paul. 866.

The summary action of an auditor in adjudicating a case in the absence of counsel, where such absence was excusable, is ground for reversal of a decree of the Orphans' Court confirming the auditor's report. Copeley's Appeal. 145.

Although a single sentence culled out of a charge, standing alone might be so interpreted as to contain an erroneous exposition of the law, yet if the connection and whole current of the charge show that such was not the meaning of the Court, the judgment will not be reversed. Blair Iron Co. *v.* Lloyd. 103.

In a homicide trial, if the general charge correctly set before the jury the distinctions in regard to homicide, an answer partially qualifying one of the defendant's points, which, standing by itself, might seem to be an inaccurate exposition of the law, will not be ground for reversal, if from the whole tenor of the charge and evidence there is no reason to believe the jury were misled. Green *v.* Com'th. 424.

Per PAXSON, J. It is the duty of the Court in a homicide case to charge the jury fully upon all questions of law arising upon the evidence, irrespective of the points presented by counsel, and their failure so to do is a sufficient ground of reversal. Meyers *v.* Com'th. 506.

Quære. Whether a doubt in the minds of the Supreme Court of the existence of an intention to kill, will, after a verdict of guilty, cause a reversal? Myers *v.* Com'th. 506.

An omission by the Court below to charge upon a point not made upon the trial is not ground for reversal.

Digitized by Google

ERRORS AND APPEALS—*Continued*

If counsel through inadvertence omit to request an answer to a particular point, it is not too late to do so at the end of the charge. Dawson *v.* Robinson. 449.

The omission of the judge in his charge to refer to certain portions of the evidence, or even slight misstatements, which evidently have not controlled the verdict, are not ground for reversal when the tenor of the charge has been fair. Penn Mutual Insurance Company *v.* Snyder. 269.

A tendency to mislead in the general tenor of the charge, is sufficient ground for reversal, although no particular portion of it is clearly erroneous. Washington Insurance Co. *v.* Rosenberger. 16.

Where no notice to produce books and papers has been served, it is error for the Judge to animadvert upon their absence. Coal Co. *v.* Price. 224

Although the right of a Judge to express an opinion on the evidence is undoubted, yet a charge so forcible in its character as almost to sweep away the jury's freedom of decision, will not be sustained. A final instruction to the jury that matters of fact are entirely for them, will not validate a charge otherwise unfair and one-sided. Burke *v.* Maxwell. 48.

The improper admission of evidence, tending to influence the minds of a jury, is not cured by a subsequent direction by the Judge to disregard it. R. R. Co. *v.* Decker. 121.

Although pleadings which have been withdrawn should not be permitted to be taken out with the jury, if they do not substantially differ from those which have been substituted for them, a judgment will not on this account alone be reversed. Kimble *v.* Carothers. 88.

A decree of the Orphans' Court confirming an auditor's report will not be reversed for the admission of incompetent testimony by the auditor, unless it appears that its admission led the auditor into some specific error, especially when it appears that the case of the appellees is not materially weakened by striking out such testimony. Bierly's Appeal. 210.

When maxim *communis error facit jus*, applied. Kostenbader *v.* Spotts. 249.

(c) On what proceedings writ of error lies. A writ of error, and not certiorari or appeal, is the proper mode to review a judgment of the Common Pleas in partition, but if the record is brought up by a certiorari the Supreme Court, for the purpose of preventing injustice and delay, may treat the case as if heard upon writ of error if the rights of no parties are affected by such action. Grubb *v.* Grubb. 177.

As to distinctions between certiorari, appeal, and writ of error, see McIlvaine's Appeal, 130. Grubb *v.* Grubb. 177.

When a certiorari is not a supersedeas. De Coursey *v.* Guarantee Trust Co. 65.

(d) What not reviewable because in the discretion of the Court below. The ruling of the Court as to the order in which counsel shall speak. Rolland *v.* Com'th. 230.

The setting aside of a sheriff's sale. Hoffa's Appeal. 144. See, however, Jackson *v.* Morter. 140.

The refusal to open a judgment obtained for want of an affidavit of defence. Eby *v.* National Insurance Co. 487.

The judgment of the Court below upon a rule to open ndgment. Lehigh Valley Insurance Co. *v.* Fuller. 7.

The action of the Court below in discharging a rule for judgment for want of a sufficient affidavit of defence will not be reviewed when the affidavit seems to disclose questions of fact which need the intervention of a jury. City *v.* Philadelphia & Reading R. R. Co. 492.

The refusal of the Quarter Sessions to quash an indictment preferred by the District Attorney without a preliminary hearing or previous commitment of the accused in a case where the grand jury had ignored a previous commitment. Rowand *v.* Com'th. 318.

(e) What constitutes a final decree. An order of the Orphans' Court for an attachment against an administrator d. b. n. c. t. a. to compel the payment of the assets of the estate into Court, pending an appeal in that Court by such administrator from an order of the Register of Wills, revoking the letters, is not a final decree from which an appeal can be taken. Mattern's Appeal. 166.

A decree confirming the report of auditors appointed under the general Banking Act of 16 April, 1850, finding that the insolvency of the bank investigated was due to fraudulent practices, is not a final decree which can be appealed from. Ruby's Appeal. 349.

A decree of the Orphans' Court directing so much of a fund previously paid into Court as had been attached by judgment creditors of a legatee to be retained until the final disposition of the attachment, is not a final decree. Valentine's Appeal. 471.

A writ of error taken to a judgment in ejectment confessed by virtue of a clause in the lease that the tenant "agrees that no writ of error or objection or exception shall be made or taken thereto," will, on motion, be quashed. Bonniwell *v.* Hopson. 492.

(f) Penalty for suing out writs of error for delay. For cases where the penalty was inflicted, see Binswanger *v.* Fisher, 340; Richards *v.* Bisler, 485.

See CERTIORARI.

ESTOPPEL. (a) By matters of record. A sheriff's return to a *fi. fa.*, that he has levied on the interest of the defendant in firm property, estops the execution plaintiff from averring before the auditor, appointed to distribute the fund produced by the sale of the same property under subsequent executions issued against the firm, that the property was not partnership but individual property. Bogue's Appeal. 256.

A defendant who signed a waiver of inquisition of real estate is estopped from averring that the same was obtained from him through fraudulent misrepresentation, for the purpose of setting aside the sale, if he was present at the sheriff's sale, but made no announcement of the manner in which the waiver had been obtained. Jackson *v.* Morter. 140.

(b) By conduct of party. One who lends money to a husband to enable him to pay the purchase-money of land, the title to which the lender knows is to be taken in the name of the wife, and takes the husband's judgment note as security for such loan, is estopped from asserting that the settlement upon the wife is fraudulent although the husband fails to repay the loan. Thompson *v.* Thompson. 228.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS. Lane's Appeal. 379. DEED. Penna. R. R. *v.* Shay. 45. LACHES. Evans *v.* Borie. 86.

EVIDENCE. (a) Generally. An abstract of title filed by either party under a rule of Court in an action of ejectment may be offered in evidence as proof of the papers and facts recited in the same. Ege *v.* Medlar. 437.

(b) Proof of execution of deed. When the evidence given to impeach the genuineness of a deed is very slight, and not sufficient to overthrow the direct and positive proof previously given of its execution, such evidence should not be submitted to the jury. Ege *v.* Medlar. 437.

(c) Foreign laws, proof of. Foreign laws are presumed to be the same as our own; if a party desires to rest his case upon a difference, the difference in law must be affirmatively shown. Van Auken *v.* Dunning. 15.

(d) Secondary evidence. The deposition of a

Digitized by Google

EVIDENCE—*Continued.*

deceased party to a cause taken and filed previous to his death is admissible in evidence under the Act of 28 March, 1814.

Quære. Whether in such a case the living party could be heard upon the trial to contradict the deposition. Speyerer *v.* Bennett. 213.

Notes of the plaintiff's testimony, taken in a former discontinued action between the same parties, are admissible in a second action, although the defendant may have died in the interval. Pratt *v.* Patterson. 161.

(e) Parol evidence to explain, vary, or contradict written instruments. In a suit upon a mortgage drawn, payable *one* year after date, parol evidence is admissible to show that the mortgagor, a woman, signed the mortgage, upon the express assurance by the mortgagee that "it would be considered for *three* years, and would not be enforced before the expiration of that time." Lippincott *v.* Whitman. 313.

A guarantor who is sued upon his contract of guaranty, which was written upon a loose sheet of paper referring to "a foregoing agreement," on another sheet of paper, is entitled to show that a paper which is prefixed to such guaranty is not the paper the performance of whose covenants he agreed to guarantee. Clarke *v.* Adams. 381.

When parol evidence is introduced to impeach, upon the ground of fraud, a sealed release of damages caused the plaintiff by the negligent killing of his son on a railroad, the evidence of fraud must be clear and distinct, and the uncorroborated testimony of the plaintiff that he did not read the paper, and was misinformed as to its character, is not sufficient to send the case to the jury. Pennsylvania R. R. Co. *v.* Shay. 45.

Although evidence may be given to prove a usage or custom of trade, it is not admissible to prove the meaning of plain English words in an auctioneer's catalogue of sale. Lippincott *v.* Seidenbach. 448.

See WILL (*e*). Johnson's Appeal. 52. CONTRACT. Malone *v.* Dougherty. 116.

(f) Book entries. In an action by an assignee for the benefit of creditors, where the assignor has been absent from the country for seven years, and cannot be found, it is sufficient to prove his handwriting to render his book of original entries competent proof of the sale and delivery of goods.

When the entries charge but one member of a firm, if the book is accompanied by proof that the goods were purchased and received by the firm, its admission is not error. Bear *v.* Trexler. 214.

In sci. fa. sur an apportioned mechanic's claim, the claimant's book of original entries containing only entries of the items furnished all the buildings without designating the precise materials furnished each building, is admissible to prove the items in the account. Millett *v.* Allen. 374.

See ALTERATION OF WRITING. Insurance Co. *v.* Bair. 126.

(g) Declarations. In an action by an executor upon a life insurance policy, where the defence was the alleged suicide of the insured, declarations by the widow of the deceased in the lifetime and absence of her husband, to the effect that she wanted to raise money on the policy, as her husband would not live long, and the insurance was their only salvation, is not admissible; nor is evidence that the widow had compromised her claim upon another policy in another company. Continental Life Ins. Co. *v.* Delpeuch. 277.

Although the rights and liabilities of the parties to a contract of life insurance are irrevocably fixed by the death of the insured, evidence of declarations of the company's agent subsequently made, though not ordinarily admissible, are admissible to explain former acts of the parties. Security Life Ins. Co. *v.* Elliott. 504.

(h) Expert testimony. One is not qualified to be called as an expert without first showing that he has a peculiar professional knowledge of the subject concerning which he is called; unless this be shown, the jury are as competent to draw inferences of fact as the witness. Continental Ins. Co. *v.* Delpeuch. 277.

(i) Res gestæ. In an action against a railroad company for negligently killing the plaintiff's husband, declarations made by the defendant's general superintendent admitting facts which would strongly tend to prove negligence, are admissible as part of the *res gestæ*, if made at the time of the transaction, but if made after the transaction is fully completed and ended, they are not admissible. Huntingdon and Broad Top R. R. Co. *v.* Decker. 121.

(k) Competency of witnesses. In an action against a husband and the admistrator of his wife upon their joint mortgage, the husband is not a competent witness. Crouse *v.* Staley. 83.

In an action by or against executors, etc., the wife or husband of a party incompetent to testify, labor under the same disqualification as such party. Stoll *v.* Weidman, 205; Taylor *v.* Kelly, 206; Bierly's Appeal, 210.

In an action by the administrator of A. against the administrator of B., the next of kin to A. is not a competent witness for the plaintiff. Kimble *v.* Carothers. 88.

But an administrator, although personally interested in an estate, is a competent witness as to facts occurring after the death of his intestate. Lahey *v.* Heenan. 181.

Notes of the plaintiff's testimony, taken in a former discontinued action between the same parties, are admissible in a second action, although the defendant may have died in the interval. Pratt *v.* Paterson, 161.

A legatee is a competent witness to prove the execution of a will. (By an equally divided Court.) Frew *v.* Clark. 497.

Where incompetent testimony has been admitted, which is calculated to affect the minds of the jury, its subsequent withdrawal by the Court, accompanied by an instruction to the jury to disregard it, does not cure the fault of its admission, and a *venire de novo* will be awarded. R. R. Co. *v.* Decker. 121.

EXECUTION. (a) Waiver of inquisition, how far it extends. Although a waiver of inquisition in a judgment note given by the then owner of real estate, under a strict interpretation of the Act of 16 June, 1836, might not bind his vendee, still as the practice has been otherwise in many parts of this commonwealth, the Court, applying the maxim *communis error facit jus*, rule otherwise. Kostenbader *v.* Spotts. 249.

As to what circumstances will estop a defendant from alleging that a waiver of iniquisition signed by him was obtained through fraudulent misrepresentation, see ESTOPPEL (*a*). Jackson *v.* Morter. 140.

(b) Distribution of proceeds. In a distribution of the proceeds of a sheriff's sale of personalty of an individual member of a firm sold under a fi. fa. against the firm, the amount of such fi. fa. must be paid before a subsequent fi. fa. against the same defendant for an individual debt receives any portion of the fund. Brady *v.* Conway. Merkle's Appeal. 110.

An execution is the end of the law. Money collected under an execution, even if not due, as, *e. g.*, usurious interest, cannot be recovered back in a new action. Ins. Co. *v.* Robinson. 173.

See PARTNERSHIP (*d*).

EXECUTORS AND ADMINISTRATORS. See DECEDENTS' ESTATES.

Digitized by Google

EXPERT TESTIMONY. See EVIDENCE (*h*). Ins. Co. *v.* Delpeuch. 277. DAMAGES, MEASURE OF. (*d*). Kille *v.* Ege. 443.

FEE SIMPLE. What words will create. See VENDOR AND PURCHASER. Coyle's Appeal. 533.

FIRE COMPANY. See CORPORATION (*e*).

FOREIGN LAWS, proof of. See EVIDENCE (*c*). Van Auken *v.* Dunning. 15.

FOREIGN JUDGMENT. Exemplification of, is a sufficient instrument within the affidavit of defence law. Power *v.* Winsor. 860.

FRAUD, when sufficient evidence of, for jury. See DEED. Penna. R. R. Co. *v.* Shay, 45; Boud *v.* Brofson, 298; Ins. Co. *v.* Bair & Shenk, 126.

FRAUDS, STATUTE OF. The requirements of the statute of frauds are met by a writing signed simply by the party to be charged thereby; it is not necessary that it should be under seal, nor is any particular form of words necessary. Cadwalader *v.* App. 1.

FRADULENT CONVEYANCE. See DEBTOR AND CREDITOR (*b*). Forrester *v.* Hanaway. 113. HUSBAND AND WIFE (*c*). Thompson *v.* Thompson. 228.

FUNERAL BENEFITS. See HUSBAND AND WIFE (*e*).

GROUND RENT. Payable in "current silver money of the United States," what is a sufficient tender. See LANDLORD AND TENANT (*a*). Maule *v.* Stokes. 378.

GUARANTY. See EVIDENCE (*e*).

HUSBAND AND WIFE. (a) Curtesy. A husband is entitled to his curtesy in lands settled to the separate use of his wife in fee, unless a contrary intent clearly appears in the deed of trust, and the giving of a power of sale to a trustee does not evidence such an intent.

Quære. Whether the execution of the power would have barred the curtesy. Ege *v.* Medlar. 437.

(b) Mechanic's claim against wife's separate estate. A mechanic's claim filed against the property of a married woman must show on the face of the record the fact of the defendant's coverture, and also that the work and materials were done and furnished at her special instance and request. Lloyd *v.* Hibbs. 21.

(c) Marriage settlement, when fraudulent as to creditors. A settlement of land by a husband on his wife at a time when he has no debts, and is not about to enter upon a hazardous business or to contract fresh obligations, is not fraudulent in law.

The party from whom the husband purchased the land having knowledge that the title was to be taken directly in the name of the wife is estopped from asserting the conveyance to be fraudulent because the husband fails to pay a judgment note given in part payment of the purchase money. Whether such vendor has the knowledge of the fact that the title was to be taken in the name of the wife is for the jury. Thompson *v.* Thompson. 228.

(d) Post-nuptial settlement, when voidable by wife. A release of dower signed by a wife in her maiden name a few hours after marriage (she having previously lived with her husband for a long term of years as mistress, and having six children by him), in consideration of the promise of a future support of herself and children is, upon the husband's death, voidable by the wife.

Her subsequent execution and acknowledgment before a magistrate of a release, reciting the former release, and relinquishing all interest in her husband's estate in lieu of an annuity of $1200, is voidable upon the death of the husband, leaving an estate of $2,000,000, upon proof being exhibited that the wife at the time of the

HUSBAND AND WIFE—*Continued.*

execution and acknowledgment of this paper had no comprehension of its contents and effect. Hammett *v.* Hammett. 189.

(e) Rights of wife living apart from husband. A wife who has voluntarily separated herself from her husband for the period of five years is not entitled to receive from a beneficial society of which her husband was a member, the sum which the by-laws provided should be paid "to his widow or relatives towards his decent interment," in a case where the husband was buried by other relatives. Berlin Beneficial Society *v.* March. 55.

See EVIDENCE (*k*).

INFANT. See NEGLIGENCE (*d*) (*f*).

INJUNCTION. See EQUITY (*a*).

INQUISITION, waiver of. See EXECUTION (*a*).

INSURANCE, FIRE. (a) Mutual Company, Forfeiture, Waiver. In a mutual company, a member who fails to pay an assessment in the manner prescribed by the laws, forfeits his rights under his policy; and the act of an agent in sending a second notice of the assessment is not of itself a waiver of this forfeiture in the absence of evidence that the notice was sent by the authority of the company. Leonard *v.* Lebanon Mut. Ins. Co. 527.

But as forfeiture so incurred may be waived by the company in such a case, the question of waiver must be left to the jury. Washington Ins. Co. *v.* Rosenberger. 16.

(b) Condition avoiding policy. A condition in a policy that it shall cease from the time when the property insured shall be levied on or taken into possession or custody under any proceeding in law or equity, is not violated by the sheriff levying on real estate under a *levari facias,* if the property is destroyed by fire before the sale.

A technical levy without actual seizure is not within the meaning of the condition. Manufacturers' Ins. Co. *v.* O'Mally. 267.

(c) Foreign Company, service of summons on. A summons must be served on the special agent named by the company, under the provisions of the Act of 4 April, 1873. A service on a mere soliciting agent is insufficient. Liblong *v* Kansas Insurance Co. 358.

INSURANCE, LIFE. (a) Insurable interest. An adult son has an insurable interest in the life of his father, since, under the Act of 13 June, 1836, § 28, he is liable to the county for the maintenance of such father if the latter is unable to maintain himself. Reserve Mutual Ins. Co. *v.* Kane. 201.

(b) Suicide. Where the body of a man whose life is insured is found drowned in a river, although there is no evidence of how the body came to be there, there is a presumption that the deceased did not commit suicide, which is not rebutted by proof that the deceased believed in spiritualism. Continental Ins. Co. *v.* Delpeuch. 277.

Whether a note given by an insured was given in absolute payment of the premium, as well as whether the agreement of the parties was that the policy should be extended for that time, is a question of fact for the jury. Security Life Ins. Co. *v.* Elliott. 504.

(c) Contract with agent. See CONTRACT (*e*). Seipel *v.* Trust Co. 537.

INTEREST. Receiver of partnership, when chargeable with. When the receiver of a partnership is forced by a complication of suits to retain in his hands for a period of years moneys received as assets of such partnership, he is not chargeable with interest in the absence of evidence of his having personally used the fund. Wallace's Appeal. 468.

See USURY.

Digitized by Google

JOINT OBLIGORS. The death of one of three joint obligors in a bond with a warrant of attorney attached, does not prevent the entry of judgment against the survivors upon the warrant. Croasdell *v.* Tallant. 375.

JUDGMENT, Revival of. When a plaintiff in a judgment has actual notice of a sale of land bound by it, even though the vendee has not recorded his deed or taken possession of the land, a *scire facias* to revive the judgment must be served upon the terre tenant. McCray *v.* Clark. 451.

Who can defend against for usury. See USURY. Miners' Bank *v.* Roseberry. 13.

Attorney's Commissions. When collectible by plaintiff as part of judgment. Schmidt and Friday's Appeal. 282.

JUDGMENT NOTE. Waiver of inquisition in, binds vendee who purchased land subject to the judgment. Kostenbader *v.* Spotts. 249. See JOINT OBLIGORS.

JUDICIAL SALE. See SHERIFF'S SALES. LAND LAW (*a*).

JURISDICTION. Local and transitory actions. An action on the case for injuries in the nature of a nuisance to land is local, and must be brought in the county where the lands are situate. Prevost *v.* Gorrell. 366.

See COURTS, JURISDICTION OF.

JUSTICES OF THE PEACE. A justice of the peace has no jurisdiction in civil cases where the sum demanded by the plaintiff exceeds $100, although a set-off be admitted, which reduces the sum in demand to an amount less than $100; but if direct payments are admitted it is otherwise. Peter *v.* Schlosser, 47; Shirley *v.* Entriken, 51.

See PLEADING. McCullough *v.* Logan. 88

LABORER. See LIEN (*d*).

LACHES. See CORPORATION (*c*). Evans *v.* Borie. 86.

LAND LAW. (a) Tax sale. An offer to the county treasurer by the owner of unseated lands to pay all the taxes due thereon, and a payment by the owner of all sums made known to him by the treasurer, is equivalent to an actual payment of the whole, and will prevent a valid sale of the land for an unpaid balance not made known by the treasurer.

A treasurer's statement of all taxes due on the tract, and his receipt for the payment of the same, is sufficient evidence of a tender and payment.

The provision in the Act of 1864, that all actions for the recovery of such lands must be brought within five years, does not apply when the sale was absolutely void for want of jurisdiction. Breisch *v.* Coxe. 84.

A party claiming under a commissioner's deed is not required under all circumstances to prove the performance of all the requirements of the Act of 29 March, 1824. When the performance of these requirements is recited in the commissioner's deed, and there is no evidence contradicting such recital, the question of performance may properly be left to the jury.

The recital of a sale by the treasurer to the commissioners in the treasurer's deed is the best and primary evidence of such sale, and is in no wise contradicted by the failure of the treasurer to make an entry of such sale in his books, or by a letter from the former not mentioning the sale.

Where there is evidence that the owner of land has paid the taxes regularly at biennial periods for a long time and the tax receipts have been destroyed, the question whether in any particular year the taxes were paid in time is for the jury. Coxe *v.* Derringer. 97.

But where the purpose of such evidence offered is to

LAND LAW—*Continued.*

defeat a title under a tax sale, the party offering it must be held to strict proof of the time of payment. Ibid.

(b) Canals, ownership of soil. The Commonwealth is the owner in fee simple of lands taken for canal purposes, and owns *usque ad mediam terram.*

A grant of land described as extending from a point thence by the said canal, passes no title to the land under the canal. Wyoming Coal Co *v.* Price. 224.

LANDLORD AND TENANT. (a) Construction of ground-rent deed, current silver money. A ground-rent created in 1806 and payable "in current silver money," is not satisfied by the tender of silver dimes coined since 1853. There must be a tender of such current silver money as will at the time of tender lawfully pay a sum of one hundred dollars. Maule *v.* Stokes. 373.

(b) Construction of lease. A lease by a charitable society of certain real estate to the trustees of the gas works contained a provision that the lessees should pay all taxes assessed on the premises during the term. The Legislature by a subsequent special Act exempted the premises from taxation so long as the revenues received from the premises should be used for charitable purposes: *Held*, that the lessor was entitled to recover from the lessee as rent the taxes subsequently assessed upon the premises. German Society *v.* City of Philadelphia. 483.

A lease for one year upon condition that, if the tenant remained on the premises after the expiration of the year, the contract was to remain in force another year and so on from year to year, entitles the tenant, if he so elect, to hold the premises through the second year, and the tenancy is not terminated by a notice to quit from the landlord served upon the tenant three months prior to the end of the first year, if the tenant remain in possession. Therefore a surety is bound for the rent of the second year. McNamee *v.* Cresson. 450.

(c) Distress. If a landlord after distraining on goods allow the tenant to remove them, the surety for the rent is discharged. McNamee *v.* Cresson. 450.

But if the goods are eloigned by the tenant without any negligence upon the part of the landlord or his bailiff, the surety is not discharged. Myers *v.* Hulseman. 487.

(d) Replevin bond. Liability of surety. In an action against a surety upon a replevin bond, an affidavit that the plaintiff accepted other goods in place of those missing after the determination of the action is sufficient. Sands *v.* Fritz. 531.

(e) Proceedings to recover possession. A lease contained a clause providing in case of breach of condition by the tenant for a confession of judgment in ejectment with an agreement that no writ of error or objection or exception shall be made or taken thereto. A writ of error taken to such confessed judgment will, on motion, be quashed. Bonniwell *v.* Hopson. 492.

In proceedings under the Landlord and Tenant Act of 14 December, 1863, when the defendant appeals from the judgment of the alderman, he must file an affidavit that the appeal is not intended for delay. Carter *v.* Hess. 325.

The assignee of a portion of a property sold subject to an existing lease of the whole, is entitled, as well as the lessor or assignee of the whole, to the remedy given by the landlord and tenant Act of 1772, for the recovery of possession at the end of the term.

An affidavit by the tenant averring that the term has not expired, does not show such a dispute as to the title as to bring the case within § 13 of the Act, entitling the tenant to an arrest of proceedings.

A certiorari bringing up proceedings under the land-

Digitized by Google

LANDLORD AND TENANT—*Continued.*
lord and tenant Act of 1772, is not a supersedeas. De Coursey *v.* Guarantee Trust Co. 65.

(f) Adverse possession. When the relationship of landlord and tenant is once established between parties, the statute of limitations does not begin to run in favor of the tenant until the privity existing between him and his landlord is severed by some unequivocal act. Cadwalader *v.* App. 1.

LEGAL TENDER. See LANDLORD AND TENANT (*a*). Maule *v.* Stokes. 373.

LIEN. (a) Mechanics and material men. The right of a mechanic to file a claim against a building is not discharged by taking the promissory note of the contractor payable at a future day, unless there is an agreement that the note is taken in satisfaction of the debt. Herron *v.* Graham. 176.

Where materials are furnished indiscriminately for a number of houses under an entire contract, the material man has the right to apportion the amount due on each house and to file separate liens therefor. Millett *v.* Allen. 374.

After a trial upon the merits, the Supreme Court will not reverse for a latent clerical error in naming the owner of the premises in the body of a mechanic's claim. Palmer *v.* Paul. 366.

(b) Requisites of claim against the property of a married woman. A claim filed against the property of a married woman must set out the fact of coverture, and that the work was done and the materials furnished at her special instance and request. Lloyd *v.* Hibbs. 21.

(c) In Northumberland County. The Act of 17 Feb. 1858, extending the provisions of the Act of 16 June, 1836, to "improvements," etc., on leased estates, is not confined to coal leases, but extends to ordinary manufacturing establishments. Thomas *v.* Smith, 6 Wr. 68, followed. Reed *v.* Clement. 53.

(d) Laborer's Lien. One who contracts to deliver timber at a saw-mill, and in pursuance of such contracts hires teams and drivers to do the work, is not entitled to priority in the distribution of a fund produced by a sheriff's sale as a laborer under the Act of 9 April, 1872. Who is a "laborer," under the Act, discussed. Wentroth's Appeal, 248.

LIMITATIONS, STATUTE OF. (a) Real actions. Adverse possession. Some clear, positive, and unequivocal act is necessary to give an adverse character to a possession originally subservient to the title of the owner. Cadwalader *v.* App. 1.

(b) What sufficient possession. An entry upon and cultivation of a portion of a tract by a disseisor, will not give him constructive possession of the whole tract, unless he has made his entry under color of title claiming by the specific boundary lines of the whole tract. The right of a disseisor does not extend beyond the mere *pedis possessio.* Ege *v.* Medlar. 437.

(c) What will prevent the running of the statute. The existence of an outstanding estate by the curtesy in the husband of the woman last seized, prevents the running of the statute against her heirs. Hence their right of action is not barred until twenty-one years after the death of the husband. The Act of 22 April, 1856, establishing a limitation of thirty years as to persons under disabilities, has no application to heirs whose rights of possession have not accrued, when they do not trace title through those having the intermediate right of possession. Ege *v.* Medlar. 437.

The provision of the Act of 8 April, 1804, that all suits for the recovery of land sold for taxes, on account of an alleged irregularity in such sale, must be brought within five years after the sale, does not apply when the

LIMITATIONS, STATUTE OF—*Continued.*
sale was absolutely void for want of jurisdiction, as when the taxes had actually been paid. Breisch *v.* Coxe. 84.

(d) Personal actions. When statute begins to run. An attorney entrusted with the collection of a debt, who, by his misleading answers to his client to the effect that the debt was uncollectible, has put his client off his guard, cannot plead the statute of limitations in an action against him to recover the amount of the debt which had been embezzled by a correspondent attorney, although the defendant had no knowledge of this fact. Morgan *v.* Tener. 398.

False answers by one of a firm in the collecting business tending to mislead one who has placed a claim in their hands, will prevent the other members of the firm from pleading the statute of limitations in an action against them for the debt which had been collected but never paid to their employer. Wickersham *v.* Lee. 400.

To revive a claim barred by the statute there must be a clear and definite acknowledgment of the debt, a specification of the amount due or a reference to something by which such an amount can be definitely and certainly ascertained, and an unequivocal promise to pay. A letter in which a debtor writes to his creditor, "I have received a letter from you some time ago asking of me, what I intended doing with the balance of a note I owe you" . . . "after S. is paid I will pay you all I owe you, and if I can do anything for you before that time I will do so. You need not trouble yourself about me, that will not pay you, for I expect to pay all I owe," *Held*, insufficient. Miller *v.* Baschore. 402.

(e) Advancements. The statute of limitations does not run against an advancement. Pilling's Appeal. 252.

MANDAMUS. The Court of Common Pleas has power to issue a mandamus against overseers of the poor to compel the reception and maintenance of a pauper under an order of removal made by justices of the peace under the Act of 13 June, 1836.

To warrant the granting of a mandamus there must be a specific legal right and the want of a specific legal remedy. It is the duty of the Court before granting it to carefully examine the circumstances, and exercise a sound discretion. Com'th *ex rel.* *v.* Overseers of Jersey Shore. 299.

See MUNICIPAL CORPORATIONS (*l*). Com'th *v.* Mitchell. 393.

MARKETABLE TITLE. See VENDOR AND PURCHASER. Coyle's Appeal. 533.

MARRIAGE SETTLEMENT, when cancelled. See HUSBAND AND WIFE.

MASHALLING ASSETS. See DEBTOR AND CREDITOR. Bair and Shenk's Appeal. 81.

MASTER AND SERVANT. (a) Liability of master for negligence of servant. A master is liable for injury resulting from a rash and improper, careless and negligent act of his servant, if such act be not wilful or malicious. Hestonville, etc., Pass. R. W. *v.* Gray 421.

(b) Liability of master to servant for injury by fellow-servant. A master who employs an incompetent servant, knowing his incompetency, is chargeable with the consequences of that servant's negligence to another servant employed in the same service. Huntingdon, etc, R. R. Co. *v.* Decker. 121.

(c) Generally. The Act of 4 April, 1868, prevents a person, employed by one railroad company, who had a track adjoining and also a right of way over the track of the company defendant, from recovering for injuries received while walking upon the track of the latter, because under that Act the plaintiff had no greater right of action than he would have had as an employé of the defendant. Del., Lack., and West. R. R. *v.* Mulherin. 39.

Digitized by Google

MEASURE OF DAMAGES. See DAMAGES, MEASURE OF.

MECHANIC'S LIEN. See LIEN

MESNE PROFITS. See EJECTMENT

MONEY COUNTS. See ASSUMPSIT.

MORTGAGE. (a) **Recording of.** The lien of a mortgage is effectual from the time of its being left for record and entered by the recorder upon his entry book. The failure of the recorder to record and index a mortgage for nine months after entry does not affect its lien, although in the interval judgments have been obtained against the mortgagor. Brown and Wood's Appeal. 35.

(b) **Proceedings upon.** The scire facias in a proceeding on a mortgage takes the place of a declaration, and must show on its face an immediate cause of action. If the breach of condition relied upon is the failure to pay interest, the default in such payment must be distinctly averred. An averment that "the principal with the interest thereof as yet remains unpaid," is not sufficient. Swift *v.* Allegheny Building Association. 54.

(c) **Attorney's commissions.** The attorney's commissions provided for in a mortgage in case of suit are the property of the mortgagee, and not of the attorney, and, if after scire facias issued, the mortgagee satisfy the mortgage, the attorney has no right to proceed to collect his commissions. By satisfying the mortgage, the mortgagee extinguished the right to the commissions. Faulkner *v.* Wilson. 339.

(d) **Admissibility of parol evidence to alter time of payment.** See EVIDENCE (*c*).

MUNICIPAL CORPORATION. (a) **Municipal expenditures.** The councils of Philadelphia have no power to assess by ordinance the cost of laying new heavy granite curbs set on a new line, upon the owners of Broad Street property, who had previously curbed and paved their pavements. Wistar *v.* Philadelphia. 124.

Although a municipal corporation can waive irregularities and defects of form in dealing with its contractors for municipal improvements, yet the property owners can be made liable for the payment of the cost only when the power conferred on the municipal authorities has been legally and in due form exercised. Where the record shows that the rules prescribed by law have not been complied with, there is no jurisdiction over the defendant or his property.

In a suit on a municipal claim it is incumbent for the plaintiff to show that ordinances relative to advertising have been strictly complied with. Fell *v.* Philadelphia. 261.

See CONSTITUTIONAL LAW (*d*).

(b) **Contracts for supplies.** Under the Act of 23 March, 1874, the municipal officers have discretionary powers in awarding contracts for supplies. In judging who is the "lowest responsible bidder," they may inquire further than as to the mere pecuniary ability of the competing party, and their decision will not be reviewed by the courts except in case of fraud.

The sending in of sealed proposals under the abovementioned Act confers no right on the lowest bidder to compel by mandamus the award of the contract to him. Com'th *ex rel.* Snyder *v.* Mitchell, 398; Findley's Appeal, 422.

MURDER. See CRIMES (*c*).

NATIONAL BANK. See USURY.

NEGLIGENCE. (a) **Generally.** The owner of a private alley, abutting on a street, who constructs in it a heavy movable platform, which by a slight movement will fall, is liable for injuries caused to a child upon whom it fell, although the child was a trespasser.

NEGLIGENCE—*Continued.*

In such a case the question of negligence in so constructing and maintaining the platform is for the jury. Phila. Hydraulic Works *v.* Orr. 552.

(b) **Liability of boom company for loss of logs.** A boom company is liable for the value of logs which are lost from their boom through their negligence. Susquehannah Boom Co. *v.* Rogers. 478.

(c) **Of steamship company for loss of baggage.** Although an ocean steamship company may not be subject to the liability of common carriers in the care of personal effects of passengers carried in their state-rooms, they are bound to exercise due care that such effects are not stolen by any passenger or employé, and whether in a particular case such care has been exercised is for the jury. American Steamship Co. *v.* Bryan. 528.

(d) **Liability of railroad company to one injured on track.** Except at crossings where the public have a right of way, railroad companies have a right to a clear track, and if a plaintiff be injured while walking upon the track he cannot recover, because of his contributory negligence. Del., Lack., and Western R. R. *v.* Mulherin. 39.

Though a young child cannot be charged with contributory negligence by reason of being upon the railroad track, an engineer who sees a young child upon the track, but making ready to get off, has a right to presume that the child will get off, and is under no obligation to bring his train to a standstill. Where, in such a case, the child's foot caught in a crevice between the plank and the rail, and was run over, *held*, that the failure of the engineer to stop the train was not *per se* negligence; the question of negligence is for the jury under proper instructions from the Court. Penna. R. R. Co. *v.* Morgan. 137.

In an action against a passenger railway company for injuries done to the plaintiff's carriage by reason of a collision, the question of negligence is for the jury. Girard College Railway Co. *v.* Middleton. 486.

(e) **Liability of to employe for injury caused by fellow-servant.** See MASTER AND SERVANT. Huntingdon R. R. *v.* Decker. 121.

(f) **Contributory.** The question of what degree of care and discretion might reasonably be expected of a boy of nine or ten years is for the jury. Hestonville R. R. *v.* Gray. 421.

When one whose property is destroyed by fire has ample time to remove it after the beginning of the fire, if he does not do so, he is guilty of contributory negligence, and cannot recover damages against those through whose negligence the fire was caused. Raydure *v.* Knight. 109.

Per PAXSON, J. he leaving uncovered of a coal oil tank is not of itself such negligence as to render the owner liable for damages caused by a fire. Raydure *v.* Knight. 109.

(g) **Negligence in executing written instrument.** See DEED. Penna. R. R. *v.* Shay. 45.

NEGOTIABLE INSTRUMENT. A promissory note does not cease to be negotiable because endorsed by a corporation with its seal. Rand *v.* Dovey. 319. See AFFIDAVIT OF DEFENCE LAW; BILLS OF EXCHANGE; BILLS OF LADING.

NOTICE. See JUDGMENT.

ORPHANS' COURT. Practice. When the distributive share of a legatee is attached in the hands of the executor, the Orphans' Court may properly direct the executor to retain it in his hands until the determination of the attachment, and such an order is not a final decree upon which to base an appeal. Valentine's Appeal. 471.

See COURTS, JURISDICTION OF; DECEDENT'S ESTATES.

Digitized by Google

PARTITION. Counsel fees and costs in. See COSTS.

PARTNERSHIP. (a) **Actions against.** See AFFIDAVIT OF DEFENCE LAW (*c*). Martien *v.* Manheim. 10.

(d) **Dormant partners, who are.** The stockholders of a banking company doing business under ordinary articles of copartnership, although only the name of the bank is disclosed to the public, and not the names of the individual partners, are more than dormant partners, and are each individually responsible for the obligations of the association contracted after their becoming partners, until notice is given of their withdrawal from it.

But they are not liable for debts contracted prior to their becoming members of the partnership, unless they expressly assume to pay them, even though there was a continuance of business without discrimination between past and future business. Shamburg *v.* Ruggles. 293.

A partner who enters a firm already established does not thereby become liable for the debts of the old firm.

A dormant partner is not liable for work done after his withdrawal from a firm by creditors who had no knowledge of his connection therewith.

Since the Act of 6 April, 1870, a mere agreement to advance money to a partnership, and to receive after repayment of such advances a share of the profits, does not of itself constitute the person making it a partner, and where he has not actually received any of the profits, and has not been held out to the world as a partner, he is not liable as such. Hart *v.* Kelly. 336.

(c) **Relations of partners inter se. Rights and duties of a partner, member of two firms dealing with each other.** B., the partner of F. in mining and shipping of coal, having charge of the sale of the firm's coal at Philadelphia, employed another firm of which he was a member to sell the coal upon commission; the accounts rendered to F. by B. showed that this was the method of doing the business, to which accounts F. made no objection, and the effect of this arrangement was to reduce the expense of transacting the business by saving necessary office expenses; under these circumstances F. after dissolution and settlement could not demand an account of B.'s share of such commissions.

B. also sold coal to the other firm of which he was a member, with notice to his partner, and at the full market value; under these circumstances he was not chargeable for profits made on a resale of such coal to the government at a profit. Freck *v.* Blakiston. 464.

(d) **Distribution of assets among partnership and separate creditors.** An auditor appointed to distribute a fund arising from the sale of personalty under executions against a partnership cannot inquire into the existence of the partnership in a contest over the fund between partnership and individual creditors, when the sheriff's return sets out that the property sold belonged to the partnership. Bogue's Appeal. 256.

The fund produced by a sheriff's sale of the equitable interest of a partnership in land under a judgment against the partnership, is liable for the payment of municipal taxes assessed against the property while the firm was in possession, although the legal title was in another. Van Arsdalen's Appeal. 463.

(e) **Purchase by one partner from another.** It is not fraud per se for one partner to purchase from another, the latter's interest in the firm through the interposition of a third party concealing the fact that he and not the third party is the real purchaser. In the absence of actual fraud or inadequacy of price, such a sale deliberately made and fully executed will not be set aside, especially after the lapse of several years. Geddes' Appeal. 150.

The payment of a firm debt by one partner does not

PARTNERSHIP—*Continued.*

entitle him to subrogation against his copartner un an account has been settled between them. Fessler's Appeal. 71.

See DEBTOR AND CREDITOR, SUBROGATION, INTEREST. Liability of receiver for interest on fund. Wallace's Appeal. 468.

PLEADING. (a) **Venue.** An action on the case for injuries in the nature of a nuisance to land is local, and must be brought in the county where the lands are situate. Prevost *v.* Gorrell. 366.

(b) **Plea in abatement.** In an action before a justice of the peace, a plea setting out that the same cause of action had been sued upon four years previously, but the suit had been abandoned, and the costs paid, is not good either as a plea in abatement or a plea in bar. McCulloch *v.* Logan. 88.

When change of declaration not allowed, because of delay. See AMENDMENT. Bricker *v.* Dull. 254.

Effect of verdict in curing defects in pleading. See AMENDMENT (*c*).

POOR LAW. Under the Act of 13 June, 1836, § 28, an adult son is bound, if able, to support a father unable to support himself. Reserve Mutual Ins. Co. *v.* Kane. 201.

A pauper who becomes chargeable upon a township where he has no legal settlement, cannot be removed to another township unless a settlement is proved in such township. In such case the burden of proof is on the township asking for a removal. Overseers of Vineland *v.* Overseers of Benton. 20.

Mandamus is a proper remedy to compel a compliance with an order for the reception and maintenance of a pauper under an order for removal under the Act of 13 June, 1836.

The penalty prescribed by that Act for refusal is not such a statutory remedy as renders a common law remedy obsolete. Com'th *v.* Overseers of Jersey Shore. 299.

POWER OF ATTORNEY. When revoked. See AGENT (*a*). Lehigh Nav. Co. *v.* Mohr. 322.

When not revoked. EQUITY (*b*). Lightner's Appeal. 295.

PRACTICE. (a) **Parties to action.** An action at law cannot be brought by individual stockholders against the directors of a corporation for negligence in the management of its affairs. The corporation itself should bring the action, or else the stockholders should file a bill in equity, making it a party defendant. Craige *v.* Gregg. 287.

The omission upon the record of the Christian name of one of several partners, cannot be taken advantage of before an auditor in the distribution of the proceeds of a sale under an execution against the partnership. Brady *v.* Conway. 110.

A landlord may be admitted to defend in ejectment to such portion of land described in the writ as he claims, after a plea of "not guilty." Ege *v.* Medlar. 437.

(b) **Service of process on agent of non-resident defendant.** In serving process upon the agent of a defendant residing in another country, a simple return of personal service is not sufficient, the return must show a service "at the usual place of business or residence of the agent." Lehigh Valley Ins. Co. *v.* Fuller. 7.

Service of process against a foreign insurance company must be upon the agent of the company specially designated under the Act of 4 April, 1873, and the sheriff's return must set out the fact of such special agency. Service upon a soliciting agent is insufficient. Liblong *v.* Kansas Fire Ins. Co. 358.

(c) **Scire facias sur mortgage.** The scire facias in a proceeding on a mortgage takes the place of the declaration, and must show on its face an immediate

Digitized by Google

PRACTICE—*Continued.*

cause of action. A breach of condition in a mortgage will not be inferred, it must be distinctly averred in the scire facias. Swift *v.* Allegheny Building and Loan Assoc. 54.

(d) **Discontinuance.** The payment of costs by a plaintiff, withdrawal of papers, and failure to proceed for four years, is an abandonment of an action before a justice of the peace.

The pendency of such an action cannot be pleaded either in abatement or bar to a subsequent action between the same parties for the same cause of action. McCulloch *v.* Logan. 88.

(e) **Affidavits of defence.** Pending a motion to open a judgment, judgment should not be entered on a scire facias to revive that judgment, for want of an affidavit of defence. Seymour *v.* Hubert. 423.

Although ordinarily taking judgment for the amount admitted to be due in an affidavit of defence is an admission by the plaintiff of the truth of the statements contained in the affidavit, if before such judgment is entered the plaintiff obtains leave to withdraw so much of his claim as the defendant states a defence to, *semble* that there is no such admission presumed. See Richards *v.* Bisler. 485.

(f) **Trial and its incidents. Notice of special matter.** The failure to give notice of special matter under a rule of court is not remedied by the filing of special counts, twelve years afterwards, and evidence, of which such notice should be given, is properly rejected Bricker's Adm'rs *v.* Dull. 254.

The improper admission of evidence, tending to influence the minds of a jury, is not cured by a subsequent direction by the Judge to disregard it. Huntingdon, etc., R. R. Co. *v.* Decker. 121.

Although pleadings which have been withdrawn should not be permitted to be taken out with a jury, if they do not substantially differ from those which have been substituted for them, a judgment will not on this account alone be reversed. Kimble *v.* Carothers. 88.

On the trial of a cause, counsel cannot be allowed to read to the jury the opinion of the Supreme Court delivered in another case involving the same questions. Ege *v.* Medlar. 437.

(g) **Notice to produce books and papers.** A party is not bound to produce books and papers upon the trial of a cause, unless call be made for them in conformity with the rules of Court, and it is error for the Judge in his charge to animadvert upon their absence. Wyoming Coal Co. *v.* Price. 224.

(h) **Opening judgment by default.** When judgment is obtained against a defendant by default, and for the purpose of opening such judgment, the defendant enters into an agreement to try the case upon the merits upon a single point, evidence is not admissible to show a defective service of the original writ. Nothing will be inquired into but the single issue. Continental Ins. Co. *v.* Delpeuch. 277.

(i) **Charge of Court. General tendency.** See Errors and Appeals.

(k) **Answers to points.** See Errors and Appeals (*b*). Dawson *v.* Robinson, 449; Green *v.* Com'th, 424; Meyers *v.* Com'th. 506.

(l) **Province of Court and Jury.** Although the right of a Judge to express an opinion on the evidence is undoubted, yet a charge so forcible in its character as almost to sweep away the jury's freedom of decision will not be sustained. The final instruction to the jury that matters of fact are entirely for them will not validate a charge otherwise unfair and one-sided. Burke *v.* Maxwell. 48. See Coxe *v.* Derringer. 97.

(m) **Reserved point.** A reserved point must be based upon certain facts which are admitted or have been found by a jury. Phillips *v.* Allegheny Car Co. 347.

PRACTICE—*Continued.*

(n) **When charge of court and answers to points are part of record.** See Errors and Appeals (*a*). Alexander *v.* Weidner. 245.

(o) **Judgment.** Attorney's commissions of five per cent. reserved in a judgment note are part of the note, and may be collected in addition to the face value. Schmidt *v.* Friday's Appeal. 282.

To whom they belong. See Mortgage (*c*). Faulkner *v.* Wilson. 339.

(p) **Quo warranto.** A quo warranto will be issued upon the application of the attorney-general without a rule to show cause. Commonwealth *v.* Walter. 376.

(q) **Before auditor.** A summary disposition by an auditor of exceptions to his report in the absence of counsel for the exceptant caused by the detention of a railroad train of which the auditor had notice by telegraph, is irregular, and is sufficient ground for a reversal. Copely's Appeal. 145.

(r) **Transfer of causes.** Proceedings in equity begun in the Supreme Court before the adoption of the constitution of 1874 are to be transferred to the proper Court of Common Pleas of Philadelphia County. Kersey Oil Co. *v.* Oil Creek, etc. R. R. Co. 288.

(s) **Punitory damages.** Writs of error taken for delay. Binswanger *v.* Fisher, 340; Richards *v.* Bisler, 485.

See also Amendment; Costs; Errors and Appeals; Evidence; Justice of the Peace; Pleading.

PRINCIPAL AND AGENT. See Agent.

PROMISSORY NOTES. See Bills of Exchange.

PURCHASER FOR VALUE. The equity of a purchaser for value is greater than that of a lien creditor for subrogation. Hoff's Appeal. 461.

QUO WARRANTO. The attorney general is entitled to a quo warranto without a rule upon the respondent to show cause.

A conviction of the respondent for alleged violation of the election laws is not a necessary prerequisite to a quo warranto to test an alleged forfeiture of the office for the same offence. Commonwealth *v.* Walter. 376.

RAILROAD COMPANY. See Master and Servant; Negligence.

RATIFICATION. See Agent. Horter *v.* Silliman. 405.

RECORDING ACTS. See Mortgage. Brown's and Wood's Appeal. 85.

RECEIVER. When chargeable with interest. See Interest. Wallace's Appeal. 468.

RELEASE OF RAILROAD DAMAGES. See Deed. Penna. R. R. Co. *v.* Shay. 45.

RENT, apportionment of. When a life-tenant leased a farm reserving rent in kind, and died during the term, his personal representatives are entitled to the proportion of rent of the existing quarter, accrued but not due at the death of such life tenant, as against the remainder-man. Borie *v.* Crissman. 144.

REPLEVIN. See Damages, Measure of. Brindle *v.* Adams. 5.

ROADS, STREETS, AND BRIDGES. See Certiorari; Constitutional Law; Municipal Corporation.

RULES OF SUPREME COURT Hour rule. 245.

Rules relating to hearing of capital cases. 277.

Digitized by Google

SALE. **(a) When property passes.** A consignment, under an agreement, of logs to be sawed by the consignee, who, after paying all expenses and reserving commission, was to account for the proceeds to the consignor, does not pass the property so as to deprive the consignee of a right of action against a boom company which negligently caused their loss. Susquehanna Boom Co. *v.* Rogers. 478.

(b) Sale by sample. See CONTRACT (*c*). Boyd *v.* Wilson. 521; Warren *v.* Coal Co., 525.

SCINTILLA OF EVIDENCE. See DEED. Penna. R. R. Co. *v.* Shay. 45. EVIDENCE (*b*). Ege *v.* Medlar. 437.

SEARCHES. See MORTGAGE.

SET-OFF. Unliquidated damages arising ex contractu, which are capable of liquidation by any known legal standard, may be set off under the Act of 1705, although arising out of a distinct and separate cause of action. Halfpenny *v.* Bell. 9.

In an action by a bank, the defendant cannot set off a note endorsed to him by the cashier of the bank without authority. Shryock *v.* Bashore. 360.

Indistinct averments of set off. Hopple *v.* Bunting. 472. See AFFIDAVIT OF DEFENCE LAW (*d*). Loucheim *v.* Becker. 449.

Usurious interest paid on a note entirely independent of the note in suit cannot be defalked in an action on a note by a national bank. Overholt *v.* Bank. 419.

SHERIFF. Action against. See DEBTOR AND CREDITOR (*c*). Leeds *v.* Commonwealth. 554.

SHERIFF'S RETURN. Conclusiveness of. See ESTOPPEL. Bogue's Appeal. 256.

SHERIFF'S SALES. When set aside. Jackson *v.* Morter. 140.

SPECIFIC PERFORMANCE. See VENDOR AND PURCHASER. Coyle's Appeal. 533.

STATUTES. **Title of.** See CONSTITUTIONAL LAW (*f*). Mauch Chunk *v.* McGee. 83.

STATUTE OF FRAUDS. Requisites of a writing to pass an interest in real estate. See FRAUDS, STATUTE OF. Cadwalader *v.* App. 1.

STATUTE OF LIMITATIONS. See LIMITATIONS, STATUTE OF.

STATUTORY REMEDY. When not exclusive. See POOR LAW. Commonwealth *v.* Overseers. 299.

STOCK. **Equitable assignment of.** See EQUITY. Lightner's Appeal. 295.

STOCK BROKER. Actions against. See ASSUMPSIT. Wagner *v.* Peterson. 344.

SUBROGATION. See DEBTOR AND CREDITOR (*e*). Hoff's Appeal. 461. PARTNERSHIP (*e*). Fessler's Appeal. 71.

SUNDAY. As to validity of promissory note dated on. See Bear *v.* Trexler. 214.

SUPREME COURT. Original jurisdiction of, in cases of injunction against corporation. See COURTS (*a*)

SURETY. Rights of, on abandonment of distress. See LANDLORD AND TENANT. McNamee *v.* Cresson, 450; Myers *v.* Hulseman, 487; Sands *v.* Fritz, 531.

TAXES AND TAXATION. **(a) Uniformity.** See CONSTITUTIONAL LAW (*c*). Lehigh Iron Co. *v.* Lower Macungie. 29.

(b) Effect of act exempting. See LANDLORD AND TENANT (*b*). German Society *v.* Philadelphia. 483.

(c) When payable out of fund produced by sheriff's sale. See PARTNERSHIP (*d*). Van Arsdalen's Appeal. 463.

TAX SALE. See LAND LAW (*a*).

TENDER. Failure to tender consideration of contract, when it is in kind, not in money, *e. g.*, stocks. See CONTRACT (*d*).

Where the holder of an equitable title to land, in possession of it, gives up possession under circumstances constituting a fraud upon his lien creditors, the purchaser thereof at a sheriff's sale need not, before bringing ejectment, tender the purchase-money to the legal owner. Forrester *v.* Hanaway. 113.

Where the vendee under articles of sale for the purchase of real estate clear of incumbrances, gave notice, before the time fixed for the execution of the deed, that he would not take it: *Held*, that the vendor was not bound to satisfy incumbrances before tendering a deed. Weaver *v.* Zimmerman. 56.

TERRE TENANT. See JUDGMENT.

TOWNSHIPS. In proceedings for the division of townships under the Act of 15 April, 1834, the record must show that the requisitions of the Statutes have been strictly complied with. *In re* Plum Township. 342.

TRESPASSER. See NEGLIGENCE (*a*).

TRESPASS quare clausum fregit. See DAMAGES, MEASURE OF (*e*) Blair Coal and Iron Co. *v.* Lloyd. 103.

TRUST, when passive. Real estate was conveyed to a trustee to pay the rents and profits to the settlor for her life, and, after her death, to convey to such persons as she should appoint by her last will under her hand and seal; and, in default of appointment, to her right heirs, reserving a power of revocation.

The trust created by this settlement was passive and executed in the settlor during her lifetime, so that a will executed by her without a seal was effective to pass property embraced in the settlement. Harkinson *v.* Bacon. 403.

A devise to a trustee of real estate in trust for the devisor's son, his heirs and assigns, until the son should attain the age of twenty-five years, with a proviso that, if the son died before the age of twenty-five years without lawful issue, the property should go to certain charities, does not create such a trust as will protect the son's interest from being levied on and sold for his debts. Enderkiss *v.* Harkness. 366.

TRUSTEES, compensation of. Although trustees are not entitled to compensation upon the value of real estate remaining unsold at the termination of the trust, yet proper compensation out of the corpus of the estate will be made to them, proportioned to their responsibility and trouble, when the regular commission on the rents is insufficient for that purpose. Biddle's Appeal. 396.

UNSEATED LANDS. See LAND LAW.

USURY. **(a) Who can take advantage of.** No one but a debtor or creditor whom he has defrauded can claim the benefit of the Act of 28 May, 1858.

A purchaser of a bankrupt's real estate subject to the lien of a judgment cannot reduce the amount of such lien by proving that the judgment included usurious interest. Miners' Trust Co. *v.* Roseberry. 13.

In the distribution of the proceeds of a sheriff's sale of real estate sold under a mortgage, subsequent execution creditors cannot reduce the amount to be paid the mortgagee by evidence that he holds another mortgage of the debtor upon other property taken for the same debt, which, if paid in full, will include usurious interest. Taylor's Appeal. 75.

Usurious interest included in a judgment bond, upon which judgment was entered, and money of the defendants attached in the hands of garnishees, although the defendant had no knowledge of these proceedings, cannot be recovered back. Federal Ins. Co. *v.* Robinson. 173.

In a feigned issue to determine the validity of a judgment in Pennsylvania held as security for a loan made

Digitized by Google

USURY—*Continued.*

in New York, the defendant offered to show "that the loan was usurious by the laws of New York." This offer was properly rejected, because such a loan is only void for the excess of usurious interest, and in the absence of proof, the law of New York will be presumed to be the same. Van Auken *v.* Dunning. 15.

When usurious interest is included in the amount of a judgment confessed by a debtor, and afterwards paid in full by him, the excess over legal interest cannot be recovered under the Act of 28 May, 1858. The excess of interest paid upon the amount of such judgment after its confession may be recovered. Hopkins *v.* West. 343.

(b) National Banks, effect of reserving usurious interest.

The reservation by a national bank of usurious interest works a forfeiture of the entire interest. The taint of usury extends through an entire series of renewal notes given for the same original debt. Overholt *v.* Bank, 419; Bryar *v.* Bank, 421.

VENDOR AND PURCHASER. Specific performance; marketable title. A devise to B. for life, and from and after her decease then to the issue of her body who should be living at the time of her death, equally to be divided between them as tenants in common, and not as joint tenants, subject to certain annuities, one of which was perpetual; and in case B. should die without issue, then to J. in fee: upon death of B. leaving issue, such issue took a fee simple, and could make a good marketable title. Coyle's Appeal. 533.

See CONTRACT, TENDER.

VENUE. The Acts of 14 April, 1834, and 28 April, 1870, relating to change of venue, are not repealed by the constitution of 1874, for the effect of the Schedule, § 2, is to preserve laws then in existence wherever legislation is necessary to carry the provisions of the Constitution into proper effect. Watson *v.* Chester R. R. Co. 467.

In actions of nuisance. See JURISDICTION. Prevost *v.* Gorrell. 366.

VOLUNTARY SETTLEMENT. See HUSBAND AND WIFE.

WAGES, LABORER'S LIEN FOR. See LIEN (*d*).

WAIVER OF INQUISITION. See EXECUTION. Kostenbader *v.* Spotts. 249.

WARRANT OF ATTORNEY. See JOINT OBLIGORS.

WARRANTY. See CONTRACT (*c*). Boyd *v.* Wilson, 521; Warren *v.* Coal Co., 525.

WIDOW. See HUSBAND AND WIFE (*c*). DECEDENTS' ESTATES (*b*).

WILL. (a) What papers testamentary. The following paper was held to be a valid will: "Know all men by these presents that I, James McCully, do hereby order and direct my administrators or executors in case of my death to pay Robert D. Clark the sum of $75,000, as a token of my regard for him, and to commemorate the long friendship existing between us." Frew *v.* Clark. 497.

(b) Construction of. From what date will speaks. The general rule that a will speaks from the death of the testator, does not apply where its language by fair construction indicates a contrary intention.

A testator, having bequeathed specific stock of the par value of $10,000 to each of his grandchildren then living, directed his executors to provide and procure for every after-born grandchild "stocks of the same amount and value (viz. ten thousand dollars)." After-born grandchildren were entitled to have set aside for them respectively, as they came into being, stocks of the same market value as those specifically bequeathed were at the date of the will. Clarke's Estate. 288.

(c) Superfluous words in a will, which obscure the sense, may be stricken out. Under the following provisions in a will, "I give and bequeath unto my son E. and P., and my daughter C. and M., my daughter's children, they shall stand in equal shares, that is to say, M.'s children shall have the share of their mother. Item. My son D. and J. they shall have nothing of my estate, they have now more than their shares would come to:" *held*, that all the testator's estate passed to E. and those mentioned in the first clause. Zerbe *v.* Zerbe. 535.

(d) Legacy, when payable. When a testator bequeaths the whole income of his estate to his wife for life, then to his mother for life, and then makes an absolute bequest to his brother and sisters, and in the last clause of the will, gives certain pecuniary legacies, these legacies are not payable till the termination of the life estates. Price's Estate. 320.

(e) Contradictory clauses. Clauses in a will, though apparently contradictory, will be reconciled if by any reasonable construction such a result can be reached. Sheetz's Appeal. 148.

A bequest of the residue of an estate to be divided among the testator's brothers and sisters, and the brothers and sisters of his wife "in equal shares, so that one has as much as another," provides for a distribution *per capita* and not *per stirpes*. Polly Bittner's Appeal. 70.

When the description of a devisee applies with exactitude to one person, parol evidence is inadmissible to show that another person less exactly described is the intended object of the testator's bounty. Johnson's Appeal. 52.

Competency of legatee as witness to prove will. See EVIDENCE (*k*). Frew *v.* Clark. 497.

Fee simple. See VENDOR AND PURCHASER. Coyle's Appeal. 533.

Passive trust. See TRUST. Enderkiss *v.* Harkness. 366.

Digitized by Google

INDEX

OF

CASES OTHER THAN SUPREME COURT CASES

REPORTED IN VOLUME III. OF THE WEEKLY NOTES.

BY

ABRAHAM M. BEITLER, Esq.

ABATEMENT. Death of defendant after service abates the suit. England *v.* Kelly, 156.

In actions by partners for tort, death of one during trial does not abate the suit as to the survivors. Struthers *v.* Peacock, 517.

ACCOUNT. See Decedents' Estates, Executors and Administrators, Orphans' Court Practice, Partnership.

ACTIONS. Action against a partner who was not served in an action against the firm, can be brought in a different Court from that in which the original action was brought. Wendill *v.* Magee, 204.

Newspapers, civil action for words published in, as to. Struthers *v.* Bulletin, 215.

By partners for tort not abated by death of one during trial. Struthers *v.* Peacock, 517.

By member of unincorporated Association against the Association by name, not sustainable. Paul *v.* Keystone Lodge, 408.

ACTS OF ASSEMBLY. Of 1725, March 20 (Actions Personal). Buckman *v.* Jones, 302.

1791, April 13 (Judgments). Chamberlain *v.* Sloan, 518.

1797, April 1 (Bread). Johnson *v.* Kolb, 273.

1810, March 20 (Constables). Commonwealth *v.* Smith, 95.

1812, March 31 (Joint Tenancy). Loxley's Estate, 306.

1815, March 13 (Divorce). Reeves *v.* Reeves, 558.

1822, April 2 (Deeds and Mortgages). Assurance Co. *v.* Power, 407.

1832, March 29 (Decedents' Estates). Thomas's Estate, 96; Secker's Estate, 391; Ralston's Estate, 392; Barnett's Estate, 412; Stewart's Estate, 476.

1834, February 24 (Decedents' Estates). Commonwealth *v* Severn, 303; Stewart's Estate, 332.

1834, April 15 (Counties and Townships). Commonwealth *v.* Marshall, 182.

1836, March 11 (District Courts). Ohman *v.* Winsmore, 157.

1836, March 21 (Limited Partnership). Brooke *v.* Alexander, 304.

1836, June 13 (Attachment of Vessels). Shakespear *v.* Schooner, 167; Cain *v.* Shakespear, 514.

1836, June 13 (Actions Personal). Blanco *v.* Bosch, 171.

ACTS OF ASSEMBLY—*Continued.*

1836, June 16 (Equity). Fulton *v.* O'Donnell, 42

1842, July 12 (Actions Personal). Blanco *v.* Bosch, 171.

1843, April 19 (Municipal Claims). City *v.* Patterson, 278.

1846, March 11 (Municipal Claims). City *v.* Scott, 502.

1851, April 14 (Decedents' Estates). Hilt *v.* Walton, 545.

1852, May 4 (Actions Personal). Gilbough *v.* Keller, 78.

1855, May 4 (Marriage). Charlton's Estate, 305.

1855, May 7 (Party Walls and Buildings). Bowers *v.* Supplee, 22.

1856, April 11 (Party Walls and Buildings). Bowers *v.* Supplee, 22.

1859, April 12 (Building Associations). Association *v* Schuller, 431.

1861, May 1 (Decedents' Estates). Greentree's Estate, 519.

1868, April 4 (Railroads). Rickard *v.* R. R. Co., 517.

1869, April 15 (Evidence). Hopple's Estate, 79. McClellan *v.* Melloy, 559.

1870, April 5 (Paving Market Street). City *v.* Patterson, 278.

1870, April 6 (Partnership). Boyd *v.* Hart, 220; Kelley *v.* Hart, 93.

1870, April 28 (Chestnut Street). Times Publishing Co. *v* Ladomus, 557.

1872, April 3 (Married Women). Co. *v.* Blair, 170; Adams *v.* Levy, 543.

1873, March 6 (Mechanic's Lien). Matsinger *v.* Mullen, 544.

1874, May 14 (Practice). Eyster *v.* McCulla, 219.

1876, April 20 (Wages). Ryan *v.* McDonough, 44; De Leon's Estate, 76; Mayberry *v.* Gerber, 240.

1876, April 28 (Beneficial Societies). Paul *v.* The Lodge, 408.

1876, May 8 (Violation of Ordinances). McLaughlin *v.* Jones, 203.

1877, March 23 (Stay Law). Thompson *v.* Buckley, 560.

ACTS OF CONGRESS. March 3, 1875. Huddy *v.* Havens, 432.

1876, February 16 (Centennial). Board *v.* Patterson, 307.

Digitized by Google

ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.

ADMIRALTY. Lien of crew on vessel for wages due for work done for charterer, as to. Hart *v.* Schooner Enterprise, 172.

As to what are maritime services. Ibid.

Rule of U. S. District Court as to depositions in admiralty cases, 565.

Liability of consignee for damages in the nature of demurrage, as to. Sheppard *v.* Ice Co., 565.

See ATTACHMENT (*d*).

AFFIDAVIT OF DEFENCE LAW.

(a) Generally. As to judgment against husband and wife for necessaries furnished to wife. Debraham *v.* Walker, 26.

Averment contradicted by the record. Smith *v.* Hopple, 27.

Conditional acceptance of an order for delivery of goods. Gormley *v.* Stovell, 79

Filing of, equivalent to appearance. Holden *v.* Woodward, 133.

Where defendant alleges a variance between the copy filed and the original, must rule plaintiff to produce original. Osmer *v.* Souder, 155; Snyder *v.* Richardson, 272.

Copy of book entries need not be signed. Ibid.

Affidavit of third party insufficient. City *v.* Peterson, 292.

Averment supplementing copy filed, as to. Dickerson *v.* McCausland, 327; Allen *v.* Graham, 493; Collins *v.* O'Toole, 564; Detmold *v.* Coal Co., 567.

Written contract referred to, must be annexed. Hoover *v.* Munyon, 356.

Practice as to taking judgment where supplemental affidavit ordered, but not filed. Conrad *v.* Rodgers, 157.

Whether the two term rule, based upon the old Pennsylvania practice, may be acted upon in a case not within affidavit of defence law. Detmold *v.* Coal Co., 567.

Note. Origin and development of affidavit of defence law. Ibid.

(b) Instruments within the act. Copy of promissory note omitting erased indorsement. Hollinshead *v.* Shallcross, 44.

Agreement to pay for privilege of furnishing liquors at ball. Nisbet *v.* McShain, 120.

Recognizance of bail in error. Griffith *v.* Salter, 433.

(c) Instruments not within the act. Wharfage not subject of book entries within the Act. Lennig *v.* Steamboat Co., 434.

Book entries for professional services of attorney. Meany *v.* Kleine, 474.

Book entries omitting defendant's first name. Collins *v.* O'Toole, 564.

(d) Sufficiency of affidavit. As to sufficiency of allegation of set-off. Rezende *v.* Berques, 43; Stover *v.* Hotel Co., 156; Donly *v.* Brown, 275.

Breach of contract, when alleged, contract must be set forth. Brown *v.* Rogers, 12.

As to pendency of separate suits on two notes. Smith *v.* Hopple, 44.

As to allegation that plaintiff holds notes as collateral. Bank *v.* Erwin, 63.

As to sufficiency of averment where defendant says he "is informed, believes and expects to be able to prove" certain facts. Brown *v.* Walton, 76.

Bankruptcy of individual members of firm defendant, no defence. Pastor *v.* Hicks, 68.

Adjudication of bankruptcy a bar to judgment in State Court, when. Frostman *v.* Hicks, 202.

Payment made in fraud of creditors cannot be set off by debtor. Bacharach *v.* Schaller, 77.

As to averment of presentation and notice of nonpayment to maker of check. McCumbridge *v.* Casselberry, 134. (See *Errata.*)

AFFIDAVIT OF DEFENCE LAW—*Continued.*

As to sufficiency of allegation that defendant never ordered or purchased the goods and owes nothing. Conrad *v.* Rogers, 157.

What is sufficient allegation of fraud to put holder to proof of consideration. Bank *v.* Matthews, 158.

What constitutes sufficient allegation of surrender of lease. Suplee *v.* Harley, 240.

Partial failure of consideration, good defence to action on contract. Kavanaugh *v.* Wall, 242.

Suit on municipal claim for paving, what is sufficient defence to. City *v.* Patterson, 278.

As to indefinite and insufficient averments of concealment and fraud. Tischner *v.* Bambrick, 94; Bailey *v.* Waterhouse, 275.

As to what is sufficient averment of warranty, or representation. Nagle *v.* Potter, 26; Taylor *v.* North, 77; Id. 170; Bailey *v.* Waterhouse, 275.

Signing paper without reading it, on faith of representations as to its contents, no defence. Volkmar *v.* Ervin, 291.

Release, sufficiency of allegation of. Nachod *v.* Kunkle, 368.

Failure of consideration, as to. Chamberlain *v.* Sloan, 518.

As to allegation that plaintiff is holder for collection only. Brown *v.* Walton, 76; Houston *v.* Allen, 134; Osmer *v.* Souder, 155; Bank *v.* Matthews, 158; Tolman *v.* Smythe, 169; Association *v.* Yost, 171.

Facts must be set out fully and without evasion. Pastor *v.* Hicks, 68; Lindsay *v.* Casselberry, 133; Taylor *v.* North, 170; Pollock *v.* Association, 170;

(e) Affidavit of loan. Requisites of. Ohman *v.* Winsmore, 157.

Plaintiff cannot file affidavit, where he holds a note for the same loan. Ibid.

An advance by broker of purchase-money of stock bought by him for a customer, not within the Act. Hopper *v.* Hemphill, 474.

See BILLS OF EXCHANGE AND PROMISSORY NOTES; EVIDENCE, PRACTICE, SET-OFF, MUNICIPAL CLAIMS.

AGENT. Estoppel of principal by acts of agent. Baldwin *v.* George, 326.

AGREEMENT. See CONTRACT.

ALDERMAN. Mandamus will lie against a magistrate to compel him to issue summons against a constable who has been guilty of illegal delay in the return of a writ. Commonwealth *v.* Smith, 95.

Cannot take jurisdiction of a claim over $100. Plaintiff cannot apply a counter claim of defendant so as to reduce his own claim below $100. James *v.* Frick, 291.

See APPEAL FROM ALDERMAN, PRACTICE.

ALLEY. See EASEMENT.

AMENDMENT. In copy filed, not allowable after two weeks from return-day. Jones *v.* Gibson, 329; Held *v.* Clemens, 475, contra, Guth *v.* Anderson, 133.

Libel in divorce improperly sworn to before a notary can be amended *nunc pro tunc.* Reeves *v.* Reeves, 558.

Proceedings under road law may be amended after appointment of jury, and prior to view. *In re* Fortieth Street, 64.

APPEAL FROM ALDERMAN. When allowed *nunc pro tunc.* Schlecht *v.* Kistine, 43.

When suit is for wages, security must be for debt and costs. Ryan *v.* McDonough, 44; Mayberry *v.* Gerber, 240.

Cause of action must be the same in court as before the alderman. Schlecht *v.* Restine, 95.

Plaintiff may rule defendant to plead to transcript. Levy *v.* Mustin, 220.

APPEARANCE. See AFFIDAVIT OF DEFENCE LAW (*a*).

Digitized by Google

ARBITRATION. Agreement for, in constitution of unincorporated association, not revoked by death of member. Singerly *v.* Johnson, 541.

Finding of arbitration committee of Board of Brokers conclusive on the Court. Singerly *v.* Johnson, 541.

ARREST. Act of 13 June, 1836, repealed by Act 12 July, 1842. Blanco *v.* Bosch, 171.

A capias for the arrest of a debtor under Act 12 July, 1842, cannot be issued without the order of a Judge. Ibid.

As to nature and extent of witness's privilege from arrest. Rex *v.* Piatt, 187.

Party to an action privileged from arrest while in attendance on a suit. Steinmetz *v.* Wade, 187.

Attaché of Foreign Legation privileged from. *In re* Anfrye, 188.

See PRACTICE (*a*).

ASSIGNMENT. For benefit of creditors, alleged to be fraudulent, does not prevent sale of goods under *fi. fa.* Bunting *v.* McCormick, 496.

See EQUITABLE ASSIGNMENT.

ASSOCIATION. See BENEFICIAL SOCIETIES, BOARD OF BROKERS, BUILDING ASSOCIATIONS, CORPORATION.

ASSUMPSIT. Will lie on promise arising out of contract, though under seal. Brown *v.* Bliem, 26.

Will not lie against unincorporated Association by name. Paul *v.* Keystone Lodge, 408.

Implied promise to pay for services rendered by brother to sister, as to. Porter *v.* Trust Co., 260.

Plea in, averring that the contract was entered into in another State, by the law of which it was usurious is in Pennsylvania, good. Juillard *v.* Remington, 372.

ATTACHMENT. (a) Generally. Money due on a municipal claim to a city contractor may be attached. Hewer *v.* Richardson, 274.

Misnomer of garnishees, amendable. Bentley *v.* Kaufman, 352.

Pendency of, must be specially pleaded. Tunis *v.* Baker, 368.

Leave will be given to pay into Court money attached by simultaneous writs and interpleader awarded. Wasserman *v.* Bank, 475.

(b) In execution. Attachment on judgment against lunatic defendant, dissolved. Harmstead *v.* Kingsley, 64.

Fi. fa. against stock in corporation, form of. Stœver *v.* Stœver, 169.

Pendency of, does not prevent entry of judgment. Tunis *v.* Baker, 368.

Judgment against garnishee for want of appearance when opened. Sanborn *v.* Petry, 170.

(c) Against fraudulent debtor. Insolvency of purchaser at time of purchase, not legal fraud. McGlensey *v.* Landis, 240.

Affidavit to support attachment under Act of 1869, what particularity required. Ibid.

(d) Of vessels. Where under Act 13 June, 1836, bond is filed and the vessel released, and afterwards judgment is given for libellant he may issue *fi. fa.* against respondents and against the vessel, he is not limited to the sureties in the bond. Shakespear *v.* Schooner Maggie Cain, 167.

Vessel released from attachment by giving bond not liable to be taken in execution. Cain *v.* Shakespear, 514.

(e) For contempt. See ORPHANS' COURT PRACTICE (*d*).

See EXAMINER, FOREIGN ATTACHMENT.

ATTORNEY AND CLIENT. Neglect of attorney, when client relieved from consequences of. Young *v.* Lindsay, 169; Schlecht *v.* Ristine, 43.

Client must keep his attorney advised of his residence. Harris *v.* Govett, 560.

AVERMENT. Function and scope of. Dickerson *v.* McCausland, 327.

What may be shown by, supplementing book account. Allen *v.* Graham, 493; Collins *v.* O'Toole, 564; Detmold *v.* Coal Co., 567.

BAIL. Surety on bail bond has fourteen days from service of summons to surrender his principal. Commonwealth *v.* Malony, 407.

BANKRUPT ACT. Interpretation of § 5106. Frostman *v.* Hicks, 202.

BANKRUPTCY. Adjudication of, a bar to judgment in State Court pending proceedings in the U. S. Court for bankrupts' discharge Frostman *v.* Hicks, 202.

Bankruptcy of one partner no defence in action against firm. Pastor *v.* Hicks, 63.

Procurement by debtor of entry of judgment and execution thereon an act of bankruptcy. *In re* A. Benton & Bro., 547.

What acts constitute sufficient procurement to authorize adjudication of bankruptcy. *In re* A. Benton & Bro., 547.

BENEFICIAL SOCIETIES. Members of, not individually liable as copartners for benefit to sick members. Paul *v.* The Lodge, 408.

Assumpsit will not lie by member of an unincorporated Association against the Association by its name.

Semble, that such a proceeding should be by bill in equity. Ibid.

BILL OF DISCOVERY. In aid of execution, as to. Fulton *v.* O'Donnell, 42.

BILLS OF EXCHANGE AND PROMISSORY NOTES. (a) Consideration. As to suit on note given as collateral security for loan. Bank *v.* Ervin, 63.

Allegation of fraud in procuring note puts holder to proof of consideration. Bank *v.* Matthews, 158.

(b) Protest. As to release of endorser by mistake in notice of protest. Banking Co. *v.* Wolf, 93.

Protest of check need not be averred in copy filed. McCambridge *v.* Casselberry, 134. (See *Errata.*)

(c) Defences by makers and endorsers. Excessive payment to plaintiff in fraud of other creditors, no defence. Bacharach *v.* Schaller, 77.

Holding unsold collateral securities for note, no defence. McCausland *v.* Hickman, 94.

A note transferred after maturity is subject to an equity, but not to a defence of set-off. Donly *v.* Brown, 275.

(d) Parol evidence to vary. Agreement between the parties to receive real estate in payment no defence against endorsee. Lindsay *v.* Casselberry, 42.

Where note is executed in consideration of a promise made by the payee, parol evidence is admissible to contradict it. Elliott *v.* Adams, 44.

Parol evidence inadmissible to vary or contradict. Lindsay *v.* Casselberry, 133; Bank *v.* Myers, 290.

Contemporaneous writing as to mode of payment, how far a defence. Shallcross *v.* Kohl, 219.

See EVIDENCE (*b*).

(e) Other matters. As to allegation of forgery of name of joint endorser. Association *v.* Yost, 171.

Due bill payable to "——— *or bearer*," holder may bring suit without filling blank; *aliter*, if payable to "——— *or order*." Boyd *v.* Bockenkamp, 25.

BILL OF PARTICULARS. In action *ex delicto*, when allowed. Bonta *v.* R. R. Co., 351.

BOARD OF BROKERS. As to application of proceeds of sale of seat of member, under constitution of. Singerly *v.* Johnson, 541; Leech *v.* Leech, 542.

Agreement in constitution of, for arbitration binding upon members of, and upon Court. Singerly *v.* Johnson, 541.

Digitized by Google

BOND. Given to release property from mechanic's lien, under Act March 6, 1873, owner not necessarily a a party. Matsinger *v.* Mullen, 544.

BOOK ENTRIES. See AFFIDAVIT OF DEFENCE LAW, EVIDENCE.

BREAD. Act April 1, 1797, avoiding contracts for sale of bread other than by weight, is still in force. Johnson *v.* Kolb, 273.

BUILDING ASSOCIATIONS. Insolvent, bill in equity will not lie to wind up affairs of. Gormerly *v.* Association, 11.

Penalties authorized by by-laws of, not usurious. Association *v.* George, 239.

As to calculation of fines for non-payment of interest when due. Association *v.* George, 239.

Fines for unpaid dues of past months can only be imposed when expressly authorized by charter or by-laws. Association *v.* Schuller, 431.

See EQUITY, MORTGAGE.

BUILDING INSPECTORS. Powers and duties of. Bowers *v.* Supplee, 22.

May require walls to be of such thickness as necessary for safety. Bowers *v.* Supplee, 22.

BUILDINGS. Thickness of walls in Philadelphia, as to. Bowers *v.* Supplee, 22.

CAPIAS. Can no longer be issued under Act 13 June, 1836. Blanco *v.* Bosch, 171.

Cannot be issued under Act 12 July, 1842, without sanction of a Judge. Blanco *v.* Bosch, 171.

See PRACTICE.

CAPIAS AD RESPONDENDUM. What averments necessary in affidavit to hold to bail. Beach *v.* Wade, 219.

Against freeholder, fine for improper issuing of writ; defective affidavit. Buckman *v.* Jones, 302.

CENTENNIAL BOARD OF FINANCE. Proviso in Act of Congress of Feb. 16, 1876, that $1,500,000, appropriated to, shall be returned to U. S before any "dividend or percentage of the profits" shall be paid to the stockholders, construed. Board *v.* Patterson, 307. (Reversed by Sup. Court of U. S)

CHECK. Want of averment of presentation and notice of non-payment to the maker. McCambridge *v.* Casselberry, 134. (See *Errata.*)

As to allegation that plaintiff is holder for collection only. Houston *v.* Allen, 134.

As to defence of forgery, duress, or fraud in obtaining signature. Houston *v.* Allen, 134.

CITY COUNCILS. See COUNCILS, CITY.

COLLATERAL SECURITY. See BILLS OF EXCHANGE AND PROMISSORY NOTES (*c*).

COMMISSIONERS OF COUNTY. When a new erection is recommended by two successive Grand Juries, and approved by Quarter Sessions, Commissioners are bound to proceed. Commonwealth *v.* Marshall, 182.

Discretion of, does not extend to judging of necessity for buildings so recommended. Commonwealth *v.* Marshall, 182.

See MANDAMUS.

COMMON CARRIER. Duty of, to furnish seat to traveller holding ticket. Levan *v.* R. R. Co., 496.

See RAILROADS AND RAILWAYS.

COMMON PLEAS. Testamentary trusts, Common Pleas has jurisdiction to order sale of real estate purchased by trustees for purposes of will, though not so stated in the deed. Beck's Estate, 243.

Lunatic, estate of, jurisdiction over. Frey's Estate. 871.

See COURTS.

CONFLICT OF LAWS. A release of judgment against one partner in a State where by law such release enures to the benefit of both, releases a judgment in Pennsylvania against the other partner. Greenwald *v.* Kaster, 327.

CONFLICT OF LAWS—*Continued.*

A policy of fire insurance issued by Missouri Company, but made in New York, is to be interpreted and governed by New York law. Todd *v.* Ins. Co , 330.

Plea that contract was made in another State, by the law of which it was usurious, is, in Pennsylvania, good, Juillard *v.* Remington, 372.

CONSTITUTIONAL LAW. City Councils cannot interfere with chartered rights of corporations. R. W. Co. *v.* Dougherty, 62.

The words "it shall be lawful" in Act April 15, 1834, § 10, construed to be imperative. Commonwealth *v.* Marshall, 182.

When Commonwealth is only nominal plaintiff, the statute of limitation runs. Commonwealth *v.* Severn, 303.

Act 23 March, 1877 (Stay Law) is constitutional, and applies to cases in which unexecuted writs of *vend. exp.* were in the hands of the sheriff at the time of its passage. Thompson *v.* Buckley, 560.

CONSTITUTION OF PENNSYLVANIA. Article I., Section 7, Libel. Commonwealth *v.* McClure, 58.

CONSTABLE. Mandamus will lie against magistrate to compel him to issue summons against a constable who has been guilty of illegal delay in the return of a writ. Commonwealth *v.* Smith, 95.

CONSTRUCTION OF WORDS. See CENTENNIAL BOARD OF FINANCE, COMMISSIONERS OF COUNTY, WILL.

CONTRACT. Partial failure of consideration good defence to an action on. Kavanaugh *v.* Woll, 242.

For sale of bread other than by weight, void. Johnson *v.* Kolb, 273.

Measure of damages where there is difficulty in ascertaining value. Rhoads *v.* Detwiler, 327.

See AGENT; HUSBAND AND WIFE; DAMAGES, MEASURE OF; INSURANCE, FIRE.

CONTRIBUTION. Right of, as between late partners, does not exist until payment by one. Tolman *v.* Smythe, 169.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CORPORATION. Building Association, insolvent, bill in equity will not lie to wind up affairs of.

See ATTACHMENT, EQUITY, PASSENGER RAILWAYS, RAILROADS AND RAILWAYS.

COSTS. Security for costs. As to, when case is on trial list. Hallahan *v.* Murray, 44.

See EXAMINER.

COUNCILS, CITY. Cannot grant rights interfering with chartered rights of railroad. R. R. Co. *v.* Dougherty, 62.

As to ordinance of July 11, 1876, regulating hackney carriages. McLaughlin *v.* Jones, 203.

COUNTY COMMISSIONERS. Duty to erect public buildings when recommended by two successive Grand Juries, and approved by Quarter Sessions. Commonwealth *v.* Marshall, 182.

COURTS. Action against a partner who was not sued in an action against the firm, can be brought in a different court from that in which the original action was brought. Wendill *v.* Magee, 204.

Whether Orphans' Court has concurrent jurisdiction with Common Pleas to order sale of real estate purchased by trustees for purposes of the will, though not so expressed in the deed. Beck's Estate, 243.

When jurisdiction of Orphans' Court ceases and that of Common Pleas attaches. Frey's Estate, 871.

Digitized by Google

COURTS—*Continued.*

Orphans' Court, jurisdiction of, to appoint guardian where minor is non-resident. Ralston's Estate, 392.

Has jurisdiction of a claim against a decedent's estate, though a suit is pending in the Common Pleas for the same matter. Evans's Estate, 519.

Court bound by finding of arbitration committee appointed in pursuance of constitution of unincorporated association. Singerly *v.* Johnson, 541.

CRIMINAL LAW. Libel, law of, under new constitution. Commonwealth *v.* McClure, 58.

Defendant convicted of fornication and bastardy liable for weekly allowances accruing after his discharge as an insolvent debtor. Commonwealth *v.* Faulkner, 540; Commonwealth *v.* Miller, 301.

DAMAGES, MEASURE OF. As to, where difficulty in ascertaining value. Rhoads *v.* Detwiler, 327.

Damages for personal injuries, when excessive. Le Van *v.* R. R. Co., 496.

Where there is a specific agreement to satisfy judgment, the Act of 13 April, 1791, is not a bar to, nor does it measure, damages for breach of the agreement. Chamberlain *v.* Sloan, 518.

In nature of demurrage for detention of vessel by consignees, as to. Sheppard *v.* Ice Co., 565.

DEBTOR AND CREDITOR. (a) Assignment for benefit of creditors. Where alleged to be fraudulent, does not prevent sale under *fi. fa.* Bunting *v.* McCormick, 496.

(b) Composition note. Excessive payment to plaintiff in fraud of other creditors no defence to suit on. Bacharach *v.* Schaller, 77.

(c) Other matters. Execution is *prima facie* satisfaction of debt. Bryan *v.* Paul, 64.

Act 21 March, 1836, postponing special partner to creditors can be invoked only by creditors themselves. Brooke *v.* Alexander, 304.

A pledge by a deceased partner in his lifetime of his individual property as security for a firm debt, is, to the extent that the securities are used, so much added to the firm capital, and firm creditors must be paid in full before the estate of the creditor partner can receive the value of the securities so used. Gordon's Estate, 410.

Husband is not liable for debts incurred by his wife doing business under Act April 3, 1872. Suit Co. *v.* Blair, 170; Adams *v.* Levy, 548.

DECEDENTS' ESTATES. (a) Generally. Husband living apart from his wife with her consent, may claim as distributee of her estate. Charlton's Estate, 305.

Bequest, whether in joint tenancy or tenancy in common. Loxley's Estate, 306.

Allowance for support of minors, when granted. Hellerman's Estate, 391.

Reimbursement of mother for past maintenance of children, what proof necessary to support petition for allowance for. Hellerman's Estate, 391.

When children born after death of testator are included in devise. Peale's Estate, 134.

Devise "to and among C. and the children of the aforesaid A., share and share alike." *Held*, that distributees took *per capita*. Peale's Estate, 134.

A lapsed devise descends to the heirs-at-law of the testator, unless a contrary intention is expressed in the residuary clause of the will. Murray *v.* Yard, 275.

(b) Duties and liabilities of executors. Dismissal of, not decreed *pro confesso*, where executor, though served with citation, has not appeared. Moore's Estate, 80.

As to imposing examiner's fees on. Soley's Estate, 80.

DECEDENTS' ESTATES—*Continued.*

As to power of executor to mortgage property for debts of testator. Steger's Estate, 368.

Custody of evidences of indebtedness to estate by an indebted executor. Greentree's Estate, 519.

Waste and mismanagement by or insolvency of executors, ground for removal of. Greentree's Estate, 519.

See EXECUTORS AND ADMINISTRATORS.

(c) Commissions. When forfeited. Steger's Estate, 368.

(d) Legacies. Lapsed bequest, as to. Loxley's Estate, 306.

Pecuniary legacies when a charge on real estate. Stewart's Estate, 332.

(e) Claim for nursing. As to rebuttal of presumption of implied promise to pay for services rendered, arising from relationship. Porter *v.* Trust Co., 260.

(f) Other matters. Writ of error, when a supersedeas. Robinson's Estate, 28.

Widow not entitled to statement from executors of particulars of decedent's estate before a year after decedent's death. Farrell's Estate, 243.

One interested in the residuum of an estate is not a competent witness in a claim against a decedent's estate. Watson's Estate, 244.

Surety, action against heir of, must be brought within five years after his death, or copy, or written statement filed. Commonwealth *v.* Severn, 303.

When jurisdiction of Orphans' Court ceases and that of Common Pleas, attaches. Frey's Estate, 371.

Remarriage of widow no bar to her claim for $300. Hilt *v.* Walton, 545.

Within what time widow must claim her $300. Hilt *v.* Walton, 545.

Where audit after adjudication is reopened and the balance of the estate is insufficient to pay all the claims, the fund must be distributed pro rata. Bardsley's Estate, 548.

See EVIDENCE, ORPHANS' COURT, ORPHANS' COURT PRACTICE, WILL.

DELIVERY. Sufficiency of, to support gift inter vivos. Reed *v.* Roberts, 453.

DEPOSITIONS. See ADMIRALTY, NEW TRIAL, ORPHANS' COURT PRACTICE.

DESERTION. See DECEDENTS' ESTATES, DIVORCE

DEVISE. See WILL.

DISCOVERY. See EQUITY, EQUITY PRACTICE.

DIVORCE. Bigamy of libellant a bar to suit for divorce for desertion. What constitutes desertion. Eichert *v.* Eichert, 290.

Affidavit to libel can only be made before a Judge or justice of the peace. Reeves *v.* Reeves, 558.

If libel is sworn to before a notary, the error can be cured by an amendment *nunc pro tunc*. Ibid.

DISTRIBUTION. See DECEDENTS' ESTATES, PARTNERSHIP.

EASEMENT. As to title of alley devised to A. leaving an open passage or alley for the houses in rear. Peters *v.* Maxwell, 543.

EQUITABLE ASSIGNMENT. A. boarded with B. and gave her considerable trouble. He gave her "in consideration of her kind services" an order upon the trustees of his father's estate to pay her $2000. Held that B. was entitled to receive this sum from A.'s estate. MacEuen's Estate, 158.

EQUITY. When and for what a bill will lie. Bill will not lie to wind up the affairs of an insolvent building association when there are no responsible officers to settle its affairs. Gormerley *v.* Assn., 11.

Bill praying discovery of deed on record, will not lie. Fulton *v.* O'Donnell, 42.

Courts of equity have no jurisdiction to enjoin chief

Digitized by Google

EQUITY—*Continued.*
of police from executing ordinance of July 11, 1876, relating to numbering, etc. of hackney coaches under a summary proceeding given by Act of Assembly. McLaughlin *v.* Jones, 203.

Bill will lie against private parties to restrain execution of ordinance of City Councils, where such ordinance interferes with chartered rights. Pass. R. R. Co. *v.* Dougherty, 62.

Interpleader bill will lie notwithstanding Act of 1836. Ins. Co. *v.* Watson, 513.

Bill will lie to enjoin issuing of award by Centennial Commission to infringer of plaintiff's trade-mark. Siegert *v.* Meinhard, 541.

Equity will enjoin obstruction of access from private property to a highway. Saul *v.* Turnpike Co., 270.

Bill by private party to restrain unlawful occupation of highway will lie. Times Publishing Co. *v.* Ladomus, 557.

See EQUITY PRACTICE, INJUNCTION, NUISANCE.

EQUITY PRACTICE. Bill of discovery in aid of execution, as to. Fulton *v.* O'Donnell, 42.

ERRORS AND APPEALS. Writ of error, when a supersedeas. Robinson's Estate, 28; Merrian *v.* Nash, 155.

In suit on recognizance of bail for stay of execution, no copy need be filed. Griffith *v.* Salter, 438.

See AFFIDAVIT OF DEFENCE LAW.

ESTOPPEL. Of principal by acts of agent, as to. Baldwin *v.* George, 326.

Judgment originally void not cured by acquiescence. McCosker *v.* Pollock, 95.

Where one of two innocent parties shall lose by the act of a third he shall bear the loss who has armed the wrong doer with power to do the injury. Bank *v.* Moodie, 118.

EVIDENCE. (a) Generally. In suit against husband for goods furnished wife, plaintiff's book of original entries not sufficient proof that articles are necessaries. Debraham *v.* Walker, 26.

(b) Parol evidence to explain, vary, or discharge written instrument. Parol evidence to vary written instrument admissible where fraud is alleged. Shiras *v.* McAdam, 326.

See Elliot *v.* Adams, 44; Whitman *v.* Lippincott, 94 (reversed in S. C., 313); Shallcross *v.* Kohl, 219; Volkmar *v.* Erwin, 291; Baldwin *v.* George, 326.

(c) Competency of witnesses. Widow of decedent is a competent witness before examiner to prove unsoundness of decedent's mind though she be the executrix. Hopple's Estate, 79.

One interested in the residuum of an estate is not a competent witness in a claim against decedent's estate. Watson's Estate, 244.

In action against administrator one liable over to the estate is not a competent witness for the administrator without a release. McClellan *v.* Melloy, 559.

EXAMINER. Examiner's bill must be paid though estate is insolvent. Soley's Estate, 80.

Examiner's fee when imposed on executor. Soley's Estate, 80.

Attachment for refusing to answer questions before, not granted until interlocutory report of, is filed. Brophy's Estate, 306.

Testimony in Orphans' Court will not be received upon depositions where it can be taken before an Examiner. Buckingham's Estate, 564.

See ORPHANS' COURT PRACTICE.

EXECUTION. (a) Generally. When sheriff not ordered to pay into Court proceeds of execution against personalty. Weis *v.* Weis & Fowler, 76.

Is *prima facie* satisfaction of the judgment. Oelschlager *v.* Larbling, 132.

EXECUTION—*Continued.*
Court will so mould execution as to protect a stakeholder until suits pending in other States are determined. Whipple *v.* Assn., 259.

(b) Proceedings under fi. fa. As to abandonment of levy. Oelschlager *v.* Larbling, 132.

Where creditor alleges sale by sheriff of personal property to have been collusive, he should issue alias *fi. fa.*, and contest the ownership by a feigned issue. Cardwell *v.* Hickman, 258.

Assignment for benefit of creditors, alleged to be fraudulent, not ground for setting aside *fi. fa.* Bunting *v.* McCormick.

Under Act 13 June, 1836, shares of co-owners in vessel cannot be sold under execution against the master and part owner who had given bond for the release of the vessel. Cain *v.* Shakespear, 514.

As to setting aside *fi. fa.* when writ of error has been taken. Merrian *v.* Nash, 155.

Allegation that a sale of personal property by the sheriff was not *bona fide* not sufficient to set aside sale. Cardwell *v.* Hickman, 258.

(c) Exemption. Whether a demand for exemption is made in time is for the sheriff to decide upon his own responsibility. Appraisement set aside for inadequacy. Chestnut *v.* Meace, 240.

(d) Stay of execution. *Fi. fa.* against goods assigned for benefit of creditors, the assignment being alleged to be fraudulent, will not be set aside. Bunting *v.* McCormick, 496.

Defendant may claim the benefit of stay law of March 23, 1877, at any time before acknowledgment of sheriff's deed. Thompson *v* Buckley, 560.

Sheriff must appraise real estate though debtor does not demand it, and though the *vend. exp.* came into his hands before the passage of the Act. Ibid.

Stay of execution on account of a defective record refused where no defence on merits was shown. Coaler *v.* Schlecht, 242.

See ATTACHMENT, EQUITY, SHERIFF, WAGES.

EXECUTORS AND ADMINISTRATORS. (a) Generally. To recover against heirs of surety of administrator, action must be commenced or copy or written statement filed within five years after his death. Commonwealth *v.* Severn, 303.

Power of executor to mortgage property for debts of testator, as to. Steger's Estate, 368.

(b) Rights and liabilities of. Dismissal of executor not decreed *pro confesso* where executor, though served with citation, has not appeared. Moore's Estate, 80.

What interest sufficient to sustain petition for citation to executor to file account. Alter's Estate, 356; Evans's Estate, 519.

As to citation to file account of deceased executor. Whitehead's Estate, 475.

As to imposing examiner's fees on executor. Soley's Estate, 80.

Custody of evidence of indebtedness to estate by an indebted executor. Greentree's Estate, 519.

Waste and mismanagement by or insolvency of executors, ground for removal of. Greentree's Estate, 519.

(c) Commissions. When forfeited. Steger's Estate, 368.

See DECEDENTS' ESTATES, ORPHANS' COURT PRACTICE, WILLS.

EXEMPTION. See EXECUTION, DECEDENTS' ESTATES, WIDOW.

FEDERAL COURTS. Jurisdiction of, over suit by owners for damages in the nature of demurrage. Sheppard *v.* Ice Co., 565.

Removal of suits from State Court to United States

Digitized by Google

FEDERAL COURTS—*Continued.*
Court, what is the "next term" at which a case can be tried under Act of March 3, 1875. Huddy *v.* Havens, 432.

See ADMIRALTY, BANKRUPTCY.

FEME SOLE TRADER. See HUSBAND AND WIFE.

FOREIGN ATTACHMENT. Quashed when defendant is within the jurisdiction when the writ issues. Burns *v.* Bowers, 64.

Every presumption in favor of jurisdiction of foreign Court. Veik *v.* McFadden, 63.

Court will exercise its discretion in giving judgment against garnishee. Bagley *v.* R. R. Co., 457.

FOREIGN CREDITOR. Seeking to attach fund here locked up by his own Court, looked on with disfavor. Bagley *v.* R. R. Co., 457.

FORFEITURE. Running of six months allowed for payment of arrears of interest on mortgage not suspended while a prior suit, prematurely brought and discontinued, was pending. Assn. *v.* Metzgar, 204.

FORGERY. Of check, as affecting holder, as to. Houston *v.* Allen, 134.

FRAUDS. Allegation of fraud in procuring note puts holder to proof of consideration. Bank *v.* Matthews, 158.

See AFFIDAVIT OF DEFENCE LAW, ATTACHMENT, BILLS OF EXCHANGE, EVIDENCE, LANDLORD AND TENANT, MORTGAGE, VENDOR AND PURCHASER.

FREEHOLDER. Privileged from arrest under capias. Buckman *v.* Jones, 302.

GARNISHEE. See ATTACHMENT, BOARD OF BROKERS, PRACTICE (*c*).

GIFT INTER VIVOS. What sufficient consideration and delivery to support. Reed *v.* Roberts, 453.

GOLD AND SILVER. What is sufficient tender of "current silver money" under deed dated in 1806. Stokes *v.* Harrison, 563.

GROUND RENT. What is sufficient tender of "current silver money" under deed dated in 1806. Stokes *v.* Harrison, 563.

GUARANTEE AND GUARANTOR. See SURETY.

GUARDIAN AND WARD. Right of one of several minors, on arriving at age, to demand final account of his share. Secker's Estate, 391.

Duty of guardian as to filing triennial accounts, and final account. Ibid.

Jurisdiction of Orphans' Court where minor is a nonresident. Ralston's Estate, 392.

Account of deceased guardian must be filed by his administrator. Stewart's Estate, 476.

HACKNEY COACHES. As to enforcement of ordinance regulating. See McLaughlin *v.* Jones, 203.

HUSBAND AND WIFE. (a) Generally. Husband not liable for goods purchased by and charged to wife, except necessaries for the family. Debraham *v.* Walker, 26.

As to partnership between. Schlecht *v.* Watson, 43.

Judgment entered on bond of married woman, void. McCosker *v.* Pollock, 95.

Husband not liable for goods furnished to wife who does business under Act April 3, 1872, with her own funds. Suit Co. *v.* Blair, 170; Adams *v.* Levy, 543.

Desertion, what amounts to under Act May 4, 1855. Charlton's Estate, 305.

Liability of feme covert for work and material furnished for her separate property. Allen *v.* Graham, 493.

See EVIDENCE.

(b) Actions by and against married women. Plea of coverture must be filed in person. Gerson *v.* Binder, 156.

INFANCY. Minority as a defence is a personal privilege, and can be pleaded by committee of lunatic. Assn. *v.* Cook, 304.

Mortgage by minor, reacknowledgment of, after minor comes of age, without consideration, does not render it good. Steger's Estate, 368.

INJUNCTION. To prevent sale of stock, pledged as collateral for a note, on the allegation that a set-off exists, which set-off is in its nature and amount indeterminate, refused. Yarnall, Adm'x, *v.* Stilz, 12.

To restrain parties acting under ordinance of Councils from interfering with chartered rights, granted. R. R. Co. *v.* Dougherty, 62.

To remove obstruction by Turnpike Co. interfering with access to property abutting on highway. Saul *v.* Turnpike Co. 270.

Ringing of church bells, if sufficient to annoy and disturb residents of neighborhood, enjoined. Harrison *v.* The Church, 384.

Issuing of award by Centennial Commission to infringer of plaintiff's trade-mark, enjoined. Siegert *v.* Meinhard, 541.

Unlawful occupation of highway restrained at suit of private party. Times Publishing Co. *v.* Ladomus, 557.

INSOLVENCY AND INSOLVENT. Bill in equity will not lie to wind up the affairs of an insolvent building association where there are no responsible officers to settle its business. Gormerly *v.* Association, 11.

Insolvency of purchaser at time of purchase not legal fraud. McGlensey *v.* Landis, 240.

Effect of a discharge as insolvent debtor, upon sentence for fornication and bastardy. Commonwealth *v.* Faulkner, 540; Commonwealth *v.* Miller, 301.

INSURANCE, FIRE. Title to policy, as to divestiture of, by sheriff's sale of insured premises. Edwards *v.* Ins. Co., 241.

Limitation in policy of, as to return of deposit money. Edwards *v.* Ins. Co., 241.

Whether policy invalidated as to realty is thereby void as to personalty covered thereby. Todd *v.* Ins. Co., 330.

Policy of, on real estate, fixtures, and stock is indivisible. Todd *v.* Ins. Co., 330.

Policy by Missouri company, made in New York, is to be interpreted and governed by New York law. Todd *v.* Ins. Co., 330.

Suppression of material facts, when to be left to jury. Fluch *v.* Ins. Co., 433.

INSURANCE, LIFE. Receipt for premium note, effect of condition in. Kerns *v.* Co. 390.

Effect on policy, of receiving note for premium. Kerns *v.* Co. 390.

Right of person who insures his life in favor of a relative, to revoke policy as to beneficiary, and substitute his executors. Ins Co. *v.* Watson, 513.

INTEREST. See BUILDING ASSOCIATIONS.

INTERPLEADER. Leave given to pay into Court, money attached by simultaneous writs and interpleader awarded. Wasserman *v.* Bank, 475.

Equity has jurisdiction to award interpleader notwithstanding the statutory remedy at law. Insurance Co. *v.* Watson, 513.

See EXECUTION.

INTESTATE ACT. See WILL.

JUDGMENT. Entered on bond of married woman void. McCosker *v.* Pollock, 95.

The Court will modify judgment and mould execution so as to protect the rights of parties where the subject is in dispute in suits pending in other States. Whipple *v.* Assn., 259.

Where there is a specific agreement to satisfy, the Act of 13 April, 1791, is not a bar to, nor does it measure

Digitized by Google

JUDGMENT—*Continued.*
damages for breach of the agreement. Chamberlain *v.* Sloan, 518.
Narr. need not be filed before return-day to take judgment for want of a plea. Marberry *v.* Freno, 563.
When opened, defendant may be put upon terms to appear and plead. Ibid.
See GARNISHEE, HUSBAND AND WIFE, PRACTICE.
JURISDICTION. See ALDERMAN, COURTS.
JUSTICE OF PEACE. See ALDERMAN, DIVORCE.

LABORERS. See NEGLIGENCE, WAGES.
LANDLORD AND TENANT. As to misrepresentation, concealment and fraud by lessor at the time of execution of the lease. Tischner *v.* Bambrick, 94; Nisbet *v.* McShain, 120.
Surrender by tenant without acceptance by lessor, no defence. B—— *v.* H——, 132.
What constitutes sufficient allegation of surrender of lease to landlord. Suplee *v.* Harley, 240.
See AFFIDAVIT OF DEFENCE LAW, SURETY.
LEGACIES. See DECEDENTS' ESTATES.
LEGAL TENDER. See GOLD AND SILVER.
LEX LOCI CONTRACTUS. See INSURANCE, FIRE; CONFLICT OF LAWS.
LIBEL. Indictment for. Law of, under new constitution. Commonwealth *v.* McClure, 58.
Civil action for. Right to discuss public matters in newspapers; limits of such rights. Struthers *v.* Bulletin, 215.
Actionable words, what are. Struthers *v.* Bulletin, 215.
Privileged communications, as to. Struthers *v.* Bulletin, 215; Beach *v.* Wade, 216.
What affidavit to hold to bail in capias ad respondendum should set forth. Beach *v.* Wade, 219.
LIEN. See ADMIRALTY, ATTACHMENT, MECHANIC'S LIEN.
LIFE ESTATE. Bequest to trustees to invest personalty, "the interest to be paid to my son during his natural life in half yearly payments for his sole benefit. If my son should die without issue, it is my desire that the whole amount of my investment be given to the Children's Orphan Asylum." *Held*, that the son took only a life estate. Bentley *v.* Kaufman, 352.
See WILL.
LIMITATIONS. What is sufficient promise to take case out of statute. Porter *v.* Co., 260.
Where Commonwealth is only nominal plaintiff, statute runs. Commonwealth to use, etc. *v.* Severn, 303.
To recover against heirs of surety of administrator, action must be commenced or copy or written statement filed within five years after his death. Commonwealth *v.* Severn, 303.
LIS PENDENS. To be determined as of the time the second writ issued. Adams *v.* Smithman, 432.
LUNATIC. Committee of, being a personal representative, can avail himself of plea of minority, as a defence. Assn. *v.* Cook, 304.
Cannot present petition in the Orphans' Court although traverse to the inquisition of lunacy is pending in the Common Pleas. Frey's Estate, 371.
Attachment on judgment against, dissolved. Harmstead *v.* Kingsley, 64.

MALICIOUS PROSECUTION. Probable cause, what constitutes. McNamee *v.* Graves, 350.
MANDAMUS. Will lie against magistrate to compel him to issue summons against a constable who has been guilty of illegal delay in the return of a writ. Commonwealth *ex rel. v.* Smith, 95.
Will lie to compel County Commissioners to erect new

MANDAMUS—*Continued.*
buildings recommended by two successive grand juries and approved by Quarter Sessions. Commonwealth *v.* Marshall, 182.
Not granted unless there is shown a specific legal right and the want of a specific legal remedy. Commonwealth *ex rel. v.* Lane, 546.
To Recorder of Deeds to compel satisfaction of lost mortgage, when not issued. Commonwealth *ex rel. v.* Lane, 546.
MARRIAGE. Remarriage of widow no bar to her claim for $500, under Act April 14, 1851. Hilt *v.* Walton, 545.
See HUSBAND AND WIFE.
MARRIED WOMAN. See HUSBAND AND WIFE.
MASTER AND SERVANT. See NEGLIGENCE.
MECHANIC'S LIEN. (a) **By whom and for what the claim may be filed.** Lien for repairs cannot be filed where property is conveyed before claim filed. Ashman *v.* Doerr, 474.
(b) **What precision necessary in claim.** Omission in claim of owner's name and of dates when materials were furnished and work done, fatal. Kennedy *v.* Bozarth, 157.
Precision such as the nature of the case admits of, sufficient in setting out work and materials in a claim. Moore *v.* Hotel Co., 289.
Requisites of, as to setting out particulars of work and material. O'Donnell *v.* Bleim, 432.
(c) **Joint and apportioned claims.** A joint claim may be filed against adjoining buildings which are partly new and partly old, when they are used for a common purpose. Moore *v.* Hotel Co., 289.
Apportioned claim for less than fifty dollars not within Act of 16 June, 1836. Steffey *v.* Frost, 409.
When claim must be apportioned. O'Donnell *v.* Bleim, 432.
Apportioned claim covering houses on opposite sides of a street, a nullity. French *v.* Kaign, 495.
(d) **Other matters.** Plea of "no lien," bad. Snyder *v.* Kohler, 156; Browning *v.* Rafsnyder, 204.
Sci. fa. to revive lien while suit on lien pending, as to. Ketcham *v.* Singerly, 544.
Failure to get judgment on *sci. fa.* within five years, as to. Ketcham *v.* Singerly, 544.
Substitution of security under Act of March 6, 1873, owner not necessarily a party to the bond. Matsinger *v.* Mullen, 544.
Substitution of security under Act of 1873 may be made at any time prior to issue of *levari.* Day *v.* Garrett, 558.
MERITORIOUS CONSIDERATION. Voluntary settlement by one standing *in loco parentis.* Reed *v.* Roberts, 453.
MINORS. See INFANCY, ORPHANS' COURT, ORPHANS' COURT PRACTICE.
MISNOMER. See AFFIDAVIT OF DEFENCE LAW, ATTACHMENT.
MISREPRESENTATIONS. By widow no bar to her receipt of $500, under Act 14 April, 1851. Hilt *v.* Walton, 545.
See MORTGAGE (c).
MORTGAGE. (a) **As to mortgages falling due for non-payment of interest.** Bringing suit prematurely on mortgage is not equivalent to a refusal to accept the interest. Building Assn. *v.* Metzgar, 204.
No defence that default, for which suit is brought, was made during pendency of former suit on same mortgage, since discontinued. Taylor *v.* Foulkrod, 171.
As to calculation of fines for non-payment of interest on building association mortgage. Assn. *v.* George, 239.

Digitized by Google

MORTGAGE — *Continued.*

(b) Parol evidence to contradict mortgage. Parol evidence inadmissible to contradict. Whitman *v.* Lippincott, 94. (Reversed in Sup. Court; see p. 818.)

Parol evidence of non-payment of mortgage money to mortgagor, as to admission of. Baldwin *v.* George, 826.

Where breach of trust is alleged, parol evidence is admissible to vary. Shiras *v.* McAdam, 826.

(c) Other matters. First mortgage should not be included as a debt in schedule to petition for sale of real estate for payment of decedent's debts. Thomas's Estate, 96.

Signing mortgage, without reading it, on the faith of representations as to its contents, no defence. Volkmar *v.* Ervin, 291.

Mortgage, by minor, re-acknowledgment by after coming of age, without consideration, does not cure defect. Steger's Estate, 868.

Release by mortgagee of part of the premises, effect of, as to subsequent lien upon the remainder. Mut. Assurance Co. *v.* Power, 407.

Entry of satisfaction of record of lost mortgage when judgment for mortgage debt has been paid, when ordered by Court. Commonwealth *ex rel.* *v.* Lane, 546.

See BUILDING ASSOCIATION. TIME.

MUNICIPAL CLAIMS. What are defences to. City *v.* Patterson, 273.

Contractor must do the paving as directed by the Act authorizing the work to be done, and the ordinances of councils. City *v.* Patterson, 273.

Agreement by contractor to do the work for a reduced price, when *nudum pactum.* City *v.* Devine, 25.

A scire facias sur tax claim must be prosecuted to judgment within five years of the issue of the writ, in order to preserve the lien of the claim. City *v.* Scott, 562.

NEGLIGENCE. He who by his negligence permits his agent to transfer stocks, cannot afterwards claim the stocks. Bank *v.* Moodie, 118.

Liability of employer for accident to employé, as to. Cole *v.* Wehn, 408.

Person lawfully engaged in a railroad car, though not an employé, cannot recover. Rickard *v.* R. R. Co., 517.

NEW TRIAL. On argument of rule for, depositions must be produced when rule is granted on the ground of after-discovered evidence. Paul *v.* Casselberry, 273.

Where a certain state of facts is proved, from which a certain occurrence might naturally follow, and such occurrence does follow, it is a question for the jury whether the occurrence was the result of the state of facts. Cole *v.* Wehn, 408.

Mental confusion of a material witness on the stand not ground for. Wetherill *v.* Hanly, 473.

When sufficient ground for granting rule *nisi.* Wilmarth *v.* Tull, 475.

Excessive damages, ground for. LeVan *v.* R. R. Co., 496.

Defendant who fails to keep his counsel advised of his residence, and is absent when the case is called, not entitled to new trial. Harris *v.* Govett, 560.

NOTARY PUBLIC. Cannot take affidavit to libel in divorce. Reeves *v.* Reeves, 558.

NOTICE. See MORTGAGE.

NUISANCE. Ringing of church bells, if sufficient to annoy and disturb residents of neighborhood, is a nuisance and will be enjoined. Harrison *v.* The Church, 884.

Obstruction to access to plaintiff's property abutting on highway, enjoined. Saul *v.* Turnpike Co. 270.

See INJUNCTION.

ORDINANCES OF COUNCILS. See EQUITY, COUNCILS, CITY.

ORPHANS' COURT. Whether Orphans' Court has concurrent jurisdiction with Common Pleas to order sale of real estate purchased by trustees for purposes of will, though not so stated in the deed. Beck's Estate, 248.

Jurisdiction of, where minor is non-resident. Ralston's Estate, 392.

Has jurisdiction of claim against decedent's estate, although a suit is pending in the Common Pleas for the same cause. Evans's Estate, 519.

See LUNATIC, ORPHANS' COURT PRACTICE.

ORPHANS' COURT PRACTICE. (a) Guardians. Right of one of several minors on arriving of age to demand final account of his share. Secker's Estate, 891.

Duty of guardian as to filing triennial accounts, and a final account. Ibid.

As to obtaining allowance from estate for past expenditures made by a parent or guardian for children. Hellerman's Estate, 391.

Petition for account by administrator of deceased guardian should be filed by guardian of minor. Stewart's Estate, 476.

Guardian should not join with administrator in petition to mortgage decedent's real estate for payment of debts, and also for maintenance of his minor children. Barnett's Estate, 412.

Account of deceased guardian must be filed by his administrator. Stewart's Estate, 476.

(b) Appeal from Register of Wills. Demand for issue when refused. Restine's Estate, 27.

What testimony sufficient to authorize an issue. Collins's Estate, 434; Wainwright's Estate, 458.

Letters testamentary not revoked except on appeal from register. Sudam's Estate, 305.

Right of legatees to day in Court. Chambers's Estate, 188.

Form of issue on appeal from register, as to. Mealey's Estate, 870.

(c) Sale of real estate. First mortgage should not be included as a debt in schedule to petition for sale of real estate for payment of decedent's debts. Thomas's Estate, 96.

Requisites of petition for sale, as to. Thomas's Estate, 96.

Clerk of Orphans' Court has right under Act 18 March, 1875, to select newspaper for advertising sales in partition. Adolph's Estate, 188.

Order to mortgage real estate not granted where there is a previous unexecuted order of sale outstanding. Barnett's Estate, 412.

(d) Other matters. Right of petitioner to discontinue. Haubest's Estate, 28.

Result of issue *devisavit vel non* should be certified from Common Pleas to Orphans' Court. Robinson's Estate, 28.

Dismissal of executor not decreed *pro confesso* where executor, though served with citation, has not appeared. Moore's Estate, 80.

Examiner's bill must be paid even though executors have no funds in their hands as executors. Soley's Estate, 80.

Where a will is contested the legatees thereunder must have their day in Court. Chambers's Estate, 188.

Widow not entitled to statement of particulars of estate from executors, until a year after decedent's death. Farrell's Estate, 248.

Distribution of balance in hands of testamentary trustees can only be made upon the audit of their account. Reinheimer's Estate, 244.

Attachment for refusing to answer questions before

Digitized by Google

ORPHANS' COURT PRACTICE—*Continued.* examiner not granted until interlocutory report filed. Brophy's Estate, 306.

Petition for citation to executor to file an account, what interest sufficient to sustain. Alter's Estate, 356. Evans's Estate, 519.

Attachment for contempt, what sufficient proof of service of. Chew's Estate, 392.

Petition to mortgage real estate for payment of debts and maintenance of minors should be presented by administrator alone. Barnett's Estate, 412.

Citation to administrator d. b. n. to file account of deceased executor, as to. Whitehead's Estate, 475.

Claim by executor against administrators of deceased co-executor for moneys of testator, when presented. Hanbest's Estate, 520.

Where audit after adjudication is reopened and the balance of the estate is insufficient to pay all the claims, fund must be distributed pro rata. Bardley's Estate, 548

Reopening of audit, after adjudication, as to. Bardsley's Estate, 548.

Petition for review, after settlement of account and distribution, for what causes granted. John Given's Estate, 160.

Testimony will not be received upon depositions where it can be taken before an examiner. Buckingham's Estate, 564.

As to discharge of testamentary trustees where they fail to act together harmoniously. Seyfert's Estate, 565.

See DECEDENTS' ESTATES, EXECUTORS AND ADMINISTRATORS, ORPHANS' COURT.

OYER. See PLEADING.

PARENT AND CHILD. Father convicted of fornication and bastardy liable for weekly allowances accruing after his discharge as an insolvent debtor. Commonwealth *v.* Faulkner, 540; Commonwealth *v.* Miller, 801.

Reimbursement of mother for past maintenance of children, when allowed. Hellerman's Estate, 391.

Voluntary gift by one standing *in loco parentis*, what is sufficient delivery. Reed *v.* Roberts, 453.

PARTIES. In suit against partners names of individuals composing the firm should be stated. Wharton *v.* Rosengarten, 258.

Surety on a lease cannot be sued jointly with lessee. Krauss *v.* McGlone, 272.

In action for tort, death of one partner during trial does not abate suit. Struthers *v.* Peacock, 517.

Misjoinder of parties, as to. Schlecht *v.* Watson, 43.

PARTITION. Right of clerk of Orphans' Court to select newspaper for advertising. Adolph's Estate, 188.

Right of petitioner to discontinue proceedings for, in Orphans' Court. Hanbest's Estate, 28.

PARTNERSHIP. Between husband and wife, as to. Schlecht *v.* Watson, 43.

As to what constitutes. Kelley *v.* Hart, 93; Boyd *v.* Hart, 220; Bucknor *v.* Pitman, 474.

As to liability of former partner for judgment in libel suit obtained after dissolution. Tolman *v.* Smythe, 169.

Right to contribution as between former partners does not exist until actual payment by one. Ibid.

Action against a partner who was not served in an action against the firm can be brought in a different Court from that in which the original action was brought. Wendill *v.* Magee, 204.

In suit against partners names of individuals constituting the firm should be stated. Wharton *v.* Rosengarten, 258.

Return of service of process against partners should show that defendants were individually served. Wharton *v.* Rosengarten, 258.

PARTNERSHIP—*Continued.*

Individual judgment on firm assets when the firm is insolvent, effect of, as to. Rhoads *v.* Detwiler, 327

A pledge by a partner, since deceased, of his individual property as security for a firm debt is, to the extent that the securities are used, so much added to the firm capital, and firm creditors must be paid in full before the estate of the creditor partner can receive the value of the securities so used. Gordon's Estate, 410.

In action by partners for tort, the death of one during the trial does not abate the suit. Struthers *v.* Peacock, 517.

Limited partnership. Special partner, suit by, against the firm, Act 21 March, 1836, no bar to judgment. Brooke *v.* Alexander, 304.

Act 21 March, 1836, postponing special partner to creditors can be invoked only by creditors themselves. Brooke *v.* Alexander, 304.

PASSENGER RAILWAY COMPANIES. City Councils cannot interfere with chartered rights of. R. W. Co. *v* Dougherty, 62.

PAYMENT. What constitutes. James *v.* Frick, 291.

See DEBTOR AND CREDITOR.

PLEADING. Set-off cannot be pleaded in an action of tort. Moyer *v.* Loeb, 95.

Plea of coverture must be filed in person. Gerson *v* Binder, 156.

Plea of coverture not necessarily a plea in abatement, merely. Gerson *v.* Binder, 156.

Plea of "no lien" to *sci. fa.* sur mechanic's lien bad. Snyder *v.* Kohler, 156.

Objection to such short plea is equivalent to notice to plead specially. Browning *v.* Rafsnyder, 204.

On appeal from alderman, plaintiff may rule defendant to plead to transcript. Levy *v.* Mustin, 220.

A statement to take the place of a formal declaration must be strictly within the Act of 1806. Shallcross *v.* Kohl, 272.

Minority as a defence is a personal privilege, and can be pleaded by committee of lunatic. Association *v.* Cook, 304.

The pendency of an attachment execution must be specially pleaded. Tunis *v.* Baker, 868.

A special plea in assumpsit, averring that the contract was entered into in another state by the law of which it was usurious, good. Juillard *v.* Remington, 372.

Craving oyer of and filing deed sets it out on record in full and entitles party to demur to it. Roberts *v.* Dobbins, 494.

Variance between declaration and agreement declared on if not material, not ground for demurrer. Roberts *v.* Dobbins, 494.

Special traverse, when properly pleaded. De Coursey *v.* Trust Co., 518.

Former judgment in proceedings between landlord and tenant under Act March 1, 1772, no bar to action of trespass. DeCoursey *v.* Trust Co., 518.

See PRACTICE.

POWER OF ATTORNEY. As to validity of transfer of stock under. Moodie *v.* Bank, 118.

PRACTICE. (a) Process. A suitor on his way from court is privileged from service of process in a new action. Torry *v.* Bast, 63.

As to privilege of witness or party to suit from arrest. See ARREST.

Service of process on agent where defendant resides out of the county; sheriff's return must show an exact compliance with the Act of Assembly. Gilbough *v.* Keller, 78.

No preliminary rule to show cause required when writ of quo warranto issues at suggestion of attorney-general. Commonwealth *v.* Daily, 133.

Digitized by Google

PRACTICE—*Continued.*

Action against partner who was not served in an action against the firm can be brought in a different court from that in which the original action was brought. Wendill *v.* Magee, 204.

In suit against partners, names of individuals constituting the firm should be stated. Wharton *v.* Rosengarten, 258.

Return of service of process against partners should show that defendants were individually served. Wharton *v.* Rosengarten, 258.

Capias ad respondendum. What averments necessary in affidavit to hold to bail. Beach *v.* Wade, 219.

Freeholder privileged from arrest under. Buckman *v.* Jones, 302.

See ARREST.

(b) Copy, declaration and pleadings. As to amendment in copy filed after expiration of time allowed by Act for filing copy. Guth *v.* Anderson, 133; Jones *v.* Gibson, 329; Held *v.* Clemens, 475.

A statement to take the place of a formal declaration must be strictly within the Act of 1806. Shallcross *v.* Kohl, 272.

Function and scope of averment, as to. Dickerson *v.* McCausland, 327; Allen *v.* Graham, 493; Detmold *v.* Coal Co. 567; Collins *v.* O'Toole, 564.

Bill of particulars in actions *ex delicto* when allowed. Borda *v.* R. R. Co., 351.

Affidavit to libel in divorce can only be made before a Judge or Justice of the Peace. Reeves *v.* Reeves, 558.

Libel sworn to before a notary can be amended *nunc pro tunc.* Ibid.

(c) Judgment by default. When judgment for want of an affidavit not opened. Coaler *v.* Schlecht, 27.

Judgment for want of appearance or plea, opened when there is a defence. Sanders *v.* Sanders, 43; Marberry *v.* Freno, 563.

When judgment will be opened on the ground of neglect or misconduct of attorney. Young *v.* Lindsay, 169.

As to striking off judgment against married woman. McCosker *v.* Pollock, 95.

Judgment opened when defendant dies after service and before judgment. England *v.* Kelly, 156.

What will excuse failure by garnishee in attachment execution to appear. Sanborn *v.* Petry, 170.

Where a paper filed purporting to be an affidavit of defence is frivolous, alleges no ground of defence, and appears to have been filed merely for the purpose of delay, the Court will without notice to defendant's attorney enter judgment for want of an affidavit of defence. Taylor *v.* Nyce, 433.

Practice as to taking judgment, where supplemental affidavit ordered, but not filed. Conrad *v.* Rodgers, 157.

When, on appeal from Alderman, judgment is affirmed, defendant who has failed to keep his counsel advised of his residence, not entitled to new trial. Harris *v.* Govett, 560.

Judgment entered for want of a plea against defendant who has not appeared not irregular because declaration not filed before return day. Marberry *v.* Freno, 563.

When opened, defendant may be put upon terms to appear and plead. Ibid.

(d) Stay of execution. Defect in record, when no defence on the merits is shown, not sufficient to prevent execution. Coaler *v.* Schlecht, 242.

Under stay law of 23d March, 1877, no demand by debtor for appraisement of real estate necessary. Thompson *v.* Buckley, 560.

See EXECUTION (*d*).

(e) Appeals from aldermen. When allowed *nunc pro tunc.* Schlecht *v.* Ristine, 43.

PRACTICE—*Continued.*

Cause of action must be the same in court as before the alderman. Schlecht *v.* Restein, 95.

Plaintiff may rule defendant to plead to transcript. Levy *v.* Mustin, 220.

When suit is for wages of manual labor security on appeal must be for debt and costs. Ryan *v.* McDonough, 44. Mayberry *v.* Gerber, 240.

Alderman cannot take jurisdiction of a claim over $100. Plaintiff cannot without the assent of defendant apply a counter claim of defendant so as to reduce his own claim below $100. James *v.* Frick, 291.

(f) Payment into court. Payment of proceeds of personal property into court only ordered in special cases. Weis *v.* Weis & Fowler, 76.

(g) Sheriff's interpleader. Bill in equity for interpleader will lie notwithstanding Sheriff's Interpleader Act of 1836. Ins. Co. *v.* Watson, 513.

(h) Other matters. As to abandonment of levy. Oelschlager *v.* Larbling, 132.

Filing affidavit of defence equivalent to an appearance. Holden *v.* Woodward, 133.

Time within which writ of error must issue to be a supersedeas. Merrian *v.* Nash, 155.

Affidavit of loan cannot be filed when plaintiff holds a note for the loan. Ohman *v.* Winsmore, 157.

Notice of filing report of referee must be given. Tennery *v.* Dickerson, 158.

As to attachment execution against stock where the same has been assigned to corporation as collateral. Stœver *v.* Stœver, 169.

Pendency of attachment execution does not prevent entry of judgment. Tunis *v.* Baker, 368.

Rule XXXIV. of Common Pleas No. 3, does not apply to reference under Act 14 May, 1874. Eyster *v.* McCulla, 219.

Ancillary proceedings in equity to be assigned to Court having jurisdiction of original case. Rule of C. P. 258.

Where creditor alleges sales by sheriff of personal property to have been collusive he should issue *alias fi. fa.*, and contest the ownership by a feigned issue. Cardwell *v.* Hickman, 258.

Appraisement when shown to be inadequate, rule for re-appraisement granted. Chestnut *v.* Meace, 240.

Surety on a lease cannot be sued jointly with lessee. Krauss *v.* McGlone, 272.

Where defendant alleges a variance between the copy filed and the original, he must rule plaintiff to produce his books of original entries. Snyder *v.* Richardson, 272.

Craving oyer of and filing deed sets it out on record in full, and entitles party to demur to it. Roberts *v.* Dobbins, 494.

Copy of book entries need not be signed. Snyder *v.* Richardson, 272.

Surrender of principal by surety on bail bond, as to. Commonwealth *v.* Malony, 407.

In suit on recognizance of bail in error no copy need be filed. Griffith *v.* Salter, 433.

Death of one partner during the trial does not abate suit. Struthers *v.* Peacock, 517.

Cause not removed from where it has been brought, unless by consent of parties, or for some extraordinary reason. Prevost *v.* Gorrell, 548.

Substitution of security under Act of March 6, 1873, owner not necessarily a party to the bond. Matsinger *v.* Mullen, 544.

Security may be entered at any time prior to issue of the levari. Day *v.* Garrett, 558.

See AFFIDAVIT OF DEFENCE LAW, AMENDMENT, ATTACHMENT, COSTS, EVIDENCE, EXECUTION, NEW TRIAL, REMOVAL OF SUITS TO FEDERAL COURTS.

Digitized by Google

POOL. See STOCK GAMBLING.

PRIORITY. See BOARD OF BROKERS, PARTNERSHIP.

PRINCIPAL AND AGENT. Both parties bound by acts of common agent. Baldwin *v.* George, 326.

PRIVILEGE FROM ARREST, OR SUIT. See ARREST, PRACTICE (*a*).

QUO WARRANTO. No preliminary rule to show cause required when writ issues at suggestion of Attorney General. Commonwealth *v.* Daly, 133.

RAILROADS AND RAILWAYS. Duty of railway company to furnish seat to traveller holding ticket. Le Van *v.* R. R. Co., 496.

Person lawfully engaged in a railroad car, though not an employé, cannot recover. Rickard *v.* R. R. Co., 517.

Liability of, for injuries to persons other than employés. Rickard *v.* R. R. Co., 517.

See COMMON CARRIER; DAMAGES, MEASURE OF; NEGLIGENCE; PASSENGER RAILWAY COMPANIES.

RECOGNIZANCE. See AFFIDAVIT OF DEFENCE LAW.

RECORD. Defect in, when no defence on merits is shown, no reason for staying execution. Coaler *v.* Schlecht, 242.

See EQUITY.

RECORDER OF DEEDS. See MANDAMUS.

REFEREES. Notice of filing report of, must be given. Tennery *v.* Dickerson, 158.

Rule XXXIV. of Court of Common Pleas No. 3, does not apply to reference under Act 14 May, 1874. Eyster *v.* McCulla, 219.

REGISTER OF WILLS. See ORPHANS' COURT, ORPHANS' COURT PRACTICE.

RELEASE. A release of judgment against one partner in a State, where, by law, such release enures to the benefit of both, releases a judgment in Pennsylvania against the other partner. Greenwald *v.* Kaster, 327.

Under Act 13 June, 1836, the giving of a bond is an absolute release of the vessel. Cain *v.* Shakespear, 514.

See Shakespear *v.* Cain, 167.

See AFFIDAVIT OF DEFENCE LAW, MORTGAGE (*c*).

REMAINDER. See WILL.

REMOVAL OF SUITS from State Court to United States Court. What is the "next term" at which a case can be tried under Act March 3, 1875. Huddy *v.* Havens, 432.

REPLEVIN. Writ will not be quashed upon affidavit that the goods do not belong to plaintiff. Steinwick *v.* Salter, 64.

RESULTING TRUST. When rebutted by evidence of an intention to make a voluntary settlement. Reed *v.* Roberts, 453.

REVOCATION. Agreement for arbitration in constitution of unincorporated association not revoked by death of member. Singerly *v.* Johnson, 541.

See INSURANCE, LIFE.

ROADS AND HIGHWAYS. Proceedings may be amended after appointment of jury and prior to view. *In re* Fortieth Street, 64.

Unlawful occupation of highway restrained at suit of private party. Times Publishing Co. *v.* Ladomus, 557.

Right of property owner to access to turnpike road along his entire frontage. Saul *v.* Turnpike Co., 270.

See PASSENGER RAILWAY COMPANIES.

RULES OF COURT. Common Pleas. Ancillary proceedings in equity to be assigned to Court having jurisdiction of original case, 258.

Rule XXXIV. of C. P. No. 3, does not apply to reference under Act of 14 May, 1874. Eyster *v.* McCulla, 219.

RULES OF COURT—*Continued.*

U. S. District Court. Rule of, as to depositions in admiralty cases, 565.

SALE. See ORPHANS' COURT PRACTICE, VENDOR AND PURCHASER.

SATISFACTION. Execution is *prima facie* satisfaction of debt. Bryan *v.* Paul, 64.

Of lost mortgage, method of securing entry of, by recorder. Commonwealth *v.* Lane, 546.

SEAMAN. As to claim of, on vessel for wages for work done for charterer. Hart *v.* Schooner Enterprise, 172.

SECURITY FOR COSTS. See COSTS, APPEAL FROM ALDERMAN.

SEPARATE EARNINGS. See HUSBAND AND WIFE.

SEPTEMBER. Two return days in. Schlecht *v.* Ristine, 43.

SET-OFF. Injunction to prevent sale of stock, pledged as collateral for a note, on the allegation that a set-off exists, which set-off is in its nature and amount indeterminate, refused. Yarnall, Admx. *v.* Stilz, 12.

Unliquidated amount for services cannot be set off. Rezende *v.* Berques, 43.

As to sufficiency of averment of. Osmer *v.* Souder, 155; Stover *v.* Hotel Co., 156.

Set-off cannot be pleaded in an action of tort. Moyer *v.* Loeb, 95.

A note passed after maturity is subject to an equity, but not to a defence of set-off. Donly *v.* Brown, 275.

See AFFIDAVIT OF DEFENCE LAW.

SHERIFF. When sheriff not ordered to pay into court proceeds of execution against personalty. Weis *v.* Weis, 76.

Sheriff's return of service of process on agent of non-resident must show an exact compliance with the Act of Assembly. Gilbough *v.* Keller, 78.

When appraisement by sheriff is shown to be inadequate, rule for re-appraisement granted. Chestnut *v.* Meace, 210.

See EXECUTION (*d*).

Allegation that a sale of personal property by the sheriff was not bona fide not sufficient for Court to set aside sale. Method of testing question of fraud. Cardwell *v.* Hickman, 258.

Under Act 23 March, 1877, no appraisement of personal property necessary unless debtor demands it; real estate must be appraised by sheriff whether debtor demands it or not. Thompson *v.* Buckley, 560.

SHERIFF'S SALE. Sheriff's sale of real estate, no appraisement having been made under Act 23 March, 1877, set aside. Thompson *v.* Buckley, 560.

SHIPPING. See ADMIRALTY, ATTACHMENT, SEAMAN, WAGES.

SLANDER. What words are actionable. Struthers *v.* Bulletin, 215; Beach *v.* Wade, 216.

STATUTE OF LIMITATIONS. See LIMITATIONS.

STATUTES. *Construction of.* The words "it shall be lawful," in Act 15 April, 1834, § 10, construed to be imperative. Commonwealth *v.* Marshall, 182.

See CENTENNIAL BOARD OF FINANCE.

STAY LAW. See EXECUTION, SHERIFF.

STOCK. Certificates with power of attorney attached, whether negotiable; transferability of. Moodie *v.* Bank, 118.

STOCK GAMBLING. Whether stock gambling by engaging in a pool operation is a "business" under Act May 4, 1852. Gilbough *v.* Keller, 78.

STREET. See ROADS AND HIGHWAYS.

Digitized by Google

SUPERSEDEAS. Time within which writ of error must issue to be a supersedeas. Merrian *v.* Nash, 155.

SURETY. On a lease cannot be sued jointly with lessee. Krause *v.* McGlone, 272.

Action against heir of, must be brought within five years after his death, or a copy or written statement filed. Commonwealth *v.* Severn, 303.

Surrender of principal by surety on bail bond, as to. Commonwealth *v.* Malony, 407.

See MECHANIC'S LIEN.

SURVIVAL OF ACTIONS. Action in tort for injuries to business reputation, does not survive, but the action is not abated as to surviving co-plaintiffs. Struthers *v.* Peacock, 517.

TAXES. See MUNICIPAL CLAIMS.

TIME. In computation of, the day from which the computation is made, is excluded. Hogg *v.* Loughery, 516.

TITLE. Of devisee, to alley adjoining lot devised. Peters *v.* Maxwell, 543.

As to cloud on, by unsatisfied mortgage where a judgment for the mortgage debt has been paid. Commonwealth *ex rel.* *v.* Lane, 546.

TRADE-MARK. Issuing of award by Centennial Commission to infringer of trade-mark, enjoined. Siegert *v.* Meinhard, 541.

TRANSCRIPT. See APPEAL FROM ALDERMAN, PRACTICE.

TROVER. As to sufficiency of affidavit to hold to bail. Buckman *v.* Jones, 302.

TRUSTS AND TRUSTEES. Real estate purchased by trustees for purposes of will, though not so stated in the deed, sale of ordered by Common Pleas. Beck's Estate, 243.

Distribution of balance in hands of testamentary trustees can only be made upon the audit of their accounts in the Orphans' Court. Reinheimer's Estate, 244.

Incompatibility of dispositions of testamentary trustees sufficient ground for removal, when interests of a *cestui que trust* may suffer. Seyfert's Estate, 565.

TURNPIKE COMPANY. See ROADS AND HIGHWAYS.

USURY. See ASSUMPSIT, BUILDING ASSOCIATION.

VARIANCE. See AFFIDAVIT OF DEFENCE LAW (*a*).

VENDOR AND PURCHASER. What words constitute warranty; "agreed" is a proper word to use to set out warranty. Nagle *v.* Potter, 26.

Warranty as a defence on the ground of bad quality must be clearly set forth. Taylor *v.* North, 77.

The *bona fide* purchaser of stocks, though his vendor had no title, is entitled thereto against the owner who has armed the vendor with the power to make the fraudulent sale. Moodie *v.* The Bank, 118.

Warranty need not be proved where contract is executory for future delivery of goods, without opportunity for inspection. Taylor *v.* North, 170.

Insolvency of purchaser at the time of the purchase is not legal fraud. McGlensey *v.* Landis, 240.

Mere representations of value do not amount to a warranty. Bailey *v.* Waterhouse, 275.

Husband not liable for debts incurred by wife doing

VENDOR AND PURCHASER—*Continued.*

business under Act April 3, 1872. Suit Co. *v.* Blair, 170; Adams *v.* Levy, 543.

See AFFIDAVIT OF DEFENCE LAW.

VENUE. Case not removed from the Court where it has been brought unless by consent of parties or for some extraordinary reason. Prevost *v.* Gorrell, 548.

VOLUNTARY SETTLEMENT. Intention to create, rebuts presumption of resulting trust. Reed *v.* Roberts, 453.

Gift in consideration of affection by one standing *in loco parentis.* What is sufficient delivery. Ibid.

WAGES. When suit is for wages of manual labor, security on appeal must be for debt and costs. Ryan *v.* McDonough, 44; Mayberry *v.* Gerber, 240.

Under Act 20 April, 1876, laborers are entitled to be paid by assignee for benefit of creditors though a year has not elapsed since assignment. De Leon's Estate, 76.

WALLS. Thickness of, in Philadelphia, as to. See Bowers *v.* Supplee. 22.

WARRANTY. See ADMIRALTY, AFFIDAVIT OF DEFENCE LAW, VENDOR AND PURCHASER.

WIDOW. As to right of, to statement from executors of particulars of decedent's estate before a year from decedent's death. Farrell's Estate, 243.

Reimbursement of widow for past maintenance of children, when allowed. Hellerman's Estate, 391.

May claim $300 under Act of April 14, 1851, after re-marriage, Hilt *v.* Walton, 545.

See DECEDENTS' ESTATES.

WILL. As to undue influence on testator. Restine's Estate, 27; Mealey's Estate, 370; Wainwright's Estate, 458.

Result of issue *devisavit vel non* should be certified from Common Pleas to Orphans' Court. Robinson's Estate, 28.

When children born after death of testator are included in devise. Peale's Estate, 134.

Devise "to and among C. and the children of the aforesaid A., share and share alike." Held that distributees took *per capita.* Peale's Estate, 134.

When a will is contested the legatees thereunder must have their day in Court. Chambers's Estate, 188.

A lapsed devise descends to the heirs at law of the testator, unless a contrary intention is expressed in the residuary clause of the will. Murray *v.* Yard, 275.

Bequest, whether in joint tenancy or tenancy in common. Loxley's Estate, 306.

Bequest of income for life with remainder over upon failure of issue, construction of. Bentley *v.* Kaufman, 352.

Words "die without leaving issue" in a bequest of personalty construed to mean without leaving issue at the death of the devisee. Bentley *v.* Kaufman, 352.

A devise by testator to his wife of all his property on condition that she remains his widow gives her no power to mortgage the property. Steger's Estate, 368.

What constitutes sufficient acknowledgment of. Mealey's Estate, 370.

Testamentary incapacity, as to. Collins's Estate, 434.

Devise of lot adjoining alley, as to title of devisee to use of alley. Peters *v.* Maxwell, 543.

See ORPHANS' COURT PRACTICE.

WITNESS. See ARREST, EVIDENCE.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

HARVARD LAW LIBRARY

Digitized by Google

Digitized by Google